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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Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.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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RIGHT TO CLEAN ENVIRONMENT AS A BASIC HUMAN RIGHTS

Prof. Gopal Krishna Chandani*

A healthy environment constitutes a basic human right. We live in partnership with nature. Natural environment has to be protected against human activity gradually in making his life more and more comfortable, man became unkind to nature. Accelerated uses of all natural resources are responsible for environmental degradation. There is 40% over consumption of natural resources. Above 70% of available water in India is polluted. Almost three thousand poisonous chemicals in the air we inhale¹. Every year 3000 children dies in New Delhi due to atmospheric pollution.² If the present trend of exploitation of natural resources is allowed to continue the future life in ‘Spaceship-Earth’ would soon be endangered. UNEP has observed that we need two earths by 2050. The role of law should cover the relationship between men and nature.

At the Stockholm Conference 1972, the state parties agreed that it was their solemn responsibility to protect and improve the environment for the present and future generations.³ In pursuance of this principle of Intergenerational equity, which has become norm of environmental jurisprudence, many countries of the world have incorporated the Right to Humane and healthy environment as a constitutional right. It has been recognized as one of the third generation human rights.

India also took a lead and it was the first country of the world to incorporate the provisions with regard to protection and preservation of environment in the Constitution. However, the provisions made under Article 48 A and 51-A(g) were not made justiciable, but there has been judicial tendency to treat individual's right to wholesome environment as a fundamental right. It has been held by the courts that the slow poisoning caused by environmental pollution should be regarded as violative of Article 21 which include the right of enjoyment of pollution free water and air. Now it is well settled that Article 21 includes humane, healthy

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¹‘Pollution of Environment’ by Justice H.R Sodhi

² The Report on ‘Environmental Pollution (Prevention and Control) Authority’ presented by Sr. Advocate Harish Salve at Supreme Court. See Nav Bharat Times dated 12.02. 2014.

³ Article 2 of the Principles declared at Stockholm Conference, 1972.

and pollution free life.⁴ The courts have also applied Article 19 (1) (a) to protect the citizens from the evil effect of noise pollution. Freedom of Speech and expression also includes by necessary implication freedom not to listen since citizen cannot be coerced to hear anything which he does not like.⁵ Similarly, the courts have held that Article 19 (1) (g) which guarantees the citizens to carry on any trade or business is subject to reasonable restrictions so that he cannot carry on the business arbitrarily which causes health hazards to the society.⁶

The Human Right Act 1993 defines human rights as basic rights relating to life, equality and dignity guaranteed by the Constitution. It is enforceable in case of violation. There is a civil and criminal liability for polluting the environment. Earlier the common law principle of strict liability as laid down in *Rylands v. Fletcher*⁷ was applied by the courts in cases of environmental damage. But now the Supreme Court has held in many PIL cases that there is an absolute liability in case of enterprises engaged in hazardous or inherently dangerous activity which possess a potential threat to health and safety of persons. Besides, environmental laws in India there are a criminal sanction for polluting the environment. Even a person whose rights are violated by reason of poverty or disability of socially and economically disadvantaged position can approach to the court of law for justice. In these PIL cases, the court will not require a regular writ petition. Only addressing the letter to the court is sufficient. The court will not even require *locus standi* of the petitioner.⁸

It is clear that there is no dearth of environmental laws in India. There is no lack of sincerity on the part of legislative and judicial wings of the government. But what are lacking are the sincere efforts on the part of implementing and enforcement authorities. The tendency to shift their responsibility entirely to the judiciary for their intervention has to be curbed. There is need to great public awareness with regards to the legal provisions.

⁴ *Damodar Rao v. Municipal Corporation Hyderabad*, AIR 1987 AP 71, See also *Meghwal Samaj Siskha Samiti v. Lekh Chand* 2011 in which the SC set aside the allotment of village pond for construction of student hostel.

⁵ *Moulana Mufti Syed v. State of West Bengal* AIR 1999 Cal 15; *Church of God (full Gospel) in India v. Majestic Colony Welfare Association* AIR 2000 SC 2773

⁶ *Burra Bazar Firework Dealers v. Commissioner of Police Calcutta*, AIR 1998 Cal HC 121

⁷ 1868 UKHL 1:1868 LR 3 HL 330

⁸ *M.C. Mehta v. Union Of India* AIR 1987 SC 984 (Oleum Leakage Case)

E-GOVERNANCE, COMMUNICATION CONVERGENCE AND INDIAN LEGAL SYSTEM

Dr. Manirani Dasgupta*

PART – I: INTRODUCTION

Information Communication Technology or the Information Way is the emergence in the contemporary dynamic society. Due to outstanding development in science and technology, worldwide multimedia technology is controlling the modern human life and environment. Now the society is electronic and digital society. Every time and everywhere we use electronic devices to solve complex problems. So, we are living in the era of multimedia and information superhighway. A single device can act as computer, telephone, camera, tape recorder, video recorder, audio-video player, type writer, television, scanner etc. Therefore, Information Communication Technology can be called as Communication Convergence Technology. E-Commerce and E-Business are established worldwide through Internet, Computer network and Mobile network in superhighway. Therefore, to solve the conflicts between manual and digital progress State has to act as parent-patria. In welfare state following the doctrine of rule of law government has to perform its functions to achieve social justice and protect human rights. Government has to act as protector, provider, economic planner, public corporation and arbitrator. In the welfare society following the strict principle of separation of powers is not possible. Executive needs to perform the functions of rulemaking, adjudicating as well as pure administrative functions. Convergence Technology makes the functions of Government easier, quicker, cheaper and more transparent. Governments in India at the State as well as Union level are using electronic media for providing more effective and more efficient facilities to citizens. The Government of West Bengal has started providing facilities through Convergence Communication Technology. E-Governance is a means of relations between Government and citizen by providing internal and external electronic facilities, such as, e-services, e-administration, e-agriculture, e-health, e-education, e-awareness, e-education and digital learning, e-filing of various statutory forms etc. Following International Model Law on the E-Commerce and Digital Signature, the United States Computer Fraud and Abuse Act, 1986; the United Kingdom's the Computer Misuse Act, 1993 etc. the Indian Parliament enacted and passed the Information Technology Act, 2000 which was amended in the year 2009. The whole Chapter -IV of the Information Technology, 2000 deals with e-records and e-governance. However, there is need of

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legal and technological awareness amongst the people and personnel as well as legal reforms to prevent and control misuse, abuse or nonuse of e-governance.

PART – II: CONCEPT AND WORKING OF E-GOVERNANCE IN INDIA

In good governance there is need of cooperation between Government and citizen. All Information of government and agencies who are public authority are to be available to the public as and when required. So, there should be easy access to information and official procedures of Government to citizen. This co-operation and co-ordination system can be achieved in its fullest extent through E-Governance.

When the Government departments, agencies, public and private authorities and public at large use the electronic media or information technology to maintain relationship and exchange data or information then this governance system is to be treated as e-governance. Through e-governance the government or any authority can become more transparent, effective and accountable to people. According to the definition given by the World Bank¹ the term ‘e-governance’ means the use of the information and communication technologies by government agencies to transfer relations with citizens, business and other arms of the government.

E-governance can be used by both the private authority and public authority for good administration which will be more transparent by using information and communication technologies. When there is use of electronic media or information and communication technologies for providing facilities and interaction between any authority and citizen as well as public at large then it may be called as electronic services. There can be use of information and communication technologies within administrative bodies, departments, institutions or organisations for internal transactions and transfer of information. It is the internal form of E-Governance or E-Administration.

However, when these administrators or authorities use information and communication technologies for relationship and providing facilities then the access to information become quicker, cheaper and smarter. In this process the administrators can provide relieves to citizen as well as non-citizen or people in e-society. This electronic service can be categorised as external use of e-governance for fulfilling the needs and desires of the society.

Therefore, e-governance is the means to achieve the good governance as it is quicker, transparent, and easier to handle with simple training and awareness; also varying to meet the needs and desires

¹ World Bank Online website

of the contemporary dynamic society and to solve ever increasing complexities as well as problems in conflicting society.

WORKING OF ELECTRONIC AND MOBILE GOVERNANCE IN INDIA

E-Governance can be categorised broadly at (i) internal and external level, (ii) private and public authority point of view as discussed above. However, another way of classification of e-governance is as follows:

Electronic and Mobile Services: Facilities provided by authorities for e-enquiry of any matter, e-requisition, e-filling, e-booking, e-payment, e-tickets through electronic media and mobile services, e.g., services provided by Electricity Board, Railway Department, Registrar Offices, Judicial Department, Universities and Colleges for electronic and online administration and services.

Electronic and Mobile Administration: At this juncture, significantly there are internal and external systems for facilitating information, keeping balance with official secrecy, to achieve good governance. Internally within the department or between the departments exchange and transfer of data and providing facilities to the public at external level became very effective, for example, e-gazette, getting e-letter of intimation, e-notification, e-registration, getting report of rights and status of any property etc.

Electronic and Mobile Filing: Filing of e-draft and petition before the Supreme Court, High Courts, Tribunals, Income Tax Department, filling and submission of e-application before any such authority or banking sectors or for economic purposes by using information superhighway will be treated as e-filing.

Electronic and Mobile Education and Digital Learning: E-education and digital learning opened the new horizon to the academicians, students, parents as well as e-society. Since submission of form for admission to any educational Institution to filling up of examination form, examination process and receiving of result and in between learning through manual as well as digital infrastructures, internet, network etc. became very essential throughout the Globe. Almost every University, Colleges, schools and other Institutions are providing these facilities for academicians and knowledge society. So, e-society includes knowledge society as well as civilised society too as it includes e-education and digital learning.

Electronic and Mobile revenue: The revenue departments provide electronic services to citizen in India for receiving information about status of payment and amount payable as revenue or tax,

stamp duty etc. However, e-filling of return for income tax purposes are available and interested person can access the services following particular procedure as prescribed by the law.

Electronic and Mobile Banking: Banking sector is moving in the air, apart from their manual services they are providing facilities for electronic fund transfer through ATM and Online Banking through computer, mobile, internet as well as several network system. Opening account in a bank, payment or withdrawal of money, getting information or updating of account became easier and matter of browsing and clicking or touching on screen or button. People can receive net banking facilities at any time and from anywhere even while travelling or doing any work at office or home. Net-banking, Online banking or E-banking as well as Mobile banking became very common and significant too as the concerned person gets mobile and e-mail alert and update information about their banking and balance.

As a result, people became very crazy about electronic, digital and mobile banking and services are providing by nationalised bank, e.g., State Bank of India, Bank of India, Bank of Baroda, and Central Bank of India etc. as well as private banks.

Electronic and Mobile Insurance: Sometimes due to sudden death of head of the family the concerned family becomes ruined situation economically too even if there is an insurance policy in the name of the deceased person because most of the times the papers are kept secretly by the concerned person and family might have no idea about the Life Insurance Policies of the deceased. In such situation only which can become as friend and help the family of deceased is the e-bima or e-insurance. Even when the person is alive but forgot to pay the amount of premium or the papers are missing even after payment of premium of the Insurance, then only solution is if the papers are stored in a file in computer or mobile or anywhere digitally after scanning or if the account is e-Insurance Account (e-IA) or there is facilities of electronic and mobile insurance and all the payment and received alert as well as data are saved in inbox or draft item or the like. Electronic and Mobile Insurance Account is free to open through any bank or company, account holder need not to pay for opening e-IA, password is only available to the account holder, there is only need of Electronic Signature. It will also be helpful to open any subsequent insurance account, account holder need not to remember date of payment of premium. At the same place he can get all information about his insurance policies, premium amount, term and conditions, maturity and benefits etc. He can take decision about own insurance policy whether to carry forward or close it. Only need is internet or network connection with computer, laptop, tab and palm top or mobile. Documentation is easier for further policies and e-IA is like the caretaker of the policy. In case of

demate the main receive will automatically enter in the electronic Insurance Account. It is also environment friendly as there is no need of paper work; so, there will be no pollution.

Electronic and Mobile Agriculture: In Indian remote villages' people are getting information and guidance through Information Communication Technology about agriculture. They are also getting e-training and digital learning facilities about several agricultural products, such as, which medicines, chemicals etc. should they apply and at what point of time it should be applied, which is the best time for using the same and other related matters. Anyone can get such information only by using computer, laptop or mobile with internet connection. Not only that, through 'log on' system the concerned person also can get alert messages about process and product of better agriculture related goods with merits and demerits.

Electronic and Mobile Health: Information Communication Technology is blessings on the contemporary society when it is used for medical treatment by doctors and for providing related facilities and maintaining relationship between people, Doctors and administrations. At the rural level, Doctors and their team can observe online operation and process of treatment 'Live' through Information Communication Technology before, during and after surgery. Even when surgery is not required then they can improve their knowledge and aware people about the same.

Electronic and Mobile entertainment and games: We are crazy about the use of new multimedia technology for getting facilities like music, songs, movies, Television programmes, news and other updates online and offline. Use of communication convergence technology for games, such as, playing chess, cricket, car racing etc. became very common to children, young as well as elderly people.

Electronic and Mobile Commerce: E-commerce and E-Business are approved for private as well as public enterprises. E-Insurance and E- Banking are controlling the commercial market through E-Marketing , On-line marketing, On-line booking, shopping and actual delivery of product or services. We are using smart phone, smart card, A.T.M credit and debit card for payment, deposit and withdrawal purposes. We also use smart card as smart money and get immediate alert about payment, deposit or withdrawal of money from the concerned account. We get mobile as well as e-mail alerts about any fund transfer, payment due date of any insurance policy, gas booking, electricity bill, corporation tax, online shopping, e-tickets or any other services.

Banglar Bhumi Project: This is a project in the State of West Bengal among other projects. This project is useful for the Land Reform and Registration Offices and information with services to

citizen about report of rights, valuation of property, amount of stamp duty and registration fee payable for any kind of transfer of property, e.g., sale, gift, will, agreement etc.

E-Will: Nowadays, we can make Internet Will about our property on payment of prescribed fee through State Bank's Investment Banking Branch known as SBI- CAP Trusty Company. It can be done through the E-Project 'My Will services on line'. However, any interested person may make e-will of his moveable or immovable property by using his computer or mobile and keep it as draft or as he may wish.

E-Provident Fund Account: On-line Provident Fund Account is also available as optional for the interested person, even if such person is transferred to other department or change his job to any authority, his E-PF Account will be monitored On-line. This process reduces administrative works and provides economic security to the concerned person.

All India E-Railway: This project is to use at administrative level as well as to provide citizen services like e-reservation, cancellation and information of tickets before, during and after journey period.

E- Transport: Now we can get services like 'Book My Cab' and 'Savaari' by using our smart phone. There is need of installing certain software or App in the smart phone. This installation is free of cost. Within the App there should be system of payment or money transfer for getting such service through pre-paid card for getting easy cab or taxi services. Apart from that nowadays we avail e-tickets for bus services in India. Therefore, we need to scrutinise how far e-governance system is recognised and governed under Indian Law.

PART-III: HISTORICAL BACKGROUND OF THE INFORMATION TECHNOLOGY LAW

In the year 1623 Sir Francis Bacon described a cipher which now bears his name a bilateral Cipher which known today as a 5 bit binary encoding. In 1920s and 1930s the United States Federal Bureau of investigation (FBI) established an office designed to deal with the use of cryptography by criminals. In the year 1960 the United States Defense Department started using computer network; thereafter computer network was used by academic and research institutions and eventually the United States invented ICANN and Protocol system. Telephone phreakers had an extra curiosity to know computer activities and networking to use in their criminal activities. In the year 1970, the information superhighway was opened to worldwide users to access internet. The United Kingdom

(UK) passed the Data Protection Act, 1984; and after **R v. Gold**², the UK passed the Computer Misuse Act, 1990 to prevent and control cyber-crimes. In the year 1991, in **U.S. v. Robert Tappan Morris**³ case, Morris was found guilty and was sentenced under Title 18 USC section 1030 (a)(5)(A). The Circuit Court held that computer abuse is prohibited under section 2(d) of the Computer Fraud and Abuse Act, 1986 which was amended twice in 1994 and in 1996. In the year 1995 the computer network and computer system of the Defense Department of the US was attacked by hackers more than 250,000 times. Hackers attacked “Yahoo!” by cyber threat through ‘logic bomb’ to stop private computer Yahoo! Users on 25th December 1997. They claimed release of infamous Kevin Mitnick from jail custody.⁴

The United Nation enacted the Model Laws on Electronic Commerce in 1997. Undefined jurisdiction posed the real cyber threat, therefore, then intellectuals were involved intensive study and they took initiatives to work together Worldwide. By 1998, worldwide hackers group started cyber-attack in new name i.e. spamming by sending fake and junk e-mail, sms, gms, mms and so forth.

They also threatened to break Pentagon network and committed cyber theft to Software of military satellite system to sell it to terrorist; attacked on NASA and Government Departments network by Russian hackers. In the year 2000 India passed the Information Technology Act. Not only that, the Information Technology (Amendment) Act, 2009 introduced several changes and new sections to the Information Technology Act, 2000 relating to e-governance, e-signature, e-securities, civil and criminal liabilities, etc.

PART – IV: E-GOVERNANCE AND INFORMATION TECHNOLOGY LAW IN INDIA

The documents, records as well as information or data should be retained for a specific period to be accessible and usable for a subsequent reference, as provided by the Information Technology Act, 2000 under section 7. The retention of electronic records must be in original form as generated, sent or received indicating the identification of origin, destination, date and time of dispatch or receipt of such records except such e-records as are automatically generated solely to enable to be dispatched or received as e-record, for example, format of e-mail must be received or dispatched in the form of e-record or information which are solely generated for this purpose and therefore question of retention in original format of the same is not disputable. The e-record will be treated as original

² (1988) 2 WLR 984

³ F-2d.504(1991) US Circuit Court 928 as summed up by Roy August in cybercrime.org

⁴ For detail see <http://www.cybercrim.org>

format as generated, sent or received when it will indicate details of its creation, sending and receipt. Creation in this context is not necessarily typing by the user rather on behalf of user any one can type or create the document.

However, where there is express law relating to retention of electronic documents, records or information, section 7(1) of the Information Technology Act, 2000 will not be applicable and that special provision will prevail. For example, section 5 of the Trade Mark Act, 1999 provides that in Trade Mark Registry Office the register must be kept in manual form and in electronic form such as in floppy disk or hard disk which must be circulated to all branch offices from head office and the Registrar shall take care of it. According to section 8 of the rules, regulations, orders, bye-laws, notifications or other matters of the Government if published in official gazette or electronic gazette, the date of publication shall be deemed to be the date of the gazette or media in which it was first published in any form whether electronic or manual. On the other hand, with reference to sections 6 to 8, though e-records and e-signature have legal sanctity but it is not a matter of right of any one to claim that any appropriate Government or Government authority should accept, issue, create, retain and preserve any document in electronic form or effect any monetary transaction in the electronic form as provided under section 9 of the Act. Therefore, in-spite of wide use, e-records are not compulsory for every transaction and communication. So, e-publications of government records are subject to official secrecy and confidentiality.

Digital Signature

Digital Signature is the use of electronic and statutory method to authenticate electronic record by anyone who subscribes it through digital signature certificate issued by appropriate authority appointed for this purpose by the Central Government. It is very difficult to define the term digital signature in precise form. According to section 2(p) of the Information Technology Act, 2000 (IT Act), the term Digital Signature means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3 of the Act. Section 2 sub-sections (ta) and (tb) were inserted by the Information Technology (Amendment) Act, 2009 which defines ‘Electronic Signature’ and ‘Electronic Signature Certificate’ respectively to authenticate electronic record in electronic technique not to supplant but to supplement the Digital Signature and the Digital Signature Certificate.

Authentication of electronic records and electronic signature must be following procedure prescribed under sections 3 and section 3A of the Information Technology Act, 2000 in India. The procedure is called affixing electronic signature or digital signature. That is adoption of specific

method or procedure by means of electronic signature for its authentication. Any person can affix digital signature or electronic signature on his electronic record. Authentication shall be effected by use of asymmetric crypto system and hash function which envelop and transform initial electronic record into another electronic recordⁱwhich are reliable and according to second schedule. This function has to be completed by Key pair. In key pair there are private key and public key. Keys are unique to the subscriber and constitute a functioning Key Pair. For the verification of the electronic record the subscriber needs to use his public key. The Central Government may prescribe the procedureⁱⁱand publish it in the official Gazette to add or omit such procedure for affixing digital signature from the second schedule depending on its reliability.

Therefore, whosoever uses information technology to communicate, data exchange or transmit information for online contract, regular business affairs, to provide Government services or personal use must use electronic or digital signature in the electronic record by using asymmetric crypto system and hash function, to protect data in cyberspace and prevent misuse or abuse of information; to authenticate data and to prevent data from any abuse or misuse. Hash function envelops it and transforms original document and authenticates original document with secure digital signature. The document will be treated reliable if it contains digital signature under verification process. There will be very little chance of tampering or misuse of data. Specially, Government sectors while using e-records must always use secure electronic or digital signature for its authentication and reliability.

Security of E-records and E-signature

When electronic signature is under the process of verification of keys till verification completes, data is under the exclusive control of signatory during the time of affixing signature and it is stored, controlled and affixed in exclusive manner using private key, then it will be treated as secure electronic signature as provided under section 15 of the IT Act. So, the security system starts from the time of application of security procedure to the time of its verification in case of electronic records according to sections 14 and 16 respectively. Then it will be treated as Secure Electronic Record. However, in case of digital signature, the signature creation data means the private key of the subscribers. For using the same the user needs to receive a certificate, which contains public key, from certifying authority authorised by the Controller and the Central Government. In e-governance use of secure digital signature must be compulsory in confidential and important data for authentication and reliability to citizens.

Legal Recognition of digital records, electronic signature and digital signature

Where law requires information or records compulsorily in writing or typewriting or printed form, such law recognises electronic records when such information or matters are (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference. Therefore, only availability in an electronic form is not enough rather for legal recognition it must be accessible and usable for any subsequent reference. According to section 5 of the IT Act, where it is legal compulsion to sign or bear electronic signature, it shall be deemed to have been satisfied where the requirements are fulfilled. Where law requires that information or any matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature then that information or record must be authenticated by affixing electronic signature, earlier which was digital signature, according to the prescribed manner. However, explanation of section 5 of the IT Act, 2000 provides that ‘signed’ means affixing of his hand written signature or any mark on any document and the ‘signature’ shall also mean accordingly. So, Electronic records and electronic signatures are recognised and approved for the e-transaction in Government and its agencies according to format and fees prescribed by the Central Government, as per section 6 of the IT Act.

Controller and Certifying Authority

According to section 17 of the IT Act, the Central Government may by notification appoint the Controller and other officers who shall use office seal of the Controller. For the purpose of regulation and functions of Certifying Authority, the Controller may recognise any foreign Certifying Authority for the purpose of this Act with previous approval of the Central Government and by notification in the official gazette and their activities will be treated as valid until the Controller revokes such recognition as provided under section 19 of the IT Act.

Any person, who is eligible under section 21(2) of the IT Act, 2000 may make application to the Controller for a license to issue e-signature certificates. The essential requirements are qualifications, expertise, manpower, financial resources and other infrastructure facilities which are essential to issue such certificates as prescribed by the Central Government. This licence, once granted, shall be valid for the period as the Central Government may prescribe and shall not be transferable or heritable but subject to terms and conditions as may be specified by the regulations as provided under section 2(3) of the Act and subject to renewal of license in prescribed form and fees not exceeding five thousand rupees and not less than forty-five days before date of expiry of validity period as prescribed by the Central Government under section 23.

However, according to sections 24 and 26 the controller may grant or reject the license and application after considering reasonable factors or suspend the license accordingly by notification

through website or such electronic or other media as he may consider appropriate. So, Certifying authority means a person who has been granted a licence to issue electronic signature certificate under section 24 of the IT Act, 2000 as provided in section 2(g). Every Certifying Authority shall follow appropriate procedures to provide reasonable level of reliability and security to ensure the secrecy and privacy of the electronic signature. Certifying Authority is the repository of all e-signature certificates and they publish information regarding its practices, e-signature certificates, current status of such certificate and observe other legal standards as provided by section 30 of the IT Act.

Electronic Signature Certificate

According to section 2(tb) of the IT Act, 2000 ‘electronic signature certificate’ means an Electronic Signature Certificate issued under section 35 and includes digital signature certificate. Every electronic signature certificate application shall accompany with fees not exceeding rupees 25,000/- to be paid to the Certifying Authority and a certification practice statement or particular statement to be considered by Certifying Authority. After due enquiries and reasonable opportunity given to the applicant the authority may grant or reject the application with recorded reasons with or without conditions as provided under section 35 of the Act.

However, the Electronic Signature Certificate may be suspended by the issuing authority on receipt of request from the subscriber or duly authorised person or if it is against the public interest for a period not exceeding 15 days without hearing the subscriber. But in such a situation the authority must communicate the same to the subscriber. If it is proved that a material fact in the DSC is false or has been concealed; a requirement was not satisfied; the security system or Certifying authorities, private key was compromised to effect DSC’s reliability and so forth then after giving reasonable opportunity of being heard to the subscriber or on request of the subscriber or duly authorised person; or on death of the subscriber; or on dissolution of the firm or winding up of the company where the subscriber is a firm or company, the authority can revoke the DSC as provided under sections 37 and 38 of the Act. The Authority shall communicate the same to the subscriber and notify according to section 39 of this Act.

Under article 9 of the United Nations Model Law on Electronic Commerce, Plenary meeting, the Certification Service Providers **(a)** must act according to its policies and practices. **(b)** They must exercise reasonable care to ensure the accuracy and completeness of all material representations which are relevant to the certificate or included in the certificate. **(c)** They must provide reasonable accessible means to enable relying party to ascertain from the certificate **(i)** the identity of the

certification service provider, (ii) the signatory as identified in the certificate had control of the signature creation data at the time when the certificate was issued; and (iii) the signature creation data were valid at or before the time when the certificate was issued. **(d)** To ascertain relying party (i) the method used to identify the signatory (ii) about any limitation for the purpose of the use of the signature creation data or the certificate, (iii) that signature creation data are valid and have not been compromised. (iv) Any limitation on the scope or extent or liability stipulated by the certification service provider. (v) Signatory followed all means according to article 8; and (vi) whether a timely revocation service is offered. **(e)** To utilise trustworthy systems, procedures and human resources in performing its services, In case of failure to satisfy the requirements mentioned under the Act, a certification service provider shall be responsible for the legal consequences.

Certificate Service Providers

Article 10 provides that the trustworthiness of the Certificate Service Providers depends on **(a)** Financial and human resources, including existence of assets, **(b)** Quality of hardware and software systems, **(c)** Procedures for (i) processing purposes, (ii) applications for certificate and (iii) retention of records. **(d)** Availability of information (i) signatories as identified in certificates and (ii) potential relying parties. **(e)** Regularity and extent of audit by an independent body. **(f)** Declaration by the state or authenticating authority about compliance with or existence of the fore- going; or **(g)** any other relevant factor.

Subscribers

Very essential duty of subscriber is generating key pair. If the subscriber accepts the public key of corresponding private key then he must generate that key pair by applying the security procedure as prescribed by the Central Government and provided under section 40 of the IT Act. Therefore, generating key pair with signature must be following security standards, confidentiality and regulations. However, in respect of Electronic Signature Certificate the subscriber shall perform such duties as may be prescribed as provided under section 40A of the IT Act. Consequently, there should be confirmation and confidence about the content of e-records. Therefore, when digital signature or electronic signatures are used then these are to be treated as proof of attached document with evidential value, authenticity, efficiency and integrity too.

E-Contract

Under Section 10A of the IT Act, contract formed through electronic means are valid contract. It provides that where in a contract formation, the communication of proposals, the acceptance of

proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form, or means was used for that purpose.

E-record will be treated as attributed to the originator when it is proved that it was sent by originator himself or his authorised person or by information system programmed by or on his behalf to operate automatically as provided by section 11 of the IT Act. According to section 13(2) of the said Act, for the date and time of dispatch and receipt of e-record we have to depend on the time when it enters the designated computer resource, when it is retrieved by addressee or when it enters into the computer resource of the addressee. Consequently, for the jurisdiction or place of sent and receipt of records are concerned, it is the place of their business as under section 13(3) though, location of computer resource and place of business of originator and addressee are different as provided by section 13(4). The principal business place will be treated as place of business where there are several business places of concerned person. And if either one has no business place then the usual place or residence will be treated as place of business. For a Corporate body, it is the place of registration as provided under section 13 (5) of the said Act. For example, X enters into an agreement with Y. X is residing at Kolkata and Y is residing at London. X sent e-copy of agreement to Y while he visited Delhi through Delhi based Cyber café and Y received it while he was at Singapore. Here place of agreement will be Kolkata or London or residential address of either X or Y, or if they are registered Company, the place of business, in case of several branches principal place of business, if no such place of business then place of registration and where nothing is working then place of server is to be treated as place of business for the purposes of business and to decide any dispute as well as to apply jurisprudential principle of territoriality of Law and territorial application of Law. And under section 75 of the Information Technology Act, 2000 only reasonable and incidental link to Indian Computer is enough to settle jurisdictional issues. Therefore, Delhi and Singapore both are important to determine jurisdiction in cyberspace for the purposes of application and working of e-governance.

PART – V: THREAT TO E-GOVERNANCE

It is true that new multimedia technology presents uncontested opportunity to promote and progress human society worldwide in the era of globalisation and liberalisation. With this we must not forget that nothing is absolute in this universe, everything has its merits as well as demerits. Scenario is the same in case of World Wide Web and new multimedia technology in the contemporary era of communication convergence. New technology are being used for socio-economic development as

well as misused and abused by wrongdoer. Criminals are also appearing to destroy and misuse computer, computer network, mobile technology, network and information processing devices which are known as e-commerce or e-governance friendly devices.

Criminals in cyberspace can commit crime in one country sitting at another county only through a computer due to jurisdictional riddles. They can visit world at a glance through World Wide Web (www) or internet system. That is why it is very difficult to identify, prevent and control cybercrimes worldwide. Criminals are also aware that their victims are most of the times vulnerable and unaware about security system, preventive and controlling measure. They hardly leave evidence of their wrong doing in cyberspace. Traditional laws are not adequate to curb cybercrime. It is not only national but also international legal challenge. Cyber crime is the new dimension of criminal jurisprudence. It evolved with evolution of computer and new multimedia technology. It requires worldwide intensive study and research to evolve more procedures to curb threat to e-governance and e-commerce.

Three international legal challenges against cyber crimes

The challenges that Law enforcement agencies face in our battle with cybercrimes are generally being divided into three categories. These are as Follows: (i) **Technical challenges** that hinder law enforcement ability to find and prosecute criminals operating online. (ii) **Legal challenges** resulting from laws and legal tools needed to investigate cybercrime lagging behind technological structural and social changes. (iii) **Operational challenges** to ensure that we have created a network of well-trained, well-equipped investigators and prosecutors who work together with unprecedented speed even across the national borders.⁵ Chapter XI of the IT Act, 2000 sections 65 to 78 deal with cyber crimes and punishment. According to Chapter XI hacking, tampering source codes, cyber pornography, and offence related to digital signature certificate, cyber piracies etc. are cybercrimes. Thus, cyber threat is increasing in every moment causing global tension. This is significantly new phenomenon with global for its fast growth. Computer is a subject matter, victim, facilitator, instrument of cyber threats. The word computer is defined in section 2 of the Copyright Act, 1957 as computer which includes all information processing devices, includes all information processing devices. Section 2(1) of the IT Act, 2000 defines the term computer. Therefore, crimes committed in cyber space or cyber world using any multimedia technology or communication convergence technology i.e. mobile phone, laptop, Desk top, wireless and related devices which has ability of

⁵ James K. Robinson, International Computer crimes Conference, "Internet as the Scene of crime" Oslo, Norway; May 29-31, 2000. Also in <http://www.cybercrime.gov>

information processing and communication through internet or network, or causing injury to those are to be treated as cyber crimes.

Not only that, electronic money transaction without proper safeguard tends to create several problems, for example, ATM fraud and fraud in banking transactions, fraud in financial transactions, internet fraud, credit card fraud and so forth are increasing day by day. Criminals in cyberspace are very often misusing and abusing e-banking and e-financial transaction facilities. Hackers in cyberspace unauthorisedly access password and source code of the users and institutions to commit economic crimes and other cyber crimes e.g. theft, denial of service attack, flowing of virus, spamming and so forth. If separate machine is used only to keep e-record without internet or network connection, there will be 100% safety and security of data. For example, two government departments are having their own network to exchange data within two departments and no computer of these two departments is connected with internet. There will be very little chance of data tampering, misuse or crime in respect of the records. But if one computer is connected with internet, there will be chance of direct as well as remote cyber attack through *I-Way*. Therefore, nowhere is safe in cyberspace without standard security and control. On the other hand if we advocate use of separate machine only for keeping records without internet connection, it is a bar to advancement and sanctity of Information Communication Technology (ICT) and it will bring us back to the genesis of computer and development of ICT because without communication processing facilities a machine can be treated as a calculator but not a computer.

People generally understand cyber crimes **hacking and hackers'** activities. There are four types of Hackers these are as follows: (i) Ethical hackers; (ii) Crackers; who break in computer systems and security thereof. (iii) Cyberpunks; who commit information theft. (iv) Phreakers; who use new multimedia technology i.e. mobile phone, wireless etc. Mr. Bharadwaj the Managing Director of IGSP Technology Centre India Pvt. Ltd. Filed an FIR in Chandigarh against cyber hacking under section 66 of the IT ACT, 2000 and section 380 of Indian Penal Code, 1860. The Techno Mobile Infoway Ltd. (TNIL) had illegally downloaded some data from their US based server. On the basis of the complaint, Police confiscated the server and related devices and arrested the alleged accused. Not only that, hacking by IIT Kharagpur student Mr. Sekhar Verma in 2002, hacking by Mr. Rajesh Malhotra in 2004, hacking in Baroda, Gujarat in 9th June 2005, hacking attack on Indian military websites and Governmental websites by Pakistani hackers are few examples of hacking in India. Young hackers Dr. Nuker, Ankit Fadia, Neeraj Pattath are appointed by the NASSCOM and Police Department to advice to prevent and control hacking and other cyber crimes. Neeraj Kaushik, country manager TrendMicro says, "Nearly 2.15% of spam originates from India. The top 20 spam

producers will always have one or two Indian service providers in the list. For example Bharati and BSNL were in the list this month.” He also said that about 15% of spasms carry some virus e.g. Trojan horse.⁶ The West Bengal National University of Juridical Sciences, Kolkata was forced to remove its website www.nujs.edu as hackers linked it to a Pornographic site which caused embarrassment to all visited dignitaries. However the University suspected that it had been done by visitors.⁷

The term ‘fraudulently’ is defined in Indian Penal Code 1860 that a person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise. Therefore, any dishonest, fraudulent activities in cyberspace using new multimedia technology for wrongful gain and wrongful loss which are prohibited by the State through Criminal Law are ‘**cyber fraud**’. From banking to ticket booking, shopping, finance, health, education, agriculture in almost all spheres in our society we have to face e-commerce and e-governance.

Section 65 of the Information Technology Act prescribed punishment for intentionally and knowingly tampering with computer source code. Section 65 prohibits tampering with computer source documents knowingly and intentionally. When that source code used for a computer, computer programme, computer system or computer network and it is necessary to be kept or maintain this according to Law. The tampering includes (1) conceal, (2) destroy or alter any computer source code, or causes another to do these. Therefore, we can say even abettors are also to be punished for this offence. This section prescribes punishment with imprisonment upto 3 years, or with fine which may extend up to R.s 2 lakhs or with both. **Section 66** of the Act provides that if any person dishonestly or fraudulently does any act referred to in section 43 which deals with cyber contravention or civil wrong, he shall be punished with imprisonment up to 3 years, or with fine which may extend up to rupees 5 lakhs or with both. **Section 66A** prescribed punishment for sending offensive messages through communication services etc. up to 3 years imprisonment and fine. **Section 66B** prescribed punishment for dishonestly receiving stolen computer resource or communication device imprisonment up to 3 years, or with fine which may extend up to rupees 1 Lakh or with both. **Section 66C** prescribed punishment for theft as as imprisonment up to 3 years and with fine which may extend up to rupees 1 Lakh. **Section 66D** prescribed punishment for cheating by personation by using computer resource as imprisonment up to 3 years and with fine which may extend up to rupees 1Lakh.

⁶ The Times of India, Kolkata, Times Business, Wednesday, Friday 13, 2008.

⁷ The Times of India, Kolkata, Wednesday, 6th February, 2008, page-4.

Chennai police was very much tempted to evolve guidelines and statutory norms to prevent and control cyber fraud and other cybercrimes especially after the incident of ATM robbery in the year 2003. In this case accused downloaded the confidential information from his own laptop internet to fulfill this end. Pune cyber fraud, Karan Bahrees case of cyber fraud in June-July 2005, ATM fraud, Internet fraud and Cyber fraud in Kolkata by BPO employee show how much we need to amend and adopt more effective data protection laws and word standards security measures.

In Pune Cyber fraud 2005 April⁸ about 16 accused were arrested under section 65 of the IT Act. The accused were authorized to access the confidential information of Citibank account holders as the bank was the e-banking service providers. Main two accused Miss M. Fernandes the unit supervisor and Mr. Ivan Thomas the former customer care executive accessed password/PINs information from about 5 account holders. It was just like taking house keys from owner by thieves. Thereafter, culprits had started their operation by sending and diverting e-mails of e-banking funds transactions. A victim only was receiving about funds transfer nothing else. One of the victims then lodged complaint to the Citibank then Citibank alerted the Mumbai and New York City Investigative Services about the same. Mumbai Citigroup immediately reached recipient banks in Pune, and alerted the Pune police's cyber crime cell to trap the cyber fraud. The accuseds were arrested red-handed while they were about to check the fund transfer in a Rupee Co-operative Bank in Pune. Here one thing is to mention that the BPO of MphasiS Ltd Msouce did not file any complaint against this major cyber fraud.

ATM Fraud in Kolkata, December 2014⁹ was reported in newspaper that the victim named Bapi Das received a mobile call that his old ATM Card will be blocked and new ATM Card will be delivered by the Bank for which he has to give information about present ATM card Number along with PIN CODE, i.e., Electronic Signature Key. The accused informed that he is the bona-fide officer of the victim's bank and he may deliver the new ATM card very next day. The victim relied on the information and disclosed his ATM number and PIN Code to the accused. The victim alleged that within few minutes he received the mobile alert about fund transfer from his account. Then, rupees 37 thousand was withdrawn from his bank account. Immediately the victim lodged the complaint before the Lake Town Police Station and Bidhan Nagar Commissionarate of Detective Department. The Detective Department investigated the matter online and unearthed that it was a case of ATM fraud committed by Biswajit Barik and Shyamal Barik. They are the resident of Paschim Medinipore District. Immediately both the accused were arrested by police and the accused

⁸ Dr. M. Dasgupta, Cyber crime in India: a comparative study, ELH, 2009 rep. 2014

⁹ The Ananda Bazar Patrika, Kolkata on Friday 5th December, 2014 page 15.

confessed their guilty with prayer for mercy. This was the case of cyber fraud as well as cyber cheating by personation. The case would have been handled under sections 65, 66 and 66D of the Information Technology Act, 2000 for which specific punishments are prescribed as imprisonment up to three years and fine would be imposed from rupees 1 lakh to 5 lakhs. Instead of awareness programmes people very often become victim and tend to provocation. Therefore, there is need of more effective preventive and controlling measures. But everything will work if public are aware, alert, warned, and act with sufficient prudence.

Terrorism is a kind of threat or terror against general people or government which is not predictable. International terrorist attack using websites and controlling network are increasing, e.g., alqaida's websites <http://www.mojahedoon.net> which was linked with Osama-bin-Laden, attack on Indian Parliament on 13th December 2001 by making false gate pass from internet, 11th September 2001 attack on WTO and Pentagon controlling network of airway, 16th December 2005 e-mail threat to attack Indian Parliament and US consulate are examples of **cyber terrorism** in India. Cyber terrorists use encryption program and digital signature to co-ordinate each other's. Cyber terrorists use mobile phones, wireless etc. to communicate each other ie, Aftab Ansari attacked on American Information Centre Kolkata from Dubai, Dawood Ibrahims terrorist activities using new technology and the flowing of 'Virus' to collapse government websites; e.g. 'I love you' virus collapsed internet and websites worldwide in the year 2000 are also example of threat to e-governance. Their activities are depends on (a) psychological, cultural and national motivation, (b) organisation, (c) training, (d) targets and weapons, (e) jurisdiction: in cyberspace they do not need visa or passport to attack any Nation, (f) publicity of their attack, (g) command and control to increase resources, (h) learning process of hacking and other cyber threats such as spamming, denial of service attack and so forth. **Section 66F** of the Act, 2000 prescribed punishment for **cyber terrorism** with life imprisonment.

Controlling measures under the Information Technology Act, 2000

Section 69 of the Act empowered the appropriate Government to issue directions for interception or monitoring or decryption of any information through any computer resource.

Under **section 69A** the Central Government or any of its office is empowered to issue directions for blocking for public access of any information through any computer resource.

Section 69B deals with the power of the Central Government to authorise to monitor and collect traffic data or information through any computer resource for the purpose of cyber security.

Section 70 deals with undertaking of protected system by the appropriate Government and for Critical Information Infrastructure. **Section 70A** provides for appointment of National Nodal Agency.

Section 70B provides for the appointment of Indian Computer Emergency Response Team by the Central Government to serve as national agency for incident response.

Section 71 prescribed imprisonment for a term which may extend to 2 years or fine up to 1 Lakh rupees or fine as penalty for misrepresentation to, or suppression of any material fact from the Controller or Certifying Authority relating to electronic signature.

Jurisdiction

Section 1(2) of the IT Act provides that the said Act shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention there-under committed outside India by any person. However, **section 75** deals with application of the act for offence or contravention committed outside India. **Section 75(1)** provides that subject to the provisions of **sub-section (2)** the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality. So, both the sections deal with extra-territorial application of the Act along with its territorial application.

Under **section 75(2)** for the purposes of sub-section (1) this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

Part –VI: CONCLUSION and SUGGESSTIONS

E-Governance is very significant in the 21st Century because now the society worldwide is information and communication technology (ICT) generated and ICT dominated society. Contemporary society in its every spare cannot think of work and success without Information and Communication Technologies. In the era of Communication Convergence Technology for government and citizen integration as well as transaction, even in non-governmental sectors, there are great necessities of electronic and mobile governance. Therefore, instead of E- Governance it is better to coin the name as Electronic and Mobile Governance and the contemporary era is the era of Mobile and Convergence Technology.

However, the Multimedia Convergence Technology should be handled with certain security and preventive measures so that it should not be misused or abused and deviants in our society should

not take it as their easier tool or target for commission of technology related offences or cybercrimes. So, there is also need of effective controlling system by Government and public for the protection of human rights in cyber world as well as to achieve social justice.

Indian Judiciary is applying the Indian Penal Code and the Information Technology Act, 2000 to prevent and control cybercrimes. However, cases on cybercrime before judiciary are very few and most of the cases are in process.

We need training for Law enforcing agencies. Though Central Bureau of Investigations, Cyber Crime Cell of Delhi, Chennai, Mumbai, Bombay, Hyderabad and Kolkata have already taken initiatives to train police officers about Information Technology to prevent and control cybercrime. On December, 2005, Kolkata Police established Cyber Crime Cell with same views. There is need to improve infrastructures of law enforcing agencies with speedy development of new multimedia Technology.

E-Governance is glowing, accepted and became well known in India at the Union as well as the State level. It is functioning at the full swing from Kashmir to Kanyakumari.

However, there is still need for training and public awareness about e-governance and its effects as well as result of misuse and abuse of Information Communication Technology to prevent and control cyber threat. Then we can hope for Good governance through e-governance.

COSMOPOLITAN AND CONTRACTARIAN DEFENSE OF HUMANITARIAN INTERVENTION: VIEWS OF JOHN RAWLS AND JURGEN HABERMAS

Mr. Bhanu Pratap *

INTRODUCTION

The cosmopolitan school led by Kant and John Rawls have presented an alternative model of world governance where human rights can be protected in a better way. Kant's Perpetual Peace Model was one of the earliest peace projects. The contract tradition was resurrected by John Rawls. Rawls along with Jurgen Habermas tends to justify the concept of Human Rights and Humanitarian Intervention by creating a hypothetical cooperative of world governance.

RAWLS VIEWS ON HUMAN RIGHTS AND HUMANITARIAN INTERVENTION

Rawls concept of human rights and his ideas on humanitarian intervention which can be traced from his survival work 'Law of the People'. First, we consider a list of human rights prescribed by John Rawls. According to him human rights are to be enumerated as follows:

- 1) The rights protecting the life and integrity of the person, including to the means of subsistence.
- 2) Right to liberty of the person (freedom of movement freedom from servitude and forced employment right to hold personal property).
- 3) Right to formal equality and guaranteed protection of the rule of law (due process, fair trials, right against self-incrimination etc.)
- 4) Liberty of conscience, freedom of thought and expression and freedom of association.¹

It can be seen that Rawls list of human rights is short and includes basic civil liberties. According to Rawls, enslaving people, letting them starve or prosecuting, renders people incapable of social cooperation and pursuing their rational good. People who are denied

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¹ Samuel Freeman, Rawls (Sonepat, Haryana: Routledge Publication First Indian Print 2008) Pages 435

human rights are not cooperating and are like slaves who are compelled or manipulated and treated as expandable when convenient.

Samuel Freeman has summoned up the idea of John Rawls on human rights and humanitarian intervention in the following words:

"The idea of human rights has two primary rules within the Law of Peoples. The First rule is to set limits to a government's internal autonomy: No government can claim sovereignty as a defense against its violation of the human rights of those subject to it. When a government consistently violates the human rights of some of its own people- the very persons whose interest government is entrusted to protect- then it forfeits its right to rule and to represent them as a people."

A government then is to be regarded as an ‘outlaw’ and no longer has immunity under the law of peoples from non-interference by other people; moreover, if its violations of human rights are egregious enough, other people are entitled to depose and replace an outlaw regime with a government that respects the human rights and common interests of the people..... War can only be waged against another government in self defense, or to protect the human rights of other peoples when violated by their own or another government.....²

Rawl’s ‘Law of the People’ is his seminal work and is delivered on the promise of a contraction account of law of nations. Rawls follows Immanuel Kant in many accounts, but in law of people he expands the horizon for humanitarian intervention by baring his argument on global justice. His law of people is an extension and part of a liberal political conception of justice. Rawls eight principles support a government is:

- 1) Respect the freedom and independence of other people;
- 2) Observe treaties and undertakings;
- 3) Respect the equality of peoples in agreements and relation;
- 4) Observe a duty of non-intervention;
- 5) Wage War only in self-defense on in defense of other people unjustly attacked

² Supra note 1, Pages 436-437.

- 6) Honour Human Rights;
- 7) Observe just restriction in waging war;
- 8) Come to the assistance of burdened, living under unfavorably conditions that prevent their harm a just social regime.³

Rawl's argument for their principles is based on a second original position (a first original position is connected to his by political idea in a Theory of Justice, where rational people enter into a contract, not knowing their status in society). In the Second original position he imagines the representatives of well-ordered liberal peoples coming together to work out the terms of their cooperation. Not knowing which society they represent they would all agree to the principles of the law of peoples behind a (thick) veil of ignorance that brackets all factual information about their own and other societies.

It is important to mention here that both Rawls and Habermas were influenced by Immanuel Kant's idea of 'Perpetual Peace' and both developed different theories. Both however supported military humanitarian intervention as a political instrument to reestablish peace and justice. According to Rawls, 'well ordered' societies are on a higher level of legitimacy and because of this, they are entitled to wage a 'just war' against criminal states.⁴

In his 1999 classical treatise on '*The law of Peoples*' John Rawls applied his own theory to international politics and law. His ideal theory proceeds in two stages. Initially, citizens of liberal democratic societies justify the principles for a law of peoples. Here the '*first original position*' as envisaged in Rawls '*Theory of Justice*' in 1971 works as a device of representation at the national level. Secondly, the original position is applied to the international level. Rawls has made some differences when we compare it to the original positions of '*Theory of Justice*'. Rawls works the switches in two important ways. In contrast to the arrangement within a society, the subjects to the contract are representatives of people not individuals. The justification process does not take place amongst all the people in

³ Supra note 1, Page 427

⁴ Regina Kreide, *Preventing Military Humanitarian Intervention? John Rawls and Jurgen Habermas on a Just Global Order*, (Special issue : The Kantian Project of International Law) German Law Journal (Vol 10 No. 1) 2009 Pg. 94

question from beginning it starts with democratic liberal people who interpret and agree on a law of people.⁵

Moral duties agreed to in the domestic original position are duties that individuals owe to all persons in the world, not just to members of their own societies one way to look at the law of nations in theory is that it extends the natural duties. The problem of the law of nations is to define the nature and scope of their duties.

The main players in Rawls international theory are democratic peoples and non-democratic states. Through the double legitimization process among the well-ordered and again well-ordered and Hierarchical peoples, the high normative standard of legitimacy is diluted and adjusted to non-democratic societies. Rawls makes an important classification in legitimacy of government forms. Democracies are the most legitimate entities just like Kant's '*Perpetual Peace*'. It is because of the normative superiority of democracies that they appeal to be obliged to exert pressure towards defect societies to become democratic. But should liberal societies that do not fit the just political liberal paradigm?

Rawls answers by distinguishing a 'just society' which is a well ordered liberal society, from a decent society and then he distinguishes both of them from an outlaw society. A decent hierarchical society Rawls defines as one that is.

- a) Peaceful and non-expansionist
- b) Guided by common good conception of justice
- c) Has a decent consultation hierarchy
- d) Honour the basic human rights that respect the humanity of its members.⁶

The above mentioned idea is somewhat similar to Kant's idea in '*Perpetual Peace*' and ever Rawls is of the view that liberal societies do have a duty towards non liberal societies. But this duty does not qualify the idea of intervention because even for a non-liberal society territorial Integrity is sacrosanct. Till this point, Rawls is in complete agreement with Kant. However, Rawls goes a step further and strongly urges for the cause of humanitarian intervention in the words of Samuel Freeman.

⁵ Ibid, Page 97

⁶ Supra note 1, Page 429

“.....Some object to Rawls duty of non-interference since it seems to imply a duty not to come to the assistances of democratic liberation movements. But the duty of non-interference only prohibits assisting democratic resistance to decent hierarchical regimes, not to tyrannical and other “outlaw” regimes. This leaves room for assisting democratic resistance is likely to prove effective. This is very different from a decent non liberal society, which is to be deemed capable to the self-imposition of democracy.....”⁷

Rawls has asked an important question how should one deal with an outlaw regime? Rawls proposes the solution of humanitarian intervention. On the other hand, Jurgen Habermas proposes a different solution. Their difference of opinion showcase the difference between classical humanitarian intervention and new emerging concept of Responsibility to protect their differences will be discussed later. Rawls gives a formula through which non ideal states may get integrated into the society of well-ordered peoples. He first describes three types of defective societies.

- A. A Society characterized by benevolent absolutism which respect the human rights and is not aggrieve to the outside has the material and technical means for development by citizens are not entitled to self-determination.
- B. Burdened societies which are neither expansion aggressive but lack the political and cultural conditions as well as the material and technical resources intended to become well ordered, despite their aspiration.
- C. Their category include the category of outlaw states who in contract to burdened society violate human right and do not want to comply with laws of people externally.⁸

Thus, according to Rawls ‘outlaw states’ are those who have a territory of their own but lack the required societal legitimacy of a post 1945 world. They lack the substantial characteristic of a legitimate state like a meaningful constitution that meets basic human rights the realization of ‘rule of law’ a minimal democratic requirement (transparency and accountability) and a cooperative foreign policy in the words of Regina Kreida.

⁷ Supra note 1, Page 433

⁸ Regina Kreide, Preventing Military Humanitarian Intervention ? John Rawls and Jurgen Habermas on a Just Global Order (Special issue : The Kantian Project of International Law) German Law Journal (Vol 10 No. 1) 2009, Pg 103

“... Rawls suggest a ‘confederative centre’ that may represent the common opinion and policy of well-ordered societies towards non well-ordered societies in public. The centre also exposes the human rights violations of oppressive regimes- a kind of naming and shaming in the name of the society of the well-ordered. At the same time, he suggests neither institutional arrangement, non-additional ways of communication. Assuming that for Rawls Iraq would have to qualify as an outlaw state; the only option left for democracies is military conflict...”⁹

Rawls suggest that outlawed must be made to realize that without honouring human rights their participation in a system of social cooperation is simply impossible Military intervention is the only option left when U N sanctions do not work.

How to deal with the ‘outlaw’ states; Rawls presumes a right to self-determination of the sovereign that even in case of war with another state or in case of civil war- should not be violated by any third party except for some clear exception Justice as Assistance on Duty of Assistance: According to Rawls independent democratic people have a duty to assist the burdened, societies to assimilate them in the law of peoples. It is seen as an important step towards promoting global justice, and it also shows that Rawls was thinking of a society where the root cause of deep entrenchment of tyranny was poverty and lop sided development of economy. Rawls understood that global poverty and certain living standard was a necessary condition for existence of peace. As shown earlier, those societies that lack the necessary infrastructure for a proper assimilation in global order should be helped by members of world community. The aim of the material and technical assistance should be to install just and democratic institutions. The idea has been summed up by Samuel Freeman.

“...Rawls duty of assistance is not a charitable duty Rather it is a duty of justice that well-ordered peoples owe to burdened peoples existing under unfavourable circumstances. The duty of assistance is as much a duty of justice as is the domestic duty to save for future generations...Like the just savings principle, the duty of assistance too should aim ‘to secure a social world that makes possible a worthwhile life for all’. The duty of assistance also resembles individual’s natural duty of mutual aid; it extends this duty of individuals to peoples.”¹⁰

⁹ Supra note 8, Page 105

¹⁰ supra note 1, Pg 441

It is interesting to note that Rawls had excluded people living in ‘outlaw regime’ from the benefit, since their leading elite is not interested in establishing a fair on decent social structure. This kind of restriction is not correct because citizens under such a regime are rendered important and are too scared to raise their voice. They should be the actual beneficiaries of the assistance. However, things have changed rapidly in the 21st Century. The duty of assistance has been incorporated in the new ground breaking norm of Responsibility to Protect. The “Responsibility to Re build” tool has explicitly incorporated the idea of Rawls. The emergence of important concept like ‘State Building’ and conveyance of ‘conflict Management’ with ‘Humanitarian Intervention’ have boosted the pace of progressive ruler. All the aforesaid mentioned tools will be discussed later.

VIEWS OF HABERMAS

Jürgen Habermas on the other hand has provided a different approach towards the problem. He Proceeds from some starting point as Rawls in so far as he also aims to after a contemporary understanding of Kant’s ‘*Perpetual Peace*’. Just like Rawls Habermas work is concerned with the foundations of a democratic constitution state. Habermas argues for a ‘constitutionalization’ of international law that is realized in a multileveled system. His vision is that of a world republic and Kant's idea of a world state from which states can voluntarily withdraw.

One element of note is that Habermas introduces two historical notions of constitution that on international level complement one another For Kant; it is the sovereignty of the people that controls the political power with the means of law. According to Habermas this relationship between state and constitution, Kant was convinced that the sovereignty of people was indivisible. In Habermas view the democratic will formation in a federalist organized multi-level system is branched out and works parallel in different legitimization channels on the community, nation, state, regional, transnational and supranational level.¹¹

Habermas further explores the range of possibilities between and individualistic legal order of a federal world republic and a global society that reserves institutions and procedures for global governance for states only and argues for a two track legitimization of intentional law that in mirrored in the institutional structure. According to Regina Kreide one approach begins with the world citizen and then proceeds to member states with full fledge citizenship

¹¹ Supra note 8, page 100

rights before realizing on the ‘supranational’ level, which is an international community. At this lever justice is materialized through the peace and human rights politics of the world organization. The other approach sees the citizen first as part of its respective nation state and then of transnational bargaining system like UN and WTO.¹²

Habermas approach can best be described as ‘constitutionalization in the making’ as well as a description of developments that can be interpreted as meeting democratic governance on transaction and supranational level highway. Habermas too proposed a leveled notion of legitimacy but unlike Rawls, he did not build his theory based on rating and stratification of states. It is the legitimacy of the law setting process that is leveled according to its normative standards. For Habermas, the legitimate juridification leads to a just world order. Habermas idea of constitutionalization of the international relations is the reason, why he considers military humanitarian intervention a police action and prefers individual perpetrator to the international criminal court.¹³

According to Habermas, the individual right holder demands the realization of human right in a situation of urgency by addressing the moral claim in absence of a reliable government for the world community. Instead of a right to intervene Habermas suggest a right to be saved from a Tyrannical regime. According to him, every instance of humanitarian intervention must have a juridical backing in order to avoid the risk of international politics.

Kant’s perpetual peace model is the hallmark which considered democracy and humanity as the most essential part of a liberal global culture. It has been argued that the benefits of humanitarian intervention always outweigh the demerits. The Doubting Thomas has always projected the concept of state that cannot be pierced. But the philosophical arguments of Kant, Rawls, Habermas and other exponents have pears this veil. Another interesting observation that has been made in this paper is the radical interpretation of Immanuel Kant, Perpetual Peace Model. It has been shown that political ideas of Immanuel Kant which were generally non-interventionist in nature can now be interpreted for the support of humanitarian intervention. This particularly true if we look at the development of Responsibility to protect doctrine. This idea has finally made the Utopian model a reality. The ideas of Rawls and Habermas are also important. Rawls encouraged humanitarian intervention for the spread of democracy whereas Habermas supported criminal persecution at an international level. These

¹² Ibid, Page 101

¹³ Ibid, Page 105

ideas were adopted in the responsibility to protect doctrine via the tools of responsibility to prevent and responsibility to react. The basic denominator is “Human Security”. Rawls in his book Laws of the People had said that any regime that does not allow its citizen to survive can never be a legitimate government. He enumerated eight conditions for this idea. He said that human rights are those minimal conditions which guarantee citizens a right to participate in the public sphere. If these rights are violated then legal validity of state itself is suspended. If the basic requirements of decent human life cannot be guaranteed by state and its population is being massacred by opposite manmade volitional act and this act is deliberately perpetrated, then case of humanitarian intervention is the only criteria left in international law.

ROLE OF PANCHAYATI RAJ INSTITUTIONS FOR DEVELOPMENT OF WOMEN

- Dr. Ritu Agarwal*

Women have always been center of concern among all the civilizations. It is well known that women issues have always claimed attention of, and agitated the minds of social thought leaders because they do not only involve development of women, but also verily impinge upon the very survival of a wholesome social order.¹ In the words of Gandhi Ji, “*Man should learn to give place to women. A country or a community in which women are not honoured cannot be considered as civilized.*”² Swami Vivekananda is also of the same view. He says, “*If we teach a man we can teach a person but if we teach a woman we can teach a family.*”³ To know about the status or position of women in society, we must trace out its historical perspective. According to sage Agastha, “*Woman combines fickleness of lightening, the sharpness of a weapon and the swiftness of the eagle.*”⁴ Through ages women issues, its themes, its focus, its strategies, its dynamics, its philosophy, its completion, its contents have been undergoing constant shifts.

The status of women in the Vedic period as compared to the other was much better and the society was also flexible. But as it is the nature’s truth that after ‘up gradation’, ‘degradation’ will automatically come and that happened. After the entry of British, so many Hindu social activists with the help of British Government tried to eradicate the social evils, which were basically the barriers for upgrading the status of women. After the independence, the Republic of India, through its Constitution, legalized the status of women by adopting the Directive Principles of State Policy and other provisions like reservation of seats for women at all the three levels of Panchayats namely Gram Panchayats, Kshetra Panchayats/ Panchayat

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¹ Singh S. (March 2003). “The Gender Agenda”, Kurukshetra, Vol. 51, No.5, P. 4.

² “*Gandhi and Women’s Empowerment*”, (Sept. 28th to October 4th 2002), Employment News, Vol. XXVII, No.26.

³ Ghosh Raja, (April 2004). “Women’s Empowerment – Some Noteworthy Experiences of the Rural Extension Center, Visva Bharti, Sriniketan,” Contemporary Social Work, Published by Department of Social Work, Lucknow University, Lucknow, Volume XXI, P. 81.

⁴ Ghosh Raja, (April 2004). “Women’s Empowerment – Some Noteworthy Experiences of the Rural Extension Center, Visva Bharti, Sriniketan,” Contemporary Social Work, Published by Department of Social Work, Lucknow University, Lucknow, Volume XXI, Ibid., P. 82.

Samities and Zila Panchayats. This is done to take care not only of a particular community, but the greater nation as a whole.

Women Development and Empowerment

“The status of women is a barometer of the democratism of any state, an indicator of how human rights are respected in it”, is according to Mikhail Gorbachev.⁵ The root cause of women’s oppression in India is patriarchy, which has snatched legitimate powers off, leaving them completely defenseless and weak. The unrealistic way, in which women are depicted in literary works and films by male chauvinists and misinterpretation of women in epics and scriptures contributed much to the poor self-image, suffering nature, defeatist attitude and lack of assertiveness on the part of women. Development and empowerment of women is aimed at striving towards acquisition of higher literacy level and education, better health care for her and her children, equal ownership of productive resources, increased participation in economic and commercial sectors, awareness of their rights, improved standard of living and achieved self-reliance, self-confidence and self-respect amongst women. President A. P. J. Abdul Kalam said empowering women was a prerequisite for creating a good nation, “*when women are empowered, society with stability is ensured. Development and empowerment of women is essential as their thoughts and their value systems lead the development of a good family, good society and ultimately a good nation.*”⁶

Development and Empowerment of Women at the International Level

Gender equality, development and empowerment of women are recognized globally as a key element to achieve progress in all area. It is one of the eight-millennium development goals to which world leaders agreed at the Millennium Submit held in New York in 2000. The charter of the United Nations signed in 1945 is the first international agreement that proclaimed gender equality as fundamental right. Since then there had been many conventions, programmes and goals for this purpose. To promote development of women and protect their rights, the General Assembly of the UN adopted convention on the elimination of all forms of discrimination against woman on 18th December 1979 which came into force on 3rd

⁵ Antony, Valsamma (February 2006). “Education And Employment: The Key To Women Empowerment”, Kurukshetra, Vol.54, No.4, P. 27-29

⁶ Sharma, Sheetal (June 2006). “Empowerment of Women and Property Rights: Key to Rural Development”, Kurukshetra, Vol. 54, No. 8, P.17

September 1981.⁷ The next still more significant shift was witnessed at the third International women conference in 1985 at Nairobi. This new strategy emerged with greater clarity and concretization as it appeared through the 1994 Jakarta Plan of action and arrived at the Fourth International Women conference in 1995 during Beijing deliberations. As it stood at the stage of 1999 Bangkok platform of action, it had already hit a new agenda of gender concerns and gender mainstreaming. India is a very important part of all these programmes. India has furnished solid proof of its commitment to the cause by celebrating the year 2001 as the year of the women.⁸

Development and Empowerment of Women at the National Level

The Indian government has enacted specific laws since independence till date to redress the problems of women and to improve their living and working conditions. The Hindu daughter acquired the right to property through the Hindu Succession Act, 1956. Widow Remarriage was legalized as per the provisions of this Act. The wives enjoyed a respectable position after the enactment of the Dowry Prohibition Act, 1961. The Hindu Adoption and Maintenance Act 1956 upgraded their status. According to the Act, a husband cannot adopt a son or a daughter without the consent of wife. The Hindu Minority and Guardianship Act also gave a prestigious position to wives as a natural and legal guardian of her minor children after their father. Several Acts are also made to restrict dowry related inhuman practices. Since women workers are particularly vulnerable to exploitation, many legislative provisions, which address the problem of women workers, are included in labour laws.⁹ The Constitution of India, the Supreme law of the land, mandates equality before law and equal protection of law for all the citizens of the country. The Constitution of India made special provision regarding Panchayats in Article 40. It said that state would come forward to organize Panchayats and would also extend to them such powers and authority that may put them in a situation to function as units of self-governments. Panchayats are small organs of the large organizational pattern of the country. The factors which enable women to attain equality in society and all walks of life, also affect their affiliation to Panchayats. For the first time the status of women was considered in terms of equality in the Constitution of India.

⁷ B hagalakshmi J. (August 2004). "Women's Empowerment: Miles To Go", Yogana, Vol. 48, P. 38.

⁸ Singh S., "The Gender Agenda", Kurukshetra, Vol. 51, No.5, op.cit, P. 5

⁹ Saksena, Anu (2004). "Gender and Human Rights: Status of Women Workers in India", Shipra Publications, New Delhi, P. 115-117

The Preamble of the Constitution of India resolved to secure to all its citizens. Justice social, economic and political, Liberty of thought, action and belief, faith and worship, Equality of status and opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity of the Nation.¹⁰ Enshrined under this preamble there exists a guarantee to enjoy certain fundamental rights and freedoms e.g. freedom of speech, protection of life and personal liberty. No distinction has been made between rights of women and men in all the spheres of life including political participation and decision-making at any level of hierarchy of administration. Indian women are allowed to enjoy these rights in a manner similar to Indian men. Various Articles of Constitution of India confer equal rights to women. All the citizens of India are equal before law (Article 14). There is prohibition of any kind of discrimination in Indian law (Article 15). The state in India is empowered to make any special provision for women and children for their welfare, even in violation of the fundamental obligation of non-discrimination among citizens. (Article 15(3)), All the citizens of India are given equal opportunity in matters relating to empowerment or appointment to any office under the State (Article 16(1)). There can be no discrimination in respect of employment of office under the state on the basis of religion, rank, sex, caste, descent, place of birth, residence or any one of them, (Article 16(2)). The constitution enunciates the Directive Principles of state policy, which also covers the fundamental rights. As a matter of fact, both together sense to achieve the national objectives of Justice, Liberty and Equality as specified in the preamble of the constitution.¹¹ The principle of adult franchise is equally applicable to women and men of our country. Decidedly it is a step to empower the women, allow them to exercise their right to vote or contest elections including Panchayats, thus establishing a democratic republic, with direct or indirect involvement of the women population.

The committee, on the status of women in India submitted its report ‘Towards Equality’ on 31st December 1974 to the Government of India. Most probably it was the first attempt to study and analyze the Constitutional provisions so far as these are related to women.¹² Some of the provisions which are applicable to women, the political order and also to Panchayati

¹⁰ Singh, Seema (2003). “Panchayati Raj And Women Empowerment”, Ocean Books Pvt., Ltd., New Delhi, P. 34

¹¹ Singh, Seema (2003). “Panchayati Raj And Women Empowerment”, Ocean Books Pvt., Ltd., New Delhi, Ibid., P. 35

¹² Report of the committee on the status of women in India towards equality, (December 1974), Government of India, P. 1-2

Raj system include the direction to state to secure a just social, political and economic order geared to promote the welfare of the people (Article – 38). The Constitution also provides for the distribution of ownership and control of material resources of the community for the common good, prevention of concentration of wealth and means of production to the common detriment and protection of childhood and youth against exploitation and moral and material abandonment (Article- 39 (B)), (C) and (F)). Women desirous of entering politics may look to above provisions in protecting themselves from political violence. ‘Sahni Tandoor’ case is an extreme example of atrocities committed on women desirous of flourishing in political field. There is no discriminatory attitude to prevent women in respect of political participation at the lowest level of hierarchy i.e. the village. The Constitution provides the organisation of village Panchayats as self- government (Article-40). It also enunciates the right to work, education and public assistance in cases of unemployment, old age, sickness, disablement and other types of underserved wants. It is a common observation that women in India, in majority are socially and economically weak and neglected. Contesting elections and political participation are not possible without financial investment. So for the empowerment of people including women, for their political participation and social and economic stability the constitution directs for the provision of work, living wage conditions of work ensuring a decent standard of life and full enjoyment of leisure, social and cultural opportunities and the promotion of cottage industries (Article 43). It also provides for uniform civil code so that women can participate politically on uniform basis without any type of discrimination (Article 44). Illiteracy is a big hurdle in the efforts for empowerment and participation of women in Panchayati Raj Institutions, therefore Article 45 provides for free and compulsory education for all children upto age of 14 years. A healthy body and a healthy mind only can flourish in the struggle for life and get the desired achievements. Nutrition and health would naturally assist women in achieving the goals of empowerment Article 47 directs for the raising of the level of nutrition and the standard of living of people and betterment of public health. The provisions in the articles relevant to Directive Principles of State Policy and those which are vital part of our Constitutional law as the committee observed, aimed at empowerment of women in different walks of life. According to the provisions both men and women should have equal right to an adequate means of livelihood (Article 39(a)). There should be equal pay for equal work for both men and women (Article 39(d)). There should be protection of workers men, women and children from entering into a vocation unsuited to their age and strength (Article-39(e)). There should be just and humane conditions of work and maternity leave for women (Article-42). All these provisions have a

direct bearing on the status of women and act as major source of their empowerment in all walks of life.

Constitutional Cover for Panchayati Raj Institutions

Although Article 40 of the constitution and Acts enacted later aimed at establishing self-government at village, block and district level, but these provisions did not extend any Constitutional power to the Panchayati Raj Institutions so constituted. In the existing arrangement Panchayats did not possess Constitutional recognition or status. These were just mentioned in Directive Principles of State Policy, which bear simple advisory status. No State Government could be forced to act accordingly on the basis of these provisions. The laxity permitted encroachment on the right and powers of Panchayati Raj Institutions. So it was felt that Constitutional cover was essential to provide Constitutional right and status to these institutions. Hence, Constitution (73rd Amendment) Act 1992 was enacted on April 24, 1993 by Government of India. Under this amendment a new part ‘9’ was inserted after part ‘8’ in the Constitution of India, which provides Constitutional status to Panchayati Raj Institutions, and all the State Governments were forced to enact a fresh act or revise the existing acts according to spirit and concept of Constitution (73rd Amendment) Act, 1992. For instance, a new Act entitled ‘Uttar Pradesh Panchayat Vidhi (Sanshodhan) Vidheyak 1994’ was enacted and promulgated since 22nd April 1994 by Uttar Pradesh government to introduce the new arrangement included in the 73rd Amendment of the Constitution in the State.¹³

Salient Features of Constitution 73rd Amendment Act, 1992

The Amendment aims to achieve three-tier Panchayat Raj System, decentralization of power and Panchayats vested with extensive rights and functions. The three levels of Panchayati Raj have been named as Gram Panchayat, Kshetra Panchayat and Zila Panchayat. All the votes registered in the electoral roll of the Gram Panchayat would be included in Gram Sabha.¹⁴ In view of the fact that the present chapter is mainly confined to women’s position in new Panchayati Raj System, only those changes in the Constitutional Amendment, which are

¹³ Singh, Seema (2003). “Panchayati Raj And Women Empowerment”, Ocean Books Pvt., Ltd., New Delhi op.cit., P. 51

¹⁴ Singh, Seema (2003). “Panchayati Raj And Women Empowerment”, Ibid., Ocean Books Pvt., Ltd., New Delhi, P. 52

directly or indirectly relevant to women empowerment and political participation have been discussed.

Reservation for Women in Panchayati Raj Institutions

Constitution (73rd Amendment) Act, 1992 provides for reservation of not less than one third seats for women at all levels of three-tier system of Panchayati Raj namely – Zila Panchayats (every district of State has a Zila Panchayat), Kshetra Panchayat (Every Khand within the district has a Kshetra Panchayat) and Gram Panchayat (Every village within a Khand has a Gram Panchayat). The Indian Society is in the grip of great inequality on all planes. Besides, poorer and weaker sections, namely Schedule Castes, Schedule Tribes, Backward Classes women are the most sufferer. On one hand the women are socially, economically, educationally and politically handicapped and on the other hand they are neglected in respect of getting various facilities due to gender issue. Since women constitute a little less than 50 percent of the population on society's progress, the result is uneven progress and development of society. As a remedial measure constitutional protection was given by process of reservation to neglected and bereaved section of the society. Initially reservation was allowed to Scheduled Castes and Scheduled Tribes only. Later it was felt necessary to extend its scope to more people. Hence 27 percent reservation was provided for backward classes also. In addition, reservation was provided for women of unreserved category for first time, to equip them with self-confidence and let the male dominated society realize that women are equal partners in all activities of social, economic and political transformation.¹⁵

Methods and Techniques for Reservation

Systematic and definite rules and processes have been drawn out for effecting reservation. Reservation procedure in Panchayats is quite a complex and intricate process.¹⁶ Main points in brief are listed here under: -

1. Reservation for Scheduled Castes and Scheduled Tribes for election of members in Gram / Kshetra / Zila Panchayats is around 23 percent.

¹⁵ Singh, Seema (2003). "Panchayati Raj And Women Empowerment", Ibid., Ocean Books Pvt., Ltd., New Delhi, P. 146.

¹⁶ Singh, Seema (2003). "Panchayati Raj And Women Empowerment", Ibid., Ocean Books Pvt., Ltd., New Delhi, P. 147-151.

2. Maximum reservation is 27 percent for Backward classes at all the three levels Panchayats.
3. Remaining 50 percent seats are not reserved for any class i.e. these are unreserved.
4. Thus reserved seats cannot be more than 50 percent.
5. Persons belonging to Schedule Castes, Schedule Tribes and Backward Classes can be elected by seeking elections.
6. Besides reservation for above classes the amendment of the Constitution reserves one third seats for women in all the above classes which would run side by side reservation for these specific groups.
7. Reservation for women shall follow following procedures.
 - (a) One-third seats would be reserved for women of Scheduled Castes and Scheduled Tribes out of the 23 percent seats reserved for Scheduled Castes and Scheduled Tribes.
 - (b) Similarly, out of the 27 percent seats reserved for the Backward Classes one-third seats would be reserved for women of Backward Classes.
 - (c) Again, out of the remaining 50 percent seats, one-third seats would be reserved for women of General Classes.

In order to make reservation fully effective, it has further been provided that the whole process explained earlier would also be applicable to election of Pradhan, Pramukh and Adhyaksha of Gram, Kshetra and Zila Panchayats respectively. To elaborate the process further main provisions are mentioned as follows:

Gram Panchayats

- a) The Pradhans of 23% villages falling under a development block would be from Scheduled Castes and Scheduled Tribes, while one-third Pradhan would be women of these classes.

- (b) Similarly, the Pradhans of 27% villages of a development block would be from Backward Classes and out of these 27, one-third Pradhans would be women of Backward Classes.
- (c) For the remaining 50% villages persons from any class of the society can be elected but out of these 50 per cent villages one-third would be women belonging to General Class.

Kshetra Panchayats / Panchayat Samitees

Reservation of seats of Pramukh of Kshetra Panchayat would be effected on the basis of the number of Kshetra Panchayarts in the district as below: -

- a) Out of the total seats of Pramukhs in the district 23% seats would be reserved for Scheduled Castes and Scheduled Tribes, 27% for Backward Classes and 50% seats would be unreserved.
- b) About women the same criterion would be adhered to as applicable to Gram Panchayats.

Zila Panchayats

The Basic principle for reservation of seats of Adhyaksha and Upadhyaksha would be almost identical to that followed at other two levels, except that number of these office bearers in Zila Panchayats would be decided at State level on the basis of number of districts. The districts would be assigned to different classes as below.

- (a) Out to total districts, persons of Scheduled Castes and Scheduled Tribes would be elected as Zila Panchayat Adhyaksh and Upadhyaksh in 23% districts. Simultaneously one-third seats of Zila Panchayat Adyaksh and Upadhyaksh are reserved for women of these classes.
- (b) Analogous to reservation level for Backward Classes 27% districts would be reserved for election of persons belonging to this class of the society. Out of these one-third seats are reserved for women of this class.
- (c) Remaining 50% district have been left out for persons of General category but here again one-third Adhyaksh and Upadhyaksh would be women of General category.

Reservation to be allotted by Rotation

The relevant Acts provide that in addition to prescribed percentages for reservation for reservation, seats are to be allotted by rotation to different territorial constituencies in a Panchayat in such order as may be prescribed. Following this condition, reservation of seats in state at all levels has been done in rotation, which starts from Hindi alphabets i.e. A, Aa, E, Ee, etc. In case of villages arranged in Hindi alphabetical order, first village will be assigned to Scheduled Caste/ Scheduled Tribe, second village to Backward Classes and third village to General category. As soon as quota of a particular class is completed in rotation further allotment to it would be stopped, other would continue till their quota is completed. Similar procedure would apply to Kshetra Panchayats and Zila Panchayat.

Another condition imposed in the Act is that the number of offices of Pradhans in Gram Panchayats, Pramukhs in Kshetra Panchayats and Adhyaksh in Zila Panchayats, so reserved shall bear as nearly as may be the same proportion to the total number of such offices in the area as the population of the Schedule Castes in the area or of Scheduled Tribes in the area or of Backward Classes in the area bears to the total population of the area. Consequently, at first it would be decided which units for reservation at various levels have higher proportion of population of Scheduled Castes, Scheduled Tribes and Backward Classes. Then reservation would start with these units only leaving out units with lower population. Evidently, while following rotation case has to be taken to exclude units with lower proportion of population of these groups.

In State of Uttar Pradesh Office bearers under three-tier system have been placed in proportion prescribed in the relevant Panchayati Raj Act.

There are various instances which show that Panchayati Raj has released the disguised energy of weaker sections particularly SCs, STs and women who after creating an equitable social order, are bound to strengthen and promote rights of people at local levels. One such example is of elected women representative Fatima Bi, Sarpanch of Koornul district, Andhra Pradesh who has done commendable work in developing her Panchayat. Snehalata Panda (1996) in her study of Village Panchayat in Orissa¹⁷ found that women entered into politics due to mandatory provision of reservation. Most of the women are from non-political

¹⁷ Panda Snehalata (1996). "Emerging Pattern of Leadership Among Rural Women In Orrisa", Indian Journal of Public Administration, Vol. 42, P. 3 – 4

background and entered into politics due to persuasion by their family members or pressure from the village community. The important aspect of her study is that the women who reluctantly entered into politics showed great maturity in outlook, enthusiasm, increasing political consciousness and increasing perception of their role and responsibility. Devaki Jain (1996) found in her study that women's experience of Panchayat Raj Institution has transformed many of them.¹⁸ The elements of this transformation include empowerment, self-confidence, political awareness and affirmation of information. She argued that women have gained a sense of empowerment by asserting control over resources, officials and most of all by challenging men. Further, women's empowerment challenged traditional ideas of male authority and supremacy. Rashmi Arun (1997) in a case study of Madhya Pradesh found that in most of the cases women are housewives, first time entrants into politics and most of them are illiterate or educated upto primary level.¹⁹ Indian Institute of Social Science (2000) in a study of Panchayat Raj in Haryana has reviewed the progress of some hundred elected women in four districts, majority of the elected women panchs including younger women were illiterate when elected to office. After two years in office they demanded literacy skill and generally felt the need of education for their daughters.²⁰ Biduyt Mohanty's (2002) recent study on the impact of 73rd amendment in Orissa through field experience analyses that about 80% - 90% of women attend the Panchayat meeting regularly.²¹ Democracy has become participatory than before at least at the grassroot level. Working culture of the panchayats has changed because of presence of women. Finally the increase in the female literacy rate can be attributed to the presence of women in Panchayats and their willingness to get educated. The power relations between husband and wife has already changed due to the reservation of women, the women's husband gets a change to come to the public sphere because of wife and particularly monolithic structure is no longer seen in family relations. Palanthurai (2001) in his study of Tamil Nadu observed that women have come to positions in the local bodies as provisions have been made in the constitution.²² The outlook of the society towards the women has started changing. Author from his experience suggests that women continuously need orientation, sensitization, capacity building, information and counseling through

¹⁸ Sinha Archana (August 2004). "Women in Local Self- Governance", Kurukshetra, Vol. 52, No.10, P. 13 – 14.

¹⁹ Arun, Rashmi (1997 April – June). "Role of Women In Panchayati Raj", Administrator, Vol. 11.

²⁰ Status of Panchayati Raj In the States and Union Territories of India (2000). Institute of Social Sciences, New Delhi.

²¹ Mohanty, Biduyt (2002 Draft).: The Daughter of the 73rd Amendment, online women politics document page.

²² Sinha, Archana (August 2004), "Women In Local Self- Governance", Kurukshetra, Vol. 52, No. 10., op. cit., P. 14.

organizations like Panchayats, NGO's etc. Gouda and others (1996) in their study of Karnataka women elected Panchayat leaders pointed out that the women members of Panchayati Raj Institution could play an effective developmental role if they are given adequate recognition and encouragement.²³ Buch Nirmala (2000) states that earlier studies of women representatives in Panchayat before the 73rd amendment noted the major presence of women from the dominant section e.g. from Marathas and families owing more than twenty acres of land in Maharashtra and Karnataka. But the profile of the new women in post 73rd amendment Panchayats showed that majorities were illiterate and large percentages were from families in the lower socio-economic strata.²⁴

The Present Study

The present study in the thesis is allocated in Mohanlalganj block area of Mohanlalganj Tehsil of Lucknow district in Uttar Pradesh. The research design of this study is descriptive and exploratory in nature. In the present study 300 respondents of which 150 are male respondents and 150 female respondents, who are of above 18 years of age are studied on the basis of quota sampling in 20 villages of Mohanlalganj block in Lucknow district. In selecting sample of the respondents care has been taken to acquire a cross-sectional representation of socio-economic status of the respondents. Both primary and secondary sources of data collection have been utilized in the course of my study. In the primary source of data collection the tools used are interview schedule, quasi participant observation and case study methods. For the collection of secondary data, records of Panchayats at various levels are consulted. Extensive use of newspaper reports, books, journals, articles in magazines, in newspapers and internet is made. Various other reports published by the Government and Non-Government Organizations are also used for factual and qualitative information. Discussions are also held with officials and non-officials connected with Panchayati Raj institutions working in rural areas such. For the purpose of data analysis statistical tools such as tables, percentages, charts, maps etc. are used as and wherever needed. This study also may have its limitations. Conceptually, time, scale and money are the major constraints of every social study and as the human beings are the subject matter of these studies; their reactions also cannot be defined in any normative pattern. They can

²³ Gowda, S. and others (1996). "Developmental Role of Women Members of Panchayati Raj Institutions: A Study in Karnataka", Journal of Rural Development, NIRD, Hyderabad, Vol. 15, No.2, P. 249 – 259.

²⁴ Buch, Nirmala(2000). "Panchayats and Women, Status of Panchayati Raj in the States of Union Territories of India", Institute of Social Science, New Delhi.

fluctuate according to changing situations. Although I have tried to cross-question the respondents during the data collection to explore the hidden truth but even than there is always a possibility of calculative analysis or colored answers. But these are the classical limitations of every social study. I have explored and tried to read between the lines of the responses and reactions given by the respondents. I have tried to follow all the prescribed scientific methods to explore the issue and analyze accordingly. For the empirical study all the sociologically accepted methods are being used and followed in the present study.

From the study it has clearly emerged that the 73rd Constitutional Amendment has opened the doors of local body administration for women by reserving one-third seats for them. The data shows that 84 percent of male respondents and 71.33 percent of the female respondents possess the knowledge about the reservation of seats for women in Panchayats. 43.33 percent of the male respondents and 53.33 percent of the female respondents are happy about the reservation of seats for women in Panchayats. According to the majority of the respondents, the political empowerment has brought some improvement in the life of the women. It is undoubtedly a great leap towards affirmation of identity of women. But there are several obstacles to the realization of transformative potential of Panchayati Raj Institutions. Because of the traditional society like ours, the socio-economic barriers and cultural taboos hinder women in variety of ways to participate and deliberate upon in Panchayati Raj Institutions. Their inherent weakness, illiteracy and ignorance make them vulnerable in decision making in the male dominated society. The study also shows that majority of the respondents i.e. 59.34 percent of males and 73.33 percent of female respondents, together constituting 66.33 percent of the total are of the opinion that husbands are the main motivators who persuade their wives to contest elections. One of the reasons for this is that men want to capture the seats reserved for women and as they themselves cannot contest elections on these reserved seats, they motivate their wives to contest for these reserved seats. It is noticed that in many cases the women representatives are invariably more dependent on their husbands and family members in decision-making activity. In such a situation, quite often the male relatives of women representatives take active part in their official activities. According to majority of the respondents i.e. 56.67 percent women representatives are mostly used as rubber stamp. However, it cannot be denied that subordination of women in society acts as a structural constraint to their participation in social, political activities. Such constraints indeed operate more or less in case of all classes and communities of women. The anti-women attitudes and lack of transparency seem to have accentuated the situation in a big way.

Suggestions Regarding Women's Development through the Panchayati Raj Institutions

From the study and observations it can be interpreted that the provision for one-third reservations made in 73rd Amendment to the Indian Constitution (1993) has ensured adequate representation of women at all the three levels of Panchayati Raj Institutions. It has however not resulted in real empowerment of women in these bodies of decentralized rural governance as most of them have not been able to perform their roles on account of lack of literacy and awareness. Some of the suggestions for the empowerment of women in general and especially through Panchayats are given as follows:

- 1) An important effort required for real empowerment of rural women is to bring about an attitudinal change in both men and women. The feeling that women are meant for household activities and rearing children needs to be replaced by a feeling of equal partnership of women and men. To articulate this, they may be imparted education for bringing about social and political awareness among both.
- 2) There exists a correlation between poverty, illiteracy and feminism. This handicap affects women at every juncture of their lives. Therefore all women representatives should be educated upto a certain level of educational attainment. Special classes for each one of them could be arranged in Panchayats.
- 3) There is a need to train the women leaders at regular intervals to enable them to manage the responsibilities assigned to them in the Panchayats at all levels. The training must be organized at the place and time keeping in mind the convenience of the women members.
- 4) There should be increased emphasis on ensuring the participation of women in the meetings of Panchayats at all levels. This is needed to promote and enhance their leadership qualities and self- confidence.
- 5) Publicizing the leadership qualities of very active and enlightened women leaders at all the levels of Panchayats, who have been successfully implementing the developmental schemes and have ensured overall development of their constituencies and honouring them in public meetings will certainly encourage other women representatives and their success stories and good practices will get replicated.

- 6) Leadership role is very essential for women in Panchayats. Special training camps should be arranged for women Panchayat representatives on the subjects relating to extension methodology and leadership development so that these women may be able to face the audience and sort out the problems of villagers and the people. Spirit of boldness needs to be inculcated in them.
- 7) Studies on women in politics have emphasized that contact with outside world makes women more alert and active in the political process. There could be two ways of doing it. Firstly, interaction between enlightened rural women and illiterate elected women leaders be encouraged. Secondly, these women could be taken out to the urban areas and their interaction with the educated urban elected women representatives be arranged.
- 8) Women representatives should persuade through Panchayats elimination of all types of gender discrimination practices prevalent in their own family, village and society.
- 9) Awareness camps and campaigns should be organized to bring a change in attitude towards gender discrimination and that there is no difference between son and daughter. Panchayats should prepare literature, organize seminars and conferences, arrange talks, nukkad nataks, song, dance, posters etc.
- 10) Steps should be taken to put a check on sex exploitation, molestation, etc. of women representatives working away from their home.
- 11) Property rights should be given to women to make them economically stable and secure.
- 12) Panchayats should arrange facilities of health, drinking water, proper and safe environment etc. for all especially for the women.
- 13) All types of government schemes should be brought to the notice of women by enlisting cooperation of Gram Pradhans, government officials etc., by arranging special camps.
- 14) The policy for women should be made known to public in general.

- 15) National Literacy Mission and other organizations engaged in the Sarva Shiksha Abhiyan should also be assigned the responsibility of educating the rural masses in general and the rural women in particular regarding the significance of Panchayati Raj and empowerment of women.
- 16) The curriculum for the students at the primary, secondary and the higher secondary levels should be so modified as to promote gender sensitivity among the students. There should be chapters on Panchayati Raj and Women Empowerment in all the classes at the school level and compulsory questions should be set on these in examinations.
- 17) The media both print as well as electronic can play an important role in creating awareness in the rural society. It can act as an agent of political socialization for inculcating the values of gender equality and gender justice.
- 18) Literacy classes for women may be run through Panchayats, urban local bodies and NGOs.
- 19) In the wake of empowerment of women it should not be forgotten that men are equal partners in the development of villages as women. Hence women representatives instead of ignoring menfolk should take them in confidence and seek their assistance in performance of their job. Men may be persuaded to assist women representatives in efficient execution of development schemes in the villages.
- 20) The unfinished agenda of women empowerment is finished by enacting an Amendment for providing reservation for women in the National parliament and in all the State legislatures. The reservations at local level are not enough for women empowerment.
- 21) The Constitution (One Hundred and Tenth Amendment) Bill, 2009 was introduced in the Lok Sabha on November 26, 2009 by the then Minister of Panchayati Raj, Shri C. P. Joshi to amend Article 243D of the Constitution of India. Article 243D of the Constitution of India mandates that atleast one- third of the total number of seats filled by direct elections in Panchayats shall be reserved for women. The bill seeks to amend the article to enhance the proportion of reservation for women from one- third to one-half of the total seats in the Panchayats. The provisions of the seat reservation

will also extent to the positions of office of Chairpersons. The States of Andhra Pradesh, Bihar, Chhattisgarh, Himachal Pradesh, Jharkhand, Kerala, Madhya Pradesh, Maharashtra, Odisha, Rajasthan, Tripura and Uttarakhand have already provided for 50% reservation for women in Panchayats through amending their State Panchayati Raj Acts. The same should be implemented in rest of the other states also like in Uttar Pradesh.

DEATH PENALTY: HUMANITARIAN PERSPECTIVES

Mr. Suresh Mani Tripathi*

Abstract

Death penalty has been a mode of punishment since time immemorial. The arguments for and against have not changed much over the years. Crime as well as the mode of punishment correlates to the culture and form of civilization from which they emerge. With the march of civilization, the modes of death punishment have witnessed significant humanized changes. Although today, this punishment has revoked in many countries completely and many international documents and treaties consider it as a violation of human rights, but still, there are some countries and governments that have maintained this punishment in their laws and against some political, social or religious crimes are applied.

The issue of death penalty has been debated and discussed several times worldwide but never has this issue been able to reach at certain conclusion. The Indian judiciary has ruled that the death penalty for murder must be restricted to the "rarest of rare" cases, but this instruction has been contradicted by the legislature.

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Introduction

Every human being has certain basic human rights, the most fundamental of which is the right to life. **Amnesty International** believes that-

"The death penalty is the ultimate denial of human rights. It is premeditated and cold-blooded killing of a human being by the state in the name of justice. It violates the right to life.....It is the ultimate cruel, inhuman and degrading punishment. There can never be any justification for torture or for cruel treatment."

The death penalty, however, brings into question whether a government has the authority to deprive a person of this fundamental right to life? If murder by an individual or a group of individuals is undesirable, how could it be justified if committed by the state or body politic? Some questions which arise in our mind while dealing with the aspects of death penalty are as follows:-

1. Whether death sentence is necessary and essential for fulfillment of the objectives of punishment?
2. Whether the elimination of crime from society is possible through the complete elimination of criminals?
3. Whether complete elimination of crime from society is at all possible or imaginable?
4. What are the alternatives of death penalty?

Penological aspects of Death Penalty-

There are several theories of punishment such as deterrent theory, preventive theory, retributive theory, reformative theory, rehabilitative theory and so forth.

Deterrent theory of punishment emphasises more on protection of society from offenders by eliminating offenders from society. According to this theory there are certain objectives of punishment that criminals should be deterred from breaking the Law, and deterrent punishment such as capital punishment should be an example to society and persons who have tendency to commit similar crime; and that if any one commits such a crime, he will be punished in the same manner.

In this way it prevents people from breaking the law and it reduces crime rate in the society by elimination of criminals. Therefore, this theory has four justifications:

- (1) Prevention,
- (2) Isolation,
- (3) Elimination, and
- (4) Exemplary threat to potential criminals in the society.

Travelling through fabrication, forensic manipulations, perjury, hostility of witness, and political and economic influences, most of the real culprits are siphoned and a few, generally poor, are awarded death sentence. Thus, the deterrent magic of this extreme penalty vanishes.

The Right to Life and Death Penalty in International Law-

The capital punishment and its enforcement have been turned into one of the challenges of human rights issues, international human rights law, in turn, has had a special emphasis on the right to human life as one of the most basic rights. In this field International documents are existed in order to reduce and abolish the capital punishment and to respect the human right. The local protocols may not lead to universal abolition of the capital punishment, because of all the earth not covered by regional conventions of human rights.

A. The United Nations-

The United Nation General Assembly recognized that in case of death sentence there is a need for high standard of fair trial to be followed by every country. Procedures must be just, fair and reasonable.

For example, UN Economic and Social Council in resolution no.15 of 1996, encouraged member countries to abolish death sentence and recommended that those countries who retain it must ensure defendants a speedy and a fair trial.

Resolution No.50 of 1984 of United Nation suggested protection of human rights of the person facing capital punishment.

B. Universal declaration of Human Rights-

Universal Declaration of Human Rights is an international treaty that was adopted in Paris on 10th December 1948 when the 48-member UN voted without opposition to it. Provisions of this Declaration have been specified the fundamental Rights of civil, cultural, economic, political and social, which all human beings in every country must have them.

Article 3 of the Declaration provides: *Every person has right to life, liberty and personal safety.* **Article 5** provides that: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

C. International Covenant on Civil and Political Rights-

International Covenant on civil and political rights 1966, interpretation of a part of principles enshrined in universal declaration is considered as legal duties and the first attempt to limit the enforcement of the capital punishment. **Article 6** of the Convention which was adopted from article 3 of the Universal Declaration of Human Rights refers to the right to life. In this

article, the “right to life is one of inherent rights of human, the law must support this right and any person shall not be arbitrarily deprived of his/her life.”

D. Second Optional Protocol related to the International Convention of Civil and Political Rights-

The protocol controls the abolishing the capital punishment, which was adopted by the UN General Assembly in 1989, and entered into force on 11 July 1991. Present Protocol, including Article 11, Section 1 of this document, the Member States shall prohibit the execution. This Article forced the member states to work towards abolition.

Other major international treaties that call for the abolition of the death penalty while permitting party states to retain such are:

- Protocol No.6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

Statistics on Death Penalty-

Under present international law there is no absolute prohibition on the imposition of the death penalty binding on all countries in the world. Many states have accepted binding treaty obligations not to impose the death penalty in any circumstances (or just in peace time) and others have voluntarily undertaken not to impose capital punishment or to carry out death sentences. However, there is still a significant minority of states that retain the death penalty and affirm its legitimacy, legality and efficacy.

The global trend towards ending the death penalty continued, Amnesty International found in its annual review of death sentences and executions. In 2012, Latvia became the 97th country to strike the death penalty from its justice system. Three quarters of executions worldwide occur in Asia. 95% of Asians live in jurisdictions that carry out capital punishment. China alone accounts for 90% of all executions in Asia and executes more people than all other countries combined. Apart from Asia and the Middle East, the US is the most high profile “retentionist” country (meaning the opposite of abolitionist). The US killed 43 criminals in 2012, but this is a lot less than the 98 executions performed in 1999. In 2012, the United States ranked fifth for the highest number of executions, behind China, Iran, Iraq, and Saudi Arabia but ahead of Yemen and the Sudan. In November 2012, India carried out its first execution since 2004 when Ajmal Kasaab, one of the gunmen involved in the 2008

Mumbai attacks, was hanged. In January 2013, Afzal Guru, mastermind of Parliament attack in the 2001, was hanged.

Provisions related with Death Sentence under Indian Penal Code-

The Indian Penal Code, 1860 is the public law and substantive criminal law which defines crimes and prescribes punishments. Under Indian Penal Code death sentence may be awarded on the offenders in the following cases only:

- Waging war against the government of India¹
- Abetting mutiny actually committed²
- Giving or fabricating false evidence upon which an innocent person suffers death³
- Murder⁴
- Murder by a life convict⁵
- Abetment of suicide of a minor or insane or intoxicated person⁶
- Attempt to murder by a person under sentence of imprisonment for life if hurt is caused⁷
- Kidnapping for ransom, etc⁸
- Dacoit accompanied with murder⁹

It is important to note that death sentence can also be awarded under special statute like POTA, Narcotics, Drugs, and Psychotropic Substance Act.

Arguments against for and against the Death Penalty

The justifications advanced for the death penalty are principally two: a retributive argument and the deterrence argument. A retributive justification for capital punishment for homicide has its roots in the approach of ‘an eye for an eye, a tooth for a tooth’. The notion is that the community in this way expresses its condemnation of a heinous crime and exacts moral satisfaction from the offender. The objections to this approach include the position that the deliberate taking of life by the state undermines the sanctity of life, has a brutalizing effect on

¹ Section 121

² Section 132

³ Section 194

⁴ Section 302

⁵ Section 303

⁶ Section 306

⁷ Section 307

⁸ Section 364

⁹ Section 364 A

society, and sees the offender as beyond rehabilitation. The argument based on deterrence continues to be invoked by politicians defending or calling for capital punishment. It frequently has an intuitive appeal for societies whose members feel the need for strong action to be taken to respond to or deter serious crime. Here the critical question is not whether the death penalty has some deterrent effect, but whether it has a *unique* deterrent effect, compared with other sanctions such as imprisonment for life or a term of years. Given that what is at stake is the legitimacy of the state's claim to kill someone, even if one accepts that deterrence would be a legitimate justification for the state to extinguish a person's life, it is not unreasonable to ask that the state clearly demonstrate that the deterrent effect claimed does in fact exist. However, despite dozens of criminological studies over the years, there is no persuasive evidence that the death penalty has a unique deterrent effect.

Other arguments against the death penalty are based on ethical, moral, pragmatic and religious grounds. Mistakes are made, and in a significant number of murder cases in different countries, defendants convicted of murder have subsequently been shown to be innocent of the crime. In those jurisdictions where the death penalty has been imposed and carried out, there is nothing that can be done to reverse the deliberate killing of an innocent person.¹⁰

Another concern about the imposition of the death penalty is that in practice it has disparate impact groups, who suffer from other disadvantages such as socio-economic deprivation and mental illness. Its impact tends to fall unequally – and thus arbitrarily – on less well-off groups in society.

Alternatives to the Death Penalty-

Any punishment must be fair, just, adequate and most of all, enforceable. Society still views murder as a particularly heinous crime which should be met with the most severe punishment. The most popular alternative to the death penalty is life imprisonment without the possibility of parole plus restitution.

Judicial Pronouncements-

At independence in 1947, India retained the 1861 Penal Code which provided for the death penalty for murder, requiring judges to state the reasons if a death sentence was not imposed. During the drafting of the Indian Constitution between 1947 and 1949, several members of the Constituent Assembly expressed the ideal of abolishing the death penalty, but no such

¹⁰ Amnesty International claims that since 1973 in the USA 123 people have been sentenced to death who has subsequently been found innocent of the crimes for which they were sentenced to death: Amnesty International, Facts and Figures, note 22.

provision was incorporated in the Constitution. Private members bills to abolish the death penalty were introduced in both houses of parliament over the next two decades, but none of them was adopted. In India, the constitutionality of capital punishment has been challenged on the ground of violation of Article 14, 19 and 21 of the constitution. In the case of *Jagmohan Singh v. State of U.P.*¹¹, Supreme Court upheld the constitutionality of the death sentence for the first time. The counsel for the appellant contended that when there are discretionary power conferred on the judiciary to impose life imprisonment or death sentence, imposing death sentence is violative of Article 14 of the Constitution if in two similar cases one gets death sentence and the other life imprisonment. On this point the Supreme Court held that there is no merit in the argument. If the Law has given to the judiciary wide discretionary power in the matter of sentence to be passed, it will be difficult to expect that there would be uniform application of Law and perfectly consistent decisions because facts and circumstances of one case cannot be the same as that of the other and thus these will remain sufficient ground for scale of values of judges and their attitude and perception to play a role. It was also contended that death penalty violates not only article 14 but also articles 19 and 21 of the Constitution. Here *procedure* is not clear because after the accused is found guilty, there is no other procedure established by law to determine whether death sentence or other less punishment is appropriate in that particular case. While rejecting this argument the Supreme Court held that-It could not violate Article 21 as the death sentence is imposed after trial in accordance with the procedure established by law.

In the same year, a new Code of Criminal Procedure was adopted. The new Code required judges to note ‘special reasons’ when imposing death sentences and required a mandatory pre-sentencing hearing to be held in the trial court. The requirement of such a hearing was obvious, as it would assist the judge in concluding whether the facts indicated any ‘special reasons’ to impose the death penalty. In 1980, in the *Bachchan Singh v. State of Punjab*¹², the Supreme Court propounded the ‘rarest of rare’ doctrine and since then, the life sentence is the rule and the death sentence the exception .In this case, Supreme Court, upheld the constitutionality of the death penalty, although the bench was not unanimous. In this case *Minority Judgment*, published in 1982, in which he argued that the death penalty was unconstitutional, Justice Bhagwati of the Supreme Court identified a number of problems within the criminal justice system:

¹¹ AIR 1973 SC 947

¹² (1980) 2 SCC 684

“Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Sometimes they are even got up by the police to prove what the police believe to be a true case. Sometimes there is also mistaken eyewitness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There are also cases where an overzealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility...”

In 1991, a Supreme Court bench again upheld the constitutionality of the death penalty in *Smt. Shashi Nayar v. Union of India and others*¹³, The Court did not go into the merits of the argument against constitutionality, arguing that the law and order situation in the country had worsened and now was therefore not an opportune time to abolish the death penalty.

In recent years, the Supreme Court has reversed two practices that had been observed for several decades in capital cases. The first practice was not to impose a death sentence where the judges hearing the case had not reached unanimity on the question of sentence or of guilt. The second was not to impose a death sentence on a person who had previously been acquitted by a lower court. Since 1999 and 2003 respectively, the Supreme Court has imposed or upheld death sentences in such cases.

In a 1994 Supreme Court judgment *Rampal Pithwa Rahidas v. State of Maharashtra*¹⁴, the Court observed that 'the manner in which the investigating agency acted in this case causes concern to us. In every civilised country the police force is invested with the powers of investigation of the crime to secure punishment for the criminal and it is in the interest of society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. In this case, the trial court had sentenced eight people to death. The High Court upheld the sentences of five of them, but the Supreme Court acquitted them all, noting that the main evidence against them was not trustworthy. The Court noted sarcastically that the main witness's memory constantly improved his confessional statement recorded a few days after the incident). The Court concluded that the witness was pressured by the police to give evidence because “the

¹³ AIR 1992 SC 395

¹⁴ (1994) SCC 478

investigation had drawn a blank and admittedly the District Police of Chandrapur was under constant attack from the media and the public.”

In a judgment in 2001 *Sudama Pandey and others v. State of Bihar*¹⁵, relating to a case in which the trial court had sentenced five people to death for the attempted rape and murder of a 12-year-old child, the High Court had commuted the sentences, but the Supreme Court noted that it was unfortunate that the High Court did not also properly review the evidence. Acquitting the accused, the Supreme Court noted that both the trial court and the High Court had committed a serious error by appreciating circumstantial evidence, resulting in a miscarriage of justice. In an indictment of the lower judiciary, the Supreme Court remarked: “The learned Sessions Judge found the appellants guilty on fanciful reasons based purely on conjectures and surmises -- It is all the more painful to note that the learned Sessions Judge, on the basis of the scanty, discrepant and fragile evidence, found the appellants guilty and had chosen to impose capital punishment on the appellants.”

In *Krishna Mochi and others v. State of Bihar*¹⁶, a three-judge bench disagreed over the sentence imposed on one of the appellants, while agreeing on the conviction and upholding the death sentence awarded to three other appellants. In a dissenting judgment, Justice Shah argued that the shortcomings in the investigation and the evidence that only proved the presence of the accused at the scene of the offence meant that this could not be a fit case for imposing the death penalty. On the other hand, he observed, “this case illustrates how faulty, delayed, casual, unscientific investigation and lapse of long period of trial affects the administration of justice which in turn shakes the public confidence in the system.”

The recent decision of the Supreme Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*¹⁷, is a welcome step in India’s death penalty jurisprudence, in this case Supreme Court revisits the case of Bachchan Singh as the defining law on the subject. The judgment calls for the prosecution to show by leading evidence that there is no possibility of rehabilitation of the accused and that life imprisonment will serve no purpose. This is a progressive judgment, which calls for the prosecution to show by leading evidence that there is no possibility of rehabilitation of the accused and that life imprisonment will serve no purpose.

¹⁵ AIR 2002 SC 293

¹⁶ (2002) 6 SCC 81

¹⁷ (2009) 6 SCC 498

Only then can the judge award a sentence of death. This case adds a new dimension to the existing death penalty jurisprudence. It seems that the judges in ***Bariyar*** did everything within their powers to restrict the application of the death penalty.

Conclusion-

In India death penalty plays an important role in the “*rarest of rare*” cases. The State should not have the right over someone’s life and India’s criminal justice system cannot be trusted to be fair. In order to serve as a just and effective mechanism for administration of justice to all sections of society, law should be nourished by and nurtured in human rights. In the 21st Century, we are finding new ways to create life and prolong life. But we still can’t make up our minds about whether it is right, ethical or good to take someone’s life, even when it is dignified by a court of law. At last we can say that, each society and its citizens have the choice to decide about the sort of world people want and will work to achieve: a world in which the state is permitted to kill as a legal punishment or a world based on respect for human life and human rights -a world without executions. Here may I quote Desmond Tutu’s observation that:

“To take a life when a life has been lost is revenge, not justice.”

GENERAL ANTI AVOIDANCE RULES

Mrs. Honey Dhawan* & Mr. Vivek Shukla**

1.1 Introduction

There is a very thin line of difference between tax evasion and tax avoidance, both undermining the amount of revenue to be generated by the authorities by way of tax collection. Tax evasion amounts to an illegal method of avoiding tax by suppression of facts, misrepresentation and fraud and thus is unacceptable. Black's Law Dictionary states that tax avoidance is the "minimization of one's tax liability by taking advantage of legally available tax planning opportunities";

The latter is practiced by assesses to avoid their liability by designing such a device, the foundation of which lies in some lacuna that may have crept in the provisions of the Act, the intention of the legislature being otherwise. It cannot be termed as illegal because it is the outcome of acts which are not forbidden by law and it is an arrangement entered into primarily for the purpose of obtaining tax advantage. Avoidance methods remain unaddressed except through express judicial decisions and specific anti-avoidance provisions.

However, of late, the court is asserting that any attempt to avoid the tax liability shall not be encouraged. Both these methods of avoiding tax liability heavily undermine the public finance function of the state, creating a hindrance in effectively collecting tax. The onus has been heavily placed on the revenue department while dealing with the matter of tax avoidance. All these reasons have consequently led to introduce the General Anti-Avoidance Rules which is intended to serve as a deterrent against avoidance.

1.1.1 Tax Avoidance Techniques - General Theory

There are four basic tax avoidance techniques practiced,¹ though numerous variations and subtleties exist:

- a) Deferred payment of tax liability;

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¹ D.P. Mittal, *Law and practice relating to General Anti Avoidance Rules (GAAR)*, Taxmann Publications (P) Ltd., New Delhi, 2012.

- b) Re-characterization of an item or income or expense to tax at a lower or nil rate;
- c) Permanent elimination of tax liability; and
- d) Shifting of income from a high-taxed to a low-taxed person.

In practice these techniques are carried out using the following methods:

- a) Use of tax Treaties for carrying Related-Party Transactions (commonly known as “Treaty Shopping”);
- b) Use of international tax shelters through artificial intermediary companies;
- c) Excessive use of debt over equity (also known as “Thin capitalization”);
- d) Non-arm's length transactions (i.e. “Transfer Pricing manipulation”);
- e) Transfer of residence;
- f) Branch entities; and
- g) Use of Tax Havens.

The bottom line is that all tax avoidance techniques take advantage of inconsistencies and discontinuities in the tax systems through various tax arbitrage techniques.

1.1.2 Sources of Anti-Avoidance Measures

Given these tax avoidance techniques, governments around the world react to this problem through various measures:

- a. *Legislative solutions:* Most governments seem to rely on anti-avoidance statutes which are passed by their legislatures. Such legislations can be broken down into two categories
 - Specific Anti-Avoidance Rules targeted at specific tax avoidance measures [“SAAR”]
 - General Anti-Avoidance Rules which are, as the name suggests a catch all system for tax avoidance [“GAAR”]
 - Bilateral measures are also generally pursued through Treaties or Double Taxation Agreements [“DTAA”]

- b. *Judicial solutions:* The Courts across the world have been instrumental in evolving and developing various judicial doctrines to curb tax avoidance. The Courts may take either a literal, i.e., strict view or purposive view towards statutory interpretation. Dozens of Courts the world over have played an important role in developing SAAR and GAAR principles and laws.
- c. *Administrative solutions:* To figure out tax avoidance has taken place and to get information on such practice is paramount. Administrative measures are a useful tool for governments to both curb and detect tax avoidance practice.

1.1.3 Westminster Doctrine

An assessee has a right to enter into any contract and undertake any transaction which is legal, but if he does an act for no business or commercial purpose, but solely to avoid taxation imposed by a public statute, is an abuse of the right. In the cases of *IRC v Duke of Westminster*² in England and in *CIT v Raman & Co.*³ in India, it was held that every taxpayer is entitled to arrange his affairs such that the tax liability attaching under the statute is less than it otherwise would be. Westminster doctrine provides the following principles⁴

- a. A legislation to receive a strict or literal interpretation;
- b. An arrangement is to be looked at not by its economic or commercial substance but by its legal form; and
- c. An arrangement is effective for tax purposes even if it has no business purpose and has been entered into just to minimize one's tax liability.

The blow to the doctrine came from the decision of the Supreme Court in *McDowell & Co. Ltd. v CTO*⁵, where the court observed “we think time has come for us to depart from the Westminster principle as emphatically as the British Courts have done.”

This doctrine led to aggressive planning which allowed the revenue authorities to look at the substance of the tax payer's situation in determining the liability of tax payable. But the observations made judicially led to the emergence of a number of doctrines in departure from the principles laid down in the Westminster Doctrine. The reason of enacting General Anti

² [1936], A.C. 1

³ [1968], 67 ITR 11, SC

⁴ Justice K. S. Radhakrishnan in *Vodafone International Holdings v. Union of India*, [2012], 17 Taxmann.com 202 SC

⁵ [1985] 154, ITR 148 SC

Avoidance Rules (GAAR) is to prevent the measures undertaken by assesses to avoid or evade tax.

GAAR reflects substance over form principle. A transaction can be considered to be void for tax purposes if there is no business reason underlying the transaction, or if a transaction is given a legal form which does not correspond to its actual character. GAAR is sought to be applied where there is (a) a transaction or a set of transactions that is solely or predominantly aimed at tax avoidance, and (b) if given effect, the object and purpose of the applicable tax law would be violated.

GAAR is a concept which generally empowers the Revenue Authorities in a country to deny tax benefits of transactions or arrangements which do not have any commercial substance or consideration other than achieving tax benefits. Such denial of tax benefits is a matter of conflict between the taxpayer and Revenue authorities.

Thus, different countries started making rules so that tax cannot be avoided by such transactions. Australia introduced these rules way back in 1981, followed by Germany, France, Canada, New Zealand, South Africa, etc. In a nutshell, it can be said that GAAR usually consists of a set of broad rules which are based on general principles to check the potential avoidance of tax in general in a form which cannot be predicted and thus cannot be provided at the time when it is legislated.

General Anti Avoidance Rules (GAAR) introduced by the Finance Act, 2012 is applied to deny tax treaty benefits to non-resident tax payers who would otherwise be entitled to them through improper use of treaty provisions. Other provisions of the Act may be ignored or the nature of the amount re-characterized in a manner that denies the tax benefits sought.

The GAAR could operate to redefine and re-characterize an amount, disregard the existence of an entity or ignore a transaction or the provisions of the Act. It authorizes the revenue authority to presume that a non-resident tax payer by entering into a series of transactions designed primarily to secure exemption or reduction from tax under a tax treaty has misused or abused the provisions of a treaty. A perceived misuse or abuse of any of the treaty provisions is considered to constitute a misuse or abuse of the domestic taxation laws. Tax avoided is considered to be tax evaded. GAAR can be made applicable in dealing with potential misuse of treaties and can override the provisions of a tax treaty in situations involving treaty shopping. Treaty shopping is subject to GAAR.

1.2 Factual scenario of selected precedents on the issue in UK

IRC v Westminster⁶	W.T. Ramsay v. Inland Revenue Commissioner⁷	Furniss v Dawson⁸	Craven v White⁹
The Duke of Westminster used to pay his gardener \$ 3 as his salary. To circumvent taxation, he started paying him in equivalent material form. The House of Lords held it to be a legitimate tax planning and hence held non-taxable.	W.T Ramsay Ltd., a farming company made a handsome capital gain and was trying to hide it under the garb of a complex and self-cancelling transactions which had generated a long loss on the account sheet. The appeals chamber decided to consider the whole transaction as a whole and hence considered its gain to be taxed. This decision is considered in UK to be a departure from Westminster Principle as the purpose of both the transactions is to carry out the existing	There was a Company A and Company B owned by a father and son separately. They were doing intra company transaction in shares to avoid capital gains. The Ramsay Principle got even more strengthened by this judgment. It was held that transaction has pre-arranged artificial steps which serve no commercial purpose other than to save tax and hence they decided to tax the whole transaction.	The taxpayers exchanged their shares in a trading company (Q Ltd.) for shares in an Isle of Man holding Company (M Ltd.), in anticipation of a potential sale or merger of the business. Meanwhile the tax payers had abandoned negotiations with one interested party, and later concluded a sale of Q Ltd.'s shares with another. M Ltd. subsequently loaned the entire sale proceeds to the taxpayers, who appealed against assessments to capital gains tax. It

⁶ *IRC v Duke of Westminster*, [1935] All ER 259 (H.L.)

⁷ *W. T. Ramsay v Inland Revenue Commissioner*, (1982) AC 300

⁸ *Furniss v Dawson*, [1984] 2 W.L.R. 226

⁹ *Craven v White*, (1988) 3 All ER 495

	model but with an access for rescue gate of tax.		laid down that the <i>Furniss v Dawson</i> was applicable only on pre-ordained transaction entered with the purpose of tax avoidance. Hence, the doctrine being not applicable, it found this transaction as tax planning.
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The confusion created by the judgements in tax planning and tax avoidance in the country from where India had taken its legal system is the root cause of problem in India.

1.3 Factual scenario of selected precedents on the issue in India

McDowell v CTO ¹⁰	Union of India v Azadi Bachao Andolan ¹¹	Vodafone International Holding BV v Union of India ¹²	Richter Holding v ADIT ¹³
The excise duty is to be paid by the manufacturer on the removal of liquor from distillery. However, the buyers themselves paid the	It was a PIL in which the investment of Indians through Mauritius registered Companies was challenged. The companies had a tax	A company holds 100% shares of another non-resident company which in turn held 67% shares in the Indian Company Hutchison-	The petitioners, a Cyprus registered company and another company acquired 100% shares in a UK registered company which in turn held

¹⁰ *McDowell & Company v C.T.O*, 1985 Indlaw, SC 426

¹¹ *Union of India v Azadi Bachao Andolan*, (2003) 263 ITR 706 (SC)

¹² *Vodafone International Holdings B.V. v Union of India*, (2012), 1 CompLJ 225 (SC)

¹³ *Richter Holding v ADIT*, [2011], 199 TAXMANN 70 (Kar)

<p>excise duty and they did not include this amount for sales tax. They lifted the corporate veil. However, the most notable feature of the judgement are the lines of Justice Reddy where he stated that Westminster principle has been buried in its own birth land and what should be referred for the demarcation between tax evasion and tax avoidance is not only genuineness of the transaction but also the fiscal purpose of the transaction. Hence, the doctrine of Westminster that <i>given a document of transaction is genuine the court cannot go behind it to some supposed underlying substance</i> is challenged in</p>	<p>residency certificate of Mauritius which as per CBDT Circular No. 789 is of no value before the court. The CBDT Circular was rejected and veil was not lifted. The court rejected Justice Reddy's viewpoint and stated that even in his opinion, tax planning is legitimate. However, to state that tax avoidance is illegitimate in itself is a wrong picture of law. Moreover, it reinstalled the value of Westminster Principle. The court observed that the McDowell judgement was nothing exceptional but only an exception to the well settled law.</p>	<p>Essar Hutchison-Essar was a joint venture between Hutchison International and Essar. Vodafone International Holdings BV acquired the entire share capital of first company from Hutchison International. This resulted in an indirect transfer of 67% shareholding in Hutchison-Essar to Vodafone.</p> <p>Though decision of Vodafone case is not about corporate veil. Vodafone case does not favour the revenue when it comes to imposition of tax by the Indian authorities on sale of shares in an offshore company that has a substantial stake in an Indian subsidiary company by lifting</p>	<p>51% shares in an Indian Company. The Indian authorities sought to tax the transaction under the head of capital gains, and sought further information from the parties.</p> <p>The judgement given was one step ahead of Vodafone as it specifically justified lifting the corporate veil for taxation of similar transaction. It was observed that to know the real nature of transaction is very necessary to lift the veil. The lifting of the corporate veil depends upon the question that whether the petitioner, as a majority shareholder, enjoys the power by way of interest and capital gains in the assets of the company and whether transfer of</p>
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India.		the corporate veil.	shares in the case on hand includes indirect transfer of assets and interest in the company.
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It is easily visible that our law on the point of tax evasion and tax avoidance is flimsy. In a recent development the Supreme Court rejected the review petition of Vodafone case. However, the budget for the year 2012-13 has given the power to the authorities to tax retrospectively, which in effect has the power to override the much talked about Vodafone ruling.

1.4 Major Recommendations by Shome Committee Report

An Expert Committee consisting of **Dr. Parthasarathi Shome** and three others was constituted on July 17, 2012 with broad terms of reference including consultation with stakeholders and finalizing the GAAR guidelines and a roadmap for implementation. The Expert Committee submitted its draft report on August 31, 2012 which was placed in the public domain on September 1, 2012. After examining the responses to the draft, the Expert Committee submitted its final report on September 30, 2012. The major facts of the committee were as follows:

- i. The Shome Committee set up by the prime minister to address the concerns of foreign investors on General Anti avoidance Rules (GAAR), recommended the postponement of the controversial tax provision by three years to 2016-17. Consequently, GAAR would apply from assessment year 2017-18. It was aimed at firms and investors routing money through tax havens.
- ii. The committee has recommended that GAAR be applicable only if the monetary threshold of tax benefit is Rs. 3 crore or more.
- iii. It has also recommended the abolition of capital gains tax on sale of listed securities by both resident and non-resident investors. Currently, there is no long term capital gain on listed securities in India while short term gains are taxed at 10-30 percent depending on the class of investors.
- iv. The panel suggested an increase in securities transaction tax (STT) to make good the tax revenue loss that may arise from abolition of tax on gains from transfer of listed securities.

- v. As a step towards reassuring global investors, the committee in its draft report suggested that GAAR provisions should not be invoked to examine the genuineness of the residency of entities in Mauritius. Mauritius is the most preferred route for foreign investments because of the liberal taxation regime in the island country. India has a double taxation avoidance agreement treaty with Mauritius.
- vi. “GAAR is an extremely advanced instrument of tax administration- one of deterrence, rather than for revenue generation”, the panel wrote in a report posted on the Finance Ministry website, suggesting the government does not begin enforcing the rules until 2016-17.
- vii. The GAAR, first proposed in the Budget in March 2012, was meant to target tax evaders, partly by stopping Indian Companies and investors from routing investments through Mauritius or other tax havens for the sole purpose of avoiding taxes.
- viii. Highlighting that the objective of GAAR should be deterrence rather than revenue, the panel has recommended that the Approving Panel (AP) for purposes of invoking GAAR provisions should consist of five members, including Chairman, who should be a retired judge of the High Court. Besides, two members should be from outside government and persons of eminence drawn from the fields of accountancy, economics or business, with knowledge of matters of income-tax, and two members should be chief commissioners of income-tax or one Chief Commissioner and one Commissioner.
- ix. It also suggested that GAAR can be invoked only with the approval of the Commissioner.

1.4.1 Recommendations of Expert Committee accepted by Government

The Central Government carefully considered the report of the Expert Committee on General Anti Avoidance Rules (GAAR) and accepted the major recommendations of the Expert Committee with some modifications. This was announced by the Union Finance Minister Shri P. Chidambaram in a press conference, who said that the following decisions have been taken by Government in this regard:

- An arrangement, the main purpose of which is to obtain a tax benefit, would be considered as an impermissible avoidance arrangement. The current provision

prescribing that it should be “the main purpose or one of the main purposes” will be amended accordingly.

- The assessing officer will be required to issue a show cause notice, containing reasons to the assessee before invoking the provisions of Chapter X-A.
- The assessee shall have an opportunity to prove that the arrangement is not an impermissible avoidance arrangement.
- The two separate definitions in the current provisions, namely, ‘associated person’ and ‘connected person’ will be combined and there will be only one inclusive provision defining a ‘connected person’.
- The Approving Panel shall consist of a Chairperson who is or has been a Judge of a High Court; one Member of the Indian Revenue Service not below the rank of Chief Commissioner of Income-tax; and one Member who shall be an academic or scholar having special knowledge of matters such as direct taxes, business accounts and international trade practices. The current provision that the Approving Panel shall consist of not less than three members being Income-tax authorities or officers of the Indian Legal Service will be substituted.
- The Approving Panel may have regard to the period or time for which the arrangement had existed; the fact of payment of taxes by the assessee; and the fact that an exit route was provided by the arrangement. Such factors may be relevant but not sufficient to determine whether the arrangement is an impermissible avoidance arrangement.
- The directions issued by the Approving Panel shall be binding on the assessee as well as the Income-tax authorities. The current provision that it shall be binding only on the Income-tax authorities will be modified accordingly.
- While determining whether an arrangement is an impermissible avoidance arrangement, it will be ensured that the same income is not taxed twice in the hands of the same tax payer in the same year or in different assessment years.
- Investments made before August 30, 2010, the date of introduction of the Direct Taxes Code, Bill, 2010, will be grandfathered.
- GAAR will not apply to such FIIs that choose not to take any benefit under an agreement under section 90 or section 90A of the Income-tax Act, 1961. GAAR will also not apply to non-resident investors in FIIs.

- A monetary threshold of Rs. 3 crore of tax-benefit in the arrangement will be provided in order to attract the provisions of GAAR.
- Where a part of the arrangement is an impermissible avoidance arrangement, GAAR will be restricted to the tax consequence of that part which is impermissible and not to the whole arrangement.
- Where GAAR and SAAR are both in force, only one of them will apply to a given case, and guidelines will be made regarding the applicability of one or the other.
- Statutory forms will be prescribed for the different authorities to exercise their powers under section 144BA.
- Time limits will be provided for action by the various authorities under GAAR.
- Section 245 N (a)(iv) that provides for an advance ruling by the Authority for Advance Rulings (AAR) whether an arrangement is an impermissible avoidance arrangement will be retained and the administration of the AAR will be strengthened.
- The tax auditor will be required to report any tax avoidance arrangement.

Further, having considered all the circumstances and relevant factors, the Government also decided that the provisions of Chapter X-A will come into force with effect from April 1, 2016 (as against the current provision of April 1, 2014). A number of countries have provided for General Anti Avoidance Rules (GAAR) in matters relating to taxation. While tax mitigation is recognized, tax avoidance is frowned upon. International literature describes tax avoidance as the legal exploitation of domestic as well as international tax laws to one's own advantage and an arrangement entered into solely or primarily for the purpose of obtaining a tax advantage. The principle of GAAR was incorporated in the Direct Taxes Code which was introduced as a Bill in Parliament on August 30, 2010.

1.5 Salient Features of GAAR

The main features of the GAAR are as follows as explained in the “Memorandum explaining the provisions relating to Direct Tax”:

- a. An arrangement whose main purpose or one of the main purposes is to obtain tax benefit and which also satisfies at least one of the four tests, can be declared as “impermissible avoidance arrangements”. The four tests are:
 - The arrangement creates rights and obligations which are not normally created between parties dealing at arm's length.

- It results in misuse or abuse of provisions of tax laws.
 - It lacks commercial substance or is deemed to lack commercial substance.
 - Is carried out in a manner which is normally not employed for bona fide purpose.
- b. It also provides that certain circumstances like period of existence of arrangement, taxes arising from arrangement, exit route shall not be taken into account while determining lack of commercial test for an arrangement.
- c. Once an arrangement is held to be an impermissible avoidance arrangement then the consequences of arrangement in relation to tax or benefit under a tax treaty can be determined by keeping in view the circumstances of the case.
- d. These provisions can be used in addition to or in conjunction with other anti-avoidance provisions or provisions for determination of tax liability, which are provided in the taxation law.
- e. For effective application in cross border transaction and to prevent treaty abuse a limited treaty override is also provided.

1.5.1 Meaning of Arrangement

An ‘arrangement’ will mean any transaction, conduit, event, trust, grant, operation, scheme, covenant, disposition, agreement or understanding, including all steps therein or parts thereof, whether enforceable or not. Therefore, if the motive behind individual steps is to obtain a tax benefit, but the overall scheme is not so, the individual steps will nevertheless be treated as an arrangement and the provisions of GAAR may be invoked.

1.5.2 Tax consequences of Impermissible Avoidance Agreements

If the conditions specified above are satisfied, the Commissioner will be empowered to declare the arrangement as an impermissible avoidance arrangement and determine the tax consequences of the taxpayer as if the arrangement had not been entered into. For this purpose, he may:

- i) Disregard, combine, or re-characterize any steps in, or parts of, the impermissible avoidance arrangement;

- ii) Disregard any accommodating party or treat any accommodating party and any other party as one and the same person;
- iii) Deem persons who are connected persons in relation to each other to be one and the same person for purposes of determining the tax treatment of any amount.
- iv) Re-allocate any gross income, receipt or accrual of a capital nature, expenditure or rebate amongst the parties.
- v) Re-characterize any gross income, receipt or accrual of a capital nature or expenditure.
- vi) Re-characterize any multi-party financing transaction, whether in the nature of debt or equity, as a transaction directly among two or more such parties.
- vii) Re-characterize any debt financing transaction as an equity financing transaction or any equity financing transaction as a debt financing transaction.
- viii) Treat the impermissible avoidance arrangement as if it had not been entered into or carried out or in such other manner as the Commissioner in the circumstances may deem appropriate for the prevention or diminution of the relevant tax benefit; or
- ix) Disregard the provisions of any agreement entered into by India with any other country under section 265 of the Act.

An arrangement declared as an impermissible avoidance arrangement shall be presumed to have been entered into or carried out for the main purpose of obtaining a tax benefit unless the party obtaining the tax benefit proves that obtaining a tax benefit was not the main purpose of the avoidance arrangement.

1.5.1 GAAR Treaty

It has been provided that the GAAR provisions would apply to a taxpayer notwithstanding that the treaty provisions are more beneficial. Considering the approaches as outlined before (under the Vienna Convention and the OECD wherein the underlying principle would be that GAAR could override the provisions of a treaty), it is important to note that OECD Commentary on Article 1 of the Model Tax Convention also clarifies that a general anti-abuse provision in the domestic law in the nature of ‘substance over form rule’ or ‘economic substance rule’ would not be in conflict with the treaty.

However, as enshrined in the Vienna Convention “every treaty in force is binding upon the parties to it and must be performed by them in good faith”, ‘Pacta sunt servanda’ is based on good faith. This entitles states to respect obligations. This good faith basis of treaties implies that a party cannot invoke provisions of its domestic law as a justification for a failure to perform. Thus, if a legislature unilaterally enacts new domestic tax laws which are contrary to an existing treaty, without the treaty having been amended or terminated, such action is violation of international law and also violates the principles of ‘pacta sunt servanda’. This type of treaty violation is known as ‘treaty override’. Further, according to rules of legislative interpretation, specific legislation overrides general legislation. Therefore, changes of a domestic law generally, which could be the case with GAAR, may not affect the treaty. Considering the same, in the absence of an anti-avoidance provision under the treaty, it remains to be seen whether the provisions would be able to override the treaty.

1.6 GAAR- Treaty Override

The provisions of the tax treaty operate even if inconsistent with the provisions of the Income Tax Act.¹⁴ No tax treaty is capable *per se* of creating or increasing a tax rate. Its function is to limit the authority of signatory countries to that which is expressly established under such treaties. International treaties pre-empt domestic legislation. Domestic law rule would not apply whenever it conflicts with the provisions of tax treaty though such domestic rule remains in full effect and is fully applicable to other legal situations not specifically addressed in the treaty. Thus a tax treaty would not repeal the domestic legislation, but merely repeal the domestic enforcement of such rulings in relation to a specific case dealt with in the treaty. It can be inferred that a tax treaty would prevail over domestic law even if domestic law is enacted after the treaty.

Tax treaties are considered to be mini legislations containing in them all the relevant aspects or features which are at variance with the general taxation laws of the respective countries. Wherever the Double Taxation Avoidance Agreement provides for a particular mode of computation of income, the said method alone is required to be followed, irrespective of the provisions of the Income Tax Act and it is only where there is no specific provision in the

¹⁴ *Union of India v Azadi Bachao Andolan*, (2003) 263 ITR 706

agreement to the contrary, the basic law in force in the country will get attracted and govern the taxation of such income.¹⁵

The term refers to a situation where the domestic legislation of a state overrules provisions of either a single treaty or all treaties having had effect in that state. Treaty provisions should not be construed as restricting in any manner the right of a contracting state to deny benefits under the treaty where it can reasonably be concluded that to do otherwise would result in an abuse of the provisions of the treaty and to apply such rules to counter abusive arrangements involving “treaty shopping”, substance over form and anti-conduit rules.

Finance Act 2012 inserted the following provisions in section 90 on the Income Tax Act, 1961:

“Notwithstanding anything contained in sub section (2), the provisions of Chapter X-A shall apply to the assessee, if such provisions are not beneficial to him.”

Sub section (2) provides that the assessee would get relief under the tax treaty or Income Tax Act, whichever is more beneficial to him. It would mean GAAR applies to any benefit obtained pursuant to treaty. Thus, where a treaty is abused GAAR could be invoked. The GAAR overrides the treaty. The issue would be whether the transaction or arrangement can be regarded as abusive of, and not whether GAAR conflicts the treaty.

All states are required to honour treaty obligations and perform them in good faith. It could therefore be said that the power under the domestic law empowering the revenue authority to invoke the GAAR cannot justify the state failure to perform its obligation under a treaty and that the domestic law cannot provide shelter for the breach of treaty provisions that in the absence of the consent of the treaty partner, it may be difficult for a court to approve the application of GAAR to a perceived treaty shopping.

A question may arise whether the GAAR can override the provisions of a tax treaty in situations involving treaty shopping and whether revenue authority could believe that “treaty shopping” (“Treaty shopping” generally refers to a situation under which a person who is not entitled to the benefits of a tax treaty uses an intermediary entity that is entitled to such benefits in order to indirectly obtain those benefits. Such practice is generally considered to

¹⁵ Dy. CIT v Turquoise Investment and Finance Ltd. (2008), 299 ITR 143 (MP).

be an “improper” use of tax treaties) is subject to the GAAR is a question which depends on the facts of each case. Where a non-resident enters into a series of transactions designed primarily to secure an exemption for reduction from tax under a tax treaty, the revenue authority may seek to apply the GAAR to deny any tax benefit that such transactions would otherwise produce. States enact GAAR to prevent treaty shopping situations and other tax evasion measures and schemes. The benefits of a tax treaty are not available if its provisions are abused. Those benefits can be denied only under the domestic law because taxes are levied only under the domestic laws. Any abuse of the provisions of a tax treaty could be characterized as the abuse of provisions of domestic law and thus anti avoidance rules set by domestic law for determining tax liability under a treaty. Therefore, abuse of treaty is abuse of domestic law.

1.7 Principles of GAAR

GAAR operates on the following principles:

- It comes into play if the transactions are in conformity with the provisions of the act and according to the Revenue authorities, are devoid of economic substance and carried out with the sole purpose of obtaining tax benefit.
- The role of GAAR is circumscribed by the requirement in section 96 that the arrangement results in tax benefit from it being not at arm's length, or from the misuse or abuse of the provisions of the Act or from lack of commercial substance, or from being entered into or carried out not for bona fide purposes.
- The mere fact that a taxpayer pays less tax, if one form of transaction than other is made does not demonstrate that GAAR applies.¹⁶
- If the existence of abusive tax avoidance is not clear, the benefit of doubt goes to the taxpayer.
- GAAR denies tax benefit where three criteria are met: benefit arises from a transaction; the transaction is an avoidance transaction and the transaction results in an abuse or misuse. The burden is on the revenue to prove on the basis of probabilities that the avoidance transaction results in abuse and misuse.

¹⁶ CIT v Hart, (2004), 217 CLR 216

- GAAR applies even where the abuse is an indirect result of a transaction as also to transactions that directly result in abuse and misuse.
- The GAAR is a residual provision, but it is designed to address the complexity of transactions which fall outside the scope of specific anti avoidance provisions. It relates specifically to the impact of complex series of transactions which often depend on the interplay of discrete provisions of the Income Tax Act. The revenue could properly use the GAAR in respect of series of transactions that had an impact on more than just the one stream of income.
- GAAR should not be used routinely every time the revenue gets upset just because a taxpayer structures a transaction in a tax effective way, or does not structure it in a manner that maximizes the tax.

1.17 Conclusion

Thus it can be summed up that the GAAR is a codification of the proposition that while interpreting the tax legislation, substance should be preferred over legal form. Transactions have to be real and are not to be looked at in isolation. The fact that they are legal does not mean that they are acceptable with reference to the meaning in the fiscal statute. Where there is no business purpose, except to obtain a tax benefit, the GAAR provisions would not allow such a tax benefit to be availed through the tax statute. These propositions have otherwise been part of jurisprudence in direct tax laws as reflected in various judicial decisions. The GAAR provisions codify this ‘substance over form’ rule.

The basic criticism of a statutory GAAR which is raised worldwide is that it provides a wide discretion and authority to the tax administration which can cast an excessive tax and compliance burden on the tax payer without commensurate remedies. One of the methods by which this can be addressed is to provide guidance on what the provisions entail and how they would be administered. These guidelines are meant to provide explanations and clarity regarding the GAAR provisions. The onus of proving that there is an arrangement; the arrangement leads to a tax benefit; the main purpose or one of the main purposes of the arrangement is to obtain a tax benefit, is on the Revenue.

LEGAL JUSTICE: RIGHT TO LEGAL SERVICES AND LEGAL AID

Dr. R. Seyon*

Abstract

Lok Adalat concept and philosophy is an innovative Indian contribution to the world jurisprudence. It has proved very effective alternative to litigation and has received laurels from the parties in particular and public in general. It also helps in emergence of jurisprudence of peace in the larger interest of justice and wider sections of society. *Lok Adalat* as the very name suggests means *people's court*. *Lok* stands for people and the vernacular meaning of the term *Adalat* is court. However, it is not a *court* as understood by the common people though; they may call it by that name. There is hardly anything common between the law courts and the Lok Adalats, except that both are tools in the legal system to deliver justice. However, the difference between the two is that a law court, sits at its premises, where the litigants come with their lawyers and witnesses to seek justice. Whereas, Lok Adalat is a kind of forum provided to the conflicted parties to arrive at a compromise between them. The institution of Lok Adalat (people's court) has its origin not in any statutory law but it is a para-judicial institution being developed by the people themselves as *participatory instrument of democratic judicial making*.

Keywords: *Lok Adalat, Legal Aid, Alternative Dispute Resolution, Distributive Justice, Conciliatory Justice*

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Lok Adalats - Justice at the Door-step of the people

Lok Adalat concept and philosophy is an innovative Indian contribution to the world jurisprudence. It has proved very effective alternative to litigation and has received laurels from the parties in particular and public in general. It also helps in emergence of jurisprudence of peace in the larger interest of justice and wider sections of society¹.

Lok Adalat as the very name suggests means *people's court*. *Lok* stands for people and the vernacular meaning of the term *Adalat* is court. However, it is not a *court* as understood by the common people though; they may call it by that name.

There is hardly anything common between the law courts and the Lok Adalats, except that both are tools in the legal system to deliver justice. However, the difference between the two is that a law court, sits at its premises, where the litigants come with their lawyers and witnesses to seek justice². Whereas, Lok Adalat is a kind of forum provided to the interested parties to arrive at a compromise between them.

The institution of Lok Adalat (people's court) has its origin not in any statutory law but it is a para-judicial institution being developed by the people themselves as *participatory instrument of democratic judicial making*.

It may be termed as a child of necessity. The Central Government constituted a committee in 1980 popularly known as "Committee for Implementing Legal Aid Schemes (CILAS)" to evolve appropriate structure and procedures with a view to achieve an equal justice for all. It was under the auspices of this committee headed by Chief Justice P. N. Bhagwati that the unique institution of Lok Adalat was first experimented.

In fact, Lok Adalat is a voluntary institution and is itself a direct outcome of an activist approach of judiciary. It is a judge inspired, judge induced and judge aided strategy devised with an aim to provide quick and cheap justice so as to reduce the backlog of cases pending in the law court.³

Courts are clogged with cases. There is a serious problem of overcrowding of dockets. Because of the ever increasing number of cases, the courts are under the threshold of finding a permanent mechanism forum through which the load of the cases could be taken off the

¹ Justice J.N.Bhatt, Souvnir, International Conference on "Lok Adalat as a Mechanism of Alternative Dispute Resolution (ADR)", p.27, held at New Delhi from 20th – 23rd Feb. 2003

² N. R. Madhava Menon, "Lok-Adalat: People's Programme for Speedy Justice", Indian Bar Review, vol. 13(2), 129 (1986)

³ Bindu Sangra, "Lok Adalats: An Instrument of Distributive Justice", Dr.Ram Manohar Lohiya National Law University Journal, vol.2 April 2010, p. 159

courts. The case load is so heavy that the court-cart is grinding to a halt. Thus realized that the over hauling of judicial process is the need of the hour.

Hence, in order to reduce the burden of the courts or to reduce the heavy demand on court time, cases must be resolved by resorting to *Alternative Dispute Resolution* methods before they enter the portals of Court. Here comes the performance of Lok Adalats and which have showed its significance by settling huge number of pending cases.

In pursuance of Article 39-A of the Constitution of India, the Parliament enacted *The Legal Services Authorities Act, 1987*. One of the aims of this Act is to organize Lok Adalats to ensure the speedy justice on the basis of distributive justice. The Act was passed to advance the constitutional mission of social justice by creating legal services authorities and to organize *Lok Adalats* to dispense cheap and quick justice to the deprived and the destitute.

The jurisdiction of *Lok Adalat* is hedged by the expression “to determine and arrive at a compromise or settlement” The system of “*Lok Adalat*” is based on compromise and settlement; if no settlement is arrived at, the case is either returned to the court or the parties are advised to seek the remedy in a court of law. But *the Legal Services Authorities (Amendment) Act, 2002* provides for compulsory adjudication for failure of parties to arrive at a compromise.

Lok Adalats resolve compoundable offences, motor vehicle claims, labour disputes, matrimonial and family disputes, bank loans, insurance claims and such other matters.

The mechanism of *Lok Adalat* has contributed significantly in reducing the backlog of cases pending in subordinate judiciary and can equally relieve the higher judiciary from incoming litigation in the form of appeal, revision etc., by settling the dispute finally once for all. Irrespective of the spectacular success, it is realized that *Lok Adalats* lack judicial approach in dispute resolution. Lamenting on the poor quality of legal service extended, the apex court held that *right to defend includes right to effective and meaningful defence*⁴. The Supreme Court has cautioned that legal aid must not be reduced to *patronizing gestures to raw entrants to the Bar*⁵, but the practice of extending legal assistance through such inexperienced lawyers is continuing resulting into unequal and ineffective presentation or defence.

Conciliatory justice is said to be able to produce qualitative better results than contentious litigation which often results in final break of the relationship among the litigants. The adopted procedure is more accessible, more rapid, informal, and less expensive and the

⁴ Kishore Chand v. State of H.P. AIR 1990 SC 2140

⁵ R.M. Wasawa v. State of Gujarat, AIR 974 SC

adjudicators are more capable and eager to understand the parties' plight and the environment in which it has arisen.

Reciprocity, which is the hallmark of conciliatory process, is the cultural heritage of India and forms a part of the psyche of Indian people.

The institution of *Lok Adalat* has been embraced by the people as a mechanism of *Alternate Dispute Resolution* (ADR), which has the potential to support the judicial process in the resolution of the disputes amicably. As an institution of dispute resolution it has immense potential to realize the constitutional commitment of securing simple, cheap, expeditious and impartial justice by ignoring socio-economic disabilities. In this process of dispute resolution the parties participate in the entire proceedings to arrive at a consensual settlement where judges act as mediators, unlike performing their traditional role of hearing the arguments and then passing the mandatory decisions.

As Lord Dennings observed, quoted by Justice Krishna Iyer in *Fertilizers Corporation Kamgar Union v. Union of India*⁶: Every new decision on every new situation in a development of the law. Law does not stand still. It moves continuously.

The institution of *Lok Adalats* is a welcome measure since it eliminates the possibilities of long drawn litigation by way of appeal or revision and relieves the parties from getting the briefs prepared, procuring witnesses and attending the court and lawyer's chambers. The institution of *Lok Adalats* has proved that it is a necessary component of judicial administration, by supplementing the courts in judicial process.

The first *Lok Adalat* was held in the early 1980s *Lok Adalats* were later given statutory recognition under the *Legal Services Authorities Act, 1987*. The Legal Services authorize set up under the Act responsible for the organization of *Lok Adalats*. *Lok Adalats* not only provide speedy justice, the procedure followed is informal and involves *Alternate Dispute Resolution* methods such as mediation.

A variety of cases are referred to *Lok Adalats* for resolution including cases involving motor accident claims, family disputes, disputes regarding electricity, pensions and also petty criminal offences.⁷ Litigants are saved both the time and expense that would be expended if the disputes remain pending in the regular courts.

⁶ AIR 1981 SC p.344

⁷ Justice S.K.Kaul, "Access to Justice", Nyaya Deep, Vol.VII, Issue 4, Oct. 2006, p.92

Delayed justice amounts to the denial of justice. The alternate dispute resolution mechanism provided by *Lok Adalats* helps in the realization not only of the fundamental right to speedy justice but also the enforcement of rights which gave rise to the dispute.

Lok Adalat provides alternative mode of resolution or device for expeditious and inexpensive justice.⁸ Experiment of *Lok Adalat* as an alternate mode of dispute settlement has come to be accepted in India, as a viable, efficient and informal one.⁹

Lok Adalat is an alternative to judicial justice. This is a recent strategy for delivering informal, cheap and expeditious justice to the common man by way of settling disputes, which are pending in courts and also those, which have not yet reached courts by negotiation, conciliation and by adopting persuasive, common sense and human approach to the problems of the disputants, with the assistance of specially trained and experienced members of a team of conciliators.¹⁰

Benefits Available under Lok Adalat

- There is no court fee and if court fee is already paid the amount will be refunded if the dispute is settled at “Lok Adalat” according to the rules;
- The basic features of “Lok Adalat” are the procedural flexibility and speedy trial of the disputes;
- The parties to the dispute can directly interact with the judge through their counsel.
- The award by the *Lok Adalat* is binding on the parties and it has the status of a decree of a civil court and it is non-appealable.

In view of above facilities provided by *The Act*, Lok Adalats are boon to the litigating public that they can get their disputes settled fast and free of cost amicably.

In the event of matter determined by compromise or settlement by a *Lok Adalat* in a case referred to it by a court, the court – fee is to be refunded in the manner laid down in the *court fee Act, 1870*¹¹:

Right to Legal Aid

⁸ D.K.Mishra, “Award of Lok Adalat Equivalent to a Decree”, Nyaya Deep, Vol. VIII, issue 3, July 2007, p.100

⁹ P.T.Thomas v. Thomas Job,” (2005), CLT 542 (SC), at page 551, para 18

¹⁰ Ibid p.551

¹¹ Abdul Hassan v. Delhi Vidyut Board”, AIR 1999, Del. 88

The right to legal aid has been specifically recognized as being a part of the fundamental right to life and liberty enshrined under Art. 21 of the constitution of India. In *Hussainara Khatoon v. Home Secretary, State of Bihar*¹², the Supreme Court observed that *legal aid is really nothing else but equal justice in action*. Legal aid is in fact the delivery system of social justice.

In *Khatri v. State of Bihar*¹³, the Supreme Court reiterated that the Court has recognised the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21. It further observed that the State is under a Constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigent and whatever is necessary for his purpose has to be done by the State and though the State may have its financial constraints and its priorities in expenditure. But the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty. In the same case, the Supreme Court also took note of the fact that this right to legal aid would be illusory for the indigent accused unless the magistrate or sessions judge before whom he is produced informs him of his right.

Right to Legal Aid – A Basic Human Right

The Legal aid is an instrument to achieve equality before law. It is a concept of administration of justice. Its denial will entail a failure of the rule of law. Every Welfare State recognizes the right to legal aid. Free and competent legal aid to the needy is very important for the effective survival of social system. Equal access to law for the rich and the poor alike is essential. As rightly said by Francis Beckon that “laws were like cobwebs; where the small flies were caught and the great break through.”

The object of legal aid is to provide legal justice to the weaker sections of the society. The slogans of democracy, rule of law and human rights have no meaning unless society provides legal justice and legal aid to the poor, illiterate and weaker sections of the society.¹⁴

The new Encyclopedia Britannica defines legal aid as the professional legal assistance given, either free or for a nominal sum, to indigent persons in need of such help.¹⁵

¹² AIR 1979 SC 1377

¹³ (1981) 1 SCC 627

¹⁴ J.S.Singh, “Right to legal Aid “A Human Right perspective”, Nyaya Deep, Vol.VIII, Issue 3, July 2007, p.75

¹⁵ The New Encyclopedia Britannica, Vol. VI, 1974 (ed), p. 122

Lord Denning has aptly observed that “since the Second World War, the greatest revolution in the law has been the system of legal aid. It means that in many cases, the lawyer’s fees and expenses are paid for by the State and not by the party concerned”.

A great crusader of the legal aid concept and movement in the USA, Regnald Herbert Smith Instituted the Bostal Legal Aid Society from 1914 and published his findings in the classic book *Justice and Poor*. During the time of President Johnson, a new impetus came to the concept of legal aid through the *Economic opportunity Act of 1964*. The underlying purpose was to deliver legal advice and aid to the neighbourhood of the underprivileged. It got a good momentum on account of *Legal Service Corporation Act, 1974*. In England, the first comprehensive law viz., *Legal Aid and Advice Act, 1949* was enacted.

Legal aid as human right is implicit in Articles 7, 8 and 10 of the Universal Declaration of Human Rights, 1948. It is also clearly provided in clause 3 of Article 14 of the International Covenant on Civil and Political Rights. Even in Article 6(3) (6) of the European convention of Human Rights, 1953 and Article 8 (2) (E) of the American convention of Human Rights, legal aid is prescribed as a fundamental right. Right to counsel is also provided by the 6th amendment of the constitution of US. The Third United Nations Conference on the prevention of Crime and Treatment of offenders was held in 1965 at Stockholm that realized the need for legal aid. The International Conventions, Declarations and conferences have recognized the right to legal aid as a human right and fundamental freedom of the people of the United Nations. The International Law provides that the legal aid should be accepted as an essential part of justice of every nation. The developed countries of the world like USA., U.K. Canada and Australia have recognized the right to legal aid.

Equality is the bedrock of any democracy. Democracy provides equality before law and equal protection of law. Regarding the principle of *equality before the law* the English Scholar A.V.Dicey Writes: “With us no man is above the law, but (what is a different thing) that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”.¹⁶

Justice V. R. Krishna Iyer observes: “The spiritual essence of a legal aid movement consists in inviting law with a human soul: its constitutional core is the provision of equal legal

¹⁶ A.V.Dicey, “Introduction to the study of the Law of the Constitution”, Universal law publishing Co.Pvt. Ltd., Indian Reprint 2003, at p.193

service as much to the weak and in want as to the strong and affluent, and the dispensation of social justice through the legal order”¹⁷

The *Legal Services Authority Act, 1987* has been enacted by Indian Parliament. The Act has constituted a number of bodies to provide the legal services to the weaker sections of the society. The Act has also made provisions regarding the *Lok Adalat*.

The Right to Legal Aid in India

The principle *equality before law* has been adopted under Article 14 of the constitution of India, which runs as: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Article 22 provides: “No person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.”

Article 21 states: “Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The provision relating to legal aid was added to the constitution of India by the “*Constitution (Forty Second Amendments) Act, 1976*” which includes:

Article 39-A.: “Equal Justice and Free Legal Aid”.

It is important to note that the provision relating to free legal aid has been added in Part IV of the constitution. The provisions of Part IV dealing with Directive Principles of State Policy are not enforceable by any court. The duty is cast upon the State to fulfill the objectives laid down in this Part by making laws.¹⁸

Inspite of the above constitutional provisions, the State could not provide the legal aid and legal services to the teeming millions of weaker, poor and illiterate people of the country.

In reality, legal aid is a constitutional imperative. The Apex Court in its dynamic and activist role has expounded the proposition of free legal aid in various judicial pronouncements.

Recognition of the Right to Legal Aid as a Human Right by the Supreme Court

¹⁷ The Government of India, “Report of the Expert Committee on Legal Aid-Procedural Justice to the people”, May 1973, para 5, p.10

¹⁸ Article 37, Constitution of India

In *Bidi Supply Company v. Union of India*¹⁹, it has been observed that “the constitution is not for the exclusive benefit of governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and humble, for those who have businesses at stake, for the “butcher, the baker and the candlestick maker”.

In *Suk Das v. Union Territory of Arunachal Pradesh*²⁰, the Apex Court has observed that free legal aid at State's Cost is a fundamental right of a person, accused of an offence involving his life and personal liberty. This right is also quite implicit in the constitutional provision of Article 21. Thus, the right to have free legal service is an integral part of a just, fair and reasonable opportunity and procedure for person being tried for an offence.

In *M.N.Hoskot v. State of Maharashtra*²¹ the Supreme Court declared *free legal services* as an essential ingredient of the right to life and personal liberty under Article 21 of the constitution, for a person accused of an offence. The Supreme Court laid down the guidelines also. The court held that “the benign prescription operate by force of Article 21 strengthened by Article 19(1) (d) read with sub-article (5) from the lowest to the highest court where deprivation of life and personal liberty is in substantial peril.

In this case, speaking on behalf of the court, Justice Krishna Iyer declared the right to legal aid as a fundamental right under Article 21 of the constitution. It was held that *procedure* in Article 21 means fair, not formal procedure; *Law* is reasonable law and not any enacted piece.

Justice Bhagwati and Justice Krishna Iyer enriched the right to legal aid movement in a number of decisions. In *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*²², Justice Bhagawati considerably widened the ambit and scope of the right to legal aid by making available to indigent and poor accused person, unable to afford a lawyer. In *Hussainara Khatoon (V) v. State of Bihar*²³, Justice Bhagwati again laid down some basic principles regarding right to free legal aid and observed: “It is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or in communicado situation, to have free legal services provided to

¹⁹ AIR 1956 SC 479

²⁰ 1986 Cri LJ 1084

²¹ AIR 1978 SC 1548

²² (1980) 1 SCC 98

²³ (1980) 1 SCC 108

him by the State and State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require²⁴

In *Kadra Pahadiya (I) v. State of Bihar*²⁵, *Sant Bir v. State of Bihar*²⁶, *Rajan Dwivedi, v. Union of India*²⁷ and *Kishore Chand v. State of HP*²⁸ all these different cases, the court held that under-trial prisoner should be represented by fairly competent lawyer at State expense.

In *Sheela Barse v. State of Maharashtra*²⁹, Sheela Barse, a journalist complained of custodial violence to women prisoners whilst confined in the police lock-up in the city of Bombay, the Supreme Court held that legal aid should be provided to a poor or indigent accused whose life and personal liberty is in peril. It is the duty of the State to provide legal assistance to the poor and indigent accused (male and female) whether they are under-trial or convicted person.

Delivering the judgment of the Court, Justice Bhagwati observed. "... It is a necessary 'since quo non' of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law ... It is therefore absolutely essential that legal assistance must be made available to prisoners in jails whether, they be under-trial or convicted persons".³⁰

With a view to make the right to legal aid a reality, for those largely depressed and deprived, down trodden and destitute, dejected and rejected, forlorn and forgotten, lowly and lost, legal service has been a remedy, which is provided in Indian constitution.³¹

In "Khatri (I) v. State of Bihar"³² the Division Bench of the Supreme Court held that the State is' under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose to be done by the State.

²⁴ Id.at pp. 112-113

²⁵ AIR 1981 SC 939

²⁶ AIR (1982) 1 SC 378

²⁷ AIR (1983) SC 624

²⁸ AIR (1991) 1 SCC 286

²⁹ AIR 1983 SC 378

³⁰ Id. Para 1 at p.380

³¹ Justice J. N. Bhatt, "Right to Legal Aid – A Basic Human Right", Nyaya Deep, Vol. VII, Issue 4, Oct.2006, p.54

³² (1981) 1 SCC 627; AIR 1981 SC 928; In this case, the Division Bench was constituted by P.N.Bhagwati and A.P.Sen JJ; and the judgment was delivered by Bhagwati J.

Mahatma Gandhi has said: “I shall work for an India in which the poorest shall feel that it is their Country in whose making they have an effective voice; an India in which there shall be no high class and low class of people; an India in which all communities shall live in perfect harmony.”

There has been no hesitation by the Indian Judiciary to innovate new ways to address the imbalance and aspirations of the poor.

The philosophy, which has guided the Indian Judiciary, is truly reflected in the words of Rabindra Nath Tagore.

“Into the mouths of these
Dumb, pale and meek
We have to infuse the language of the soul
Into the hearts of these
Weary and worn, dry and forlorn
We have to minstrel the language of humanity”.

GENDER DISCRIMINATION IN LANGUAGE

Ms. Smita Joseph*

Abstract

This paper highlights some of the ways by which discriminatory practices against women are reflected and reproduced through language. Data from Japanese shows that the language used by women i.e. the use of polite markers, avoidance of abusive words and slangs, and the use of supportive devices demonstrate gender-based expectations from women as role models for appropriate behavior in the society. In Japanese, for instance, women are expected to use polite 1st and 2nd person pronouns and are prohibited to use the 1st and 2nd person pronouns exclusively reserved for boys since they are considered vulgar and coarse. The gender-based, differential use of pronouns in the Japanese society indicates the inferior status of women vis-à-vis men, and the role models of women as good wives and daughters. These expectations are emphasized on women and girls through the use of polite forms in language, to refer to themselves and others. The Japanese society also encourages different interaction styles of women and men that indicate societal expectations of women as supportive and collaborative to men and the society in general. However, perceptions of women as supportive and collaborative are common to all cultures and societies. In order to test Gender-based Discrimination in Language, a survey was conducted in a university in which 13 volunteers – all university faculty and students- participated. The purpose of this survey was to explore the use of derogatory terms against women and men, the list of names and pronoun forms of address used between husband and wife across three generations and the role of language in the socialization of girls and boys. All these aspects were explored in the regional languages of India. The results of the survey clearly show the exclusive use of abuses by men, trace the source of abuses in the female body and associate abuses with the chastity of women. These depict female subordination in the Indian society reflected through language use.

Keywords- Sex-exclusive features, Gender-preferential features, Gender-based discrimination in language, Abusive language, Language socialization.

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Introduction

Sex is the distinction based on biological differences, between men and women. *Gender*, on the other hand, is one's social identity. It is constructed through social actions, relationship with others and agreement with culture –its rules and restrictions. Gender-based differences can be visibly seen in the form of differential expectations from men and women in the society.

Sex-exclusive features in language

Sex-exclusive and gender-preferential features are the two ways in which gender distinctions are maintained in language. The feature exclusively associated with females or males is called a sex-exclusive feature. A sex-exclusive feature is either used by a specific sex or addressed to speakers of a particular sex. In English, kinship terms and address terms are typical instances of sex exclusivity. Examples include aunty, uncle, madam, sir, etc. as these terms directly indicate the sex of the referent.

The Japanese have a unique way of expressing gender differences in language. Their interaction styles and grammatical features marked for gender are given below. A close look at the data tells us how gender is created and communicated through language in Japanese.

The use of sex-exclusive sentence finals in Japanese

Japanese women use *wa*, *no* and *kashira* as sentence finals in their language:

kirei *da* **wa**
 beautiful (exclamation)
 ‘This is beautiful’

ashita *hare ru* **kashira**
 tomorrow be sunny I wonder
 ‘I wonder whether tomorrow will be sunny’

ashita *gakkou-e-iku* **no**
 tomorrow school –to-go-**confirming/stressing/emphasizing**
 ‘I will go to school tomorrow’

Men use sentence finals such as *ze*, *yo* (when preceded by *no da*) and *na*:

sa iku ze

well go-forceful/ emphasize

‘Well, let us go’

yo is used in two ways. It either follows the verb or the adjective. In the first case, it takes the following construction:

ashita iku yo (gender neutral)

tomorrow go

‘Let us go tomorrow’

ashita iku no da yo (boy)

ashita iku no yo (girl)

When it follows the adjective, the following constructions are possible:

ano hana kirei yo (girl)

that flower beautiful

‘That flower is beautiful’

ano hana kirei da yo (boy)

na gives the appearance of a tag:

ashita gakkou -e- iku yo na (boys)

tomorrow school-to-go won’t you?

‘You will go to school, won’t you?’

kono hana wa kirei desu na (boys)

this flower beautiful it is isn’t it

‘This flower is beautiful, isn’t it?’

kono hana wa kirei desu ne (girls)

this flower beautiful it is isn’t it

‘This flower is beautiful, isn’t it?’

Except *kashira* (meaning uncertainty) and *ze* (meaning forcefulness) the sentence-finals marked for girls and boys do not carry any overt meanings. But at the same time, if these sex-exclusive features are used by the other sex it would sound odd. For instance, if a feature marked for females is used by males it would typecast the speaker as a ‘male trying to become a female’.

The use of sex-exclusive 1st person pronouns in Japanese

watakushi is the most formal 1st person pronoun in Japanese available to both boys and girls. Its less formal variant is *watashi*. I have been told that while it is normal for girls to use *watashi*, its use might be quite formal for boys. On the other hand, *atakushi* and *atashi* are the informal 1st person pronouns available to girls. However *atakushi* is the more polite variant and denotes respect. Since these two informal variants are exclusive to girls they can be considered markers of femininity. Men and young boys, on the other hand, use *boku* and *ore* to refer to themselves. While *boku* is less formal *ore* is purely informal and vulgar; the use of *ore* is strictly prohibited by girls/ women. This term is restricted to men, who use it to sound masculine.

The use of sex-exclusive 2nd person pronouns in Japanese

The 2nd person pronoun forms of address are avoided in Japanese lest it is considered rude. When used the forms available are *anata* which designates intimacy and at the same time deference. Typically wives use *anata* to refer to their husbands. *anta* is a degree less polite than *anata* and *kimi* is used for someone lower than you in social hierarchy. In comic books and novels, boys often use *kimi* to address girls. *omae* is regarded as impolite but can also be used as an informal form of address in intimate/ informal exchanges, *temee* is more impolite and *kisama* is considered extremely impolite. It is extremely inappropriate for girls and

women to use the impolite 2nd person pronouns *kimi*, *temee* and *kisama* or *omae*; but at the same time these forms of address are used by men and boys to indicate the toughness and aggressive traits associated with masculinity.

Gender-preferential features in language

Gender-preferential features in language are those which are used by both men and women but one group uses it more often than the other. It has been found that for stable variables¹ women favor the standard or prestigious forms in language. There are three reasons why women use standard, and men non-standard, linguistic forms.

One reason would be, men and women have different orientations to class. Women orient to overt², standard language prestige norms whereas men to covert³, vernacular prestige norms. Women's refuge in standard language is due to the fact that they are unable to change their socio-economic status through action in the marketplace; unlike men who claim status through performance, women depend on the accumulation of symbolic capital for upward mobility.

This hypothesis finds support in Trudgill's work in Norwich (1972, cited in Eckert & McConnell-Ginet, 1999; Eckert, 1990) where women used standard variants over men. This usage of standard language was to enhance their symbolic capital in order to rise up in the social ladder. Lack of opportunities limited their possibilities to accomplish at work so language was the only mechanism by which women could capitalize and enhance themselves. Men, particularly middle class men, used working class vernacular variants to associate with the working class masculinity of toughness and strength. Note that by using vernacular variants these men were not associating with working class per say but with certain qualities associated with working class masculinity. These vernacular variants were at the opposite end of the social spectrum in relation to the standard variants in the linguistic market, and were

¹ A stable variable is a situation where there is no competition between two linguistic items and both variants co-exist together. It is a situation where one item does not lead to the death of the other.

² A variant is said to have an overt prestige if speakers are highly conscious of its prestige value and evaluate the variant as a standard marker in speech. Overt prestige is often associated with the speech of higher status speakers (Meyerhoff, 2006).

³ This is the prestige which is below the level of conscious awareness. In other words, the prestige of the variant is hidden and not openly acknowledged in the speech community. Covert prestige is often used in the context of the local, vernacular varieties and is meant to express solidarity and localness among the in-group members (Meyerhoff).

stigmatized. Through the usage of standard (overt prestige) and vernacular variants (covert prestige) women and men were projecting gender specific ideals.

The second reason is that, women's position in society makes them more vulnerable to criticism and they use standard language to avoid being criticized. This differential treatment makes women work harder on their symbolic capital like language and clothing. This reasoning differs from the preceding argument where linguistic standards are maintained for social mobility. Under this argument, linguistic standards are maintained by women to defend their position.

The usage of the standard as a defence strategy has been highlighted in Wolfram's study (1969, cited in Eckert & McConnell-Ginet, 1999) of the women in the African American community of Detroit. Here women at all socioeconomic levels are more conservative in the use of the stigmatized, AAE (African American English) stable grammatical variables vis-à-vis men. The African American women are the most victimized, sexually and socially, in the American society. Their use of standard language is seen as a strategy to defend themselves against this social vulnerability. This is similar to the case of Mayan community where women use polite variables with men to avoid physical abuse, and with women, to get support and to avoid punishment (Brown, 1980 cited in Eckert & McConnell-Ginet, 1999).

Thirdly, men' and women's use of standard and non-standard language has been correlated with employment opportunities as well. In industrial societies, women generally hold jobs of a secretary and teacher. A secretary is a link between the outside world and her employers and their linguistic correctness strengthens their employer's reputation. A teacher is acknowledged by institutions where linguistic correctness is valued and they are supposed to be role models for their students. At the same time, jobs of men like construction workers and truck drivers may not require the use of standard language. They share dense networks with fellow construction workers that further restrict their language to the vernacular (Milroy, 1976, 1980). A secretary or a teacher, on the other hand, have loose networks as they are expected to interact with varied individuals, students and clients. This maintenance of gender differentiated employment market contributes to establishing gender as a set of polarized oppositions.

The use of gender-preferential interactional styles in Japanese

Japanese males and females also differ in their interactional styles. In the Japanese society, interruption is viewed as a device to support the speaker and to show active listenership. A study by Ueno (2003) showed that females use more supportive interruptions in their language. It has been claimed that in the American societies as well females use this linguistic device to show cooperation.

Japanese women also use more backchannels than men. Backchannels are linguistic expressions like *hmm*, *yes*, or *strategies seeking clarifications from the speaker* -- used by the listeners in a one-way communication. One of the functions of backchannels is demonstrating active listenership.

The language forms used by Japanese women reflect their status in the society. The use of feminine 1st and 2nd person pronouns and avoidance of masculine 1st and 2nd person pronouns clearly indicate the inferior status of women vis-à-vis men, and the role models of women as good wives and daughters. These expectations are emphasized through the use of polite forms in language, to refer to themselves and others. The different interaction styles of women and men, as well, show that women are expected to be more supportive and collaborative than men – the qualities considered to be feminine, universally.

Testing gender-based discrimination in language

To test sex-exclusivity and preferential features in the regional languages of India, I conducted a survey in a university on gender-based discrimination in language. 13 volunteers, including faculty members and students, participated in this survey. The participants ranged from an age group of 21 to 68, and spoke various Indian languages – Marathi, Hindi, Malayalam, Tamil, Bengali, etc. The survey questionnaire was administered in separate batches, sometimes in groups and on other occasions individually. The results of their responses were tabulated accordingly.

One of the test items was to list derogatory terms used against men and women in participants' languages. It was found that most of the terms referring to women described them in terms of sexual attractiveness in the eyes of men. Whereas most of the abuses used in their respective languages were associated with the chastity of women. On the other hand, the labels which described men celebrated their sexual prowess and promiscuity.

Language plays a very important role in the socialization of girls and boys. The second kind of test item was, to list the kind of words that as social ethics have to be avoided by girls in

each one's community. A related question was, tapping the attitudes of participants towards girls' and boys' use of abusive language (Test Item: If a girl happens to use abuses, will she be labeled in a bad way? Does the same rule apply to boys?)

69% of the respondents believed that girls who used bad language were marked. And atleast 54% of them felt that it was normal for boys to use expletives as part of their socialization. Many male respondents agreed to the fact that they were encouraged to use abuses while they were growing up and it was very normal for boys and men to use abuses referring to the female reproductive system, sexual intercourse and chastity of women. But as a social given, these abuses have to be categorically avoided by girls and women.

In addition, a test item to elicit the names and pronoun forms of address between the parents, grandparents and couples of the present generation was also included. The purpose of this item was to draw an inter-generational change in the use of the terms of address used between the spouses. It was found that in the participants' previous generations it was normative for the wife to use honorific titles like *sir*, *father* and 2nd person pronouns of address like *you* (honorific) for referring to their husbands. In some cases, women also used titles that designated ownership (e.g. *malak* in Marathi), terms used to refer to senior males in the society in general (e.g. *chettan* in Malayalam) or even avoided addressing their husbands directly. The wife, on the other hand, was said to be addressed by her husband directly by name, pronouns of address which lacked honorificity or terms which designated authority.

Most of the respondents came to a consensus that couples of the present generation use reciprocal terms of address and pet names to address each other.

Conclusions

One of the biggest disadvantages of this test was that it was not a systematic observation of language use. Therefore there is no way by which one can test the authenticity of participants' responses. Nevertheless this survey gives us insights into the source and extended meanings of abuses, patterns of gender-based labeling and unequal terms of address between women and men.

The following conclusions can be drawn from the survey:

1. Like the Japanese, the Indian society also celebrates gender-based ideals. These gender-based ideals reflect differential expectations from women and men. E.g. the feminine ideals of purity are evident in differential patterns of language socialization where women and girls are expected to avoid expletives in their language. The virtue of chastity is often associated with the female, and the direct and indirect references of this virtue with the female are evident in the usage of abuses. The expectations from men contrast to that of women. E.g. the coarsest abuses are exclusively meant to be used by men and it is quite attractive for men to be promiscuous, at the same time. These ideologies are reflected in the labels or terms used for men.
2. The female subordination is quite evident in differential terms of address where the husband uses a pronoun lacking in respect to address his wife. But, on the contrary, the wife either uses respectful terms of address to refer to her husband or avoids addressing her husband directly. These unequal terms of address further reflect hierarchical relations between men and women although one sees a change in the current generation where reciprocal terms of address are said to be used between husband and wife.

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USE OF MYTHICAL SYMBOL IN RUSKIN BOND: SITA AND THE RIVER

Ms. Shameena Bano*

Abstract

Ruskin Bond an Indophile Britisher blood in his vein lyrically recreates the Indian values and ethos in the English Language. The fact is that Bond writes about the land, the ordinary people, the flora and fauna, culture, its values and mostly peculiarities of the people of small-town contributes to the Indian short story in English. This shows that he has himself imbued with the Indian ethos and the moral values. Therefore, Bond has selected the medium of the short story to educate its young mind in India, where the religious and philosophical truths discovered by the forecasters were made to reach the common man through the medium of the story called Puranas. These stories, which form especially the backbone of Indian mythology, its long from the Vedic period, inexhaustible, remain ageless, invincible in timeless primordiality, it impart as a great medium for people especially parents to inculcate interest in Indian culture in the young generation. Sometimes the stories help us in understanding and also help dealing the life with confidence. It is an inbuilt pressure reliever of the society. The most interesting aspect of the stories in Indian mythology is that they are usually meant to convey subtle fact, values, rules and maxims to guide our daily lives.

Keywords: *Indian Mythology, Moral Values, Symbol, God, Nature.*

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Introduction

Ruskin Bond an Indopile Britisher blood in his vein lyrically recreates the Indian values and ethos in the English Language. Bond has selected the medium of the short story to educate its young mind. For no other ancient civilization has used the medium of story to educate its people, where the religious and philosophical truths discovered by the forecasters were made to reach the common man through the medium of the story called Puranas. This story is enriched by the Indian soil, which forms, especially the backbone of Indian mythology, its long from the Vedic period. This story helps us in better understanding and dealing the life with courage. Bond's has used of the mythical symbol becomes function of human consciousness, emotion, belief and other components of its experience. This paper will make a deep study of the mythical symbol from collection of short stories *Dust on the Mountain: Collected Stories*.

In the story “**Sita and the River**” there are four characters a young girl Sita, who is less than sixteen, her grandfather, grandmother, and a boy’s name Vijay. Vijay is a character who appears as a savior when Sita’s is carried by the flood, which sweeps her island, when she is alone. Vijay also protects her from other wild dangers too. Vijay saved her from starvation by offering her the mangoes. Here, “the Vijay mysteriously appearance in a boat to rescue Sita is reminiscent of an even earlier myth of the flood, when King Satyavrat, who was doing penance on the bank of a river, was warned of a heavy rainfall that would result in the destruction of the world. Satyavrat was told that a boat and a fish to whom he had been kind (none other than God Vishnu), would appear mysteriously, and he would be taken to a new world where, known as Manu, he would be the founder of the human race. (Khorana 256) “Sita’s gets a fanciful thought that her savior Vijay is Lord Krishna Himself.” Sita was confused and wondered if “the boy was actually Krishna..... He looked blue in the moonlight, the colour of the young God Krishna.” (236).

In her sleep, she dreams of Krishna and Vijay who seems to be one and the same. In her land of dreams, she is sitting beside Lord Krishna on “a great white bird” over the high mountains and to the realms of the God. When she got up, Vijay’s said, “I will play my flute for you...The sweetest music that Sita had ever heard came pouring from the little flute.” (236) The sweet music carried her (Sita) away again dream land. As if they (Sita and the blue God) were riding on the bird once again. Sita’s dream of riding on a white bird, “Garuda,” refers to an episode of the Ramayana, in which Garuda tried to save Sita from the clutch of

the evil king of Lanka. According to the Hindu religious epic, the Mahabharata, Lord Krishna is worshipped as an incarnation of Lord Vishnu and in the Ramayana, Sita as a divine mother. Both of them repeatedly reincarnate on earth to end human suffering.

Here, the flute music is regarded as a symbolic submission to the transcendental unifying spirit of God and nature. Here, the concept, that whenever the innocent and the virtuous are found caught in danger there materializes Lord Krishna to protect them, is demonstrated in the story.

“The man who sees me in everything
and everything within me
will not be lost to me, nor
will I ever be lost to him.

He who is rooted in oneness
realizes that I am
in every being; wherever
he goes, he remains in me.

When he sees all being as equal
in suffering or in joy
because they are like himself,”

(The Bhagavad Gita 4.8)

Bond uses so many images related to him-the image of a bird and the image of a flute. Like god Krishna, Vijay is also the son of a cowherd. His whole life among the cowherds is simple, natural and pleasing. He is spontaneous, free and voluntary. When Vijay leaves Sita, he gives his flute to her (Sita) as a token of love, “Keep it for me,’ I will come for it one day.’ (248)

“Human life can find its fulfillment in warm and
loving relationships. Human love sublimated
to the utmost level,so it becomes comparable with love
to God, "Krishna's flute symbolizes the call of God,
which caused the souls of men to forsake their
worldly attachments and rush to love him.

Just as lord Krishna promised Radha to return and meet her soon. At the end, the writer combines the male and the female to recreate a generation like Manu and Smirti and that universe is renewing frequently after destruction.”

(Govindam, *Hinduism*)

In the last Carnam she recalls their secret meetings and how Krishna used to compose her:

**visadakadambatale militam kalikalusabhayam samayantam |
mamapi kimapi tarangadanangadrisha manasa ramayantam ||**

(Govindam,*Natalie Savelyeva*)

“Shri Krishna is a towering personality and it is difficult to separate the human aspect of his life from the divine in Krishna concept. He is a grand mystery and everyone has tried to understand him in his own way. The Yogis considered him to be the absolute truth, the Gopis the highest object of love, the warriors as an ideal hero, Kamsa as an object of fear and Sisupala as an object of hate whatever one thinks of him, One can be attained him through friendship as Yudhisthira or through devotion as Narada. So, Krishna is the embodiment of intellectual and spiritual glory. No other single idea has so much influenced the course of India’s religion, philosophy, art and literature as the life and personality of Krishna” (*Hindu wisdom*)

In the later part of the story when life restores to normal, Sita returns to her small island with her grandfather. She is deeply influenced by Vijay and develops a soft corner for him. Every day, she eagerly awaits, Vijay and finds her expectations, turning into a reality when she finds Vijay beside her one day. “He sat down beside and they cooled their feet in the water, which was clear now, taking in the blue of the sky.” (250) Here, the beautiful, realistic and innocent adolescent love of an Indian village life is portrait They start conversing: “Sometimes the river is angry, and sometimes it is kind.’ said Sita. ‘We are part of the river,’ said the boy. “We cannot live without it” Human life can find its fulfillment in warm and loving relationships” (250)

“Nature mysticism and Vedanta philosophy is clearly visible in Bond. Ruskin Bond’s characters come to a realization of their spiritual affinity with creation through a single manifestation of nature. Whether it is a cherry tree, a raindrop, a window on the roof from

which to view the world, a hidden pool, or an old banyan tree, a single facet serves as a symbol of harmony with nature and a transcendental vision of life” (Khorana, 259) Bond form a close affinity of characters with nature and understanding it is many boons and expressing their gratitude towards it. Through the grandmother stories, Sita has acknowledged nature as a source to reach the Supreme Being. In the face of disaster, how people’s association of gods with nature holds scope for better communion between humans and nature. There is a peepul tree “it was an old tree. A seed had been carried to the island by a strong wind some fifty years back, had found shelter between two rocks, had taken root there, and had sprung up to give shelter to a small family.” (230). The tree has its own spirit that commands the respect of humans.” (230) The tree becomes a symbol of generosity and magnanimity. Sita is told by her grandmother to yawn under the tree:

“And, if you must yawn, always snap Your fingers
in front of your mouth. If you forget to do that,
a demon might jump down your throat!

Moreover, the grandmother compares the peepul tree to the body of Lord Krishna and fosters the reverential outlook towards nature. “the peepul had beautiful leaves and Grandmother likened to the body of the mighty God Krishna –broad at the shoulders, then tapering down to a very seriously.” (220)

Sita’s grandfather has good knowledge about the river and also awareness of its duality because of his daily interaction with it. All the member readiness to accept the odds of their lives and lead a harmonious life with nature Their relationship with the river, as that Hindu toward the holy Ganga, is one submission and faith, and is not dictated by a desire to dominate or exploit it. They are contented with their right appropriation of nature and do not involve in the misappropriation of the natural resources. (*Gentle shade* 35) The river helps the whole family to be self-sufficient by supplying their daily needs: water for drinking and washing, for their vegetable, fish for food and also a safe environment to develop their goats and hens.

Sita’s is ready to accept and to adapt to the changing face of nature. How humans should seek to change and face the challenges posed by nature through sheer correspondence with it. Sita keeps a doll named “Mumta” as her companion; she can only hear her doll answer.

Here, Bond always prefer or choose the Indian names for his characters, as doll “Mumta” well illustrate in the context of Hindu tradition which signifying love and affection which a mother feels for her child. Sita love her doll deeply. She considers her sometime as her best friend and sometime as her mother, with whom she can share all her feelings and secrets. She shares her loneliness and thoughts whenever she feels low. Because untimely death of her mother’s and father walked a hundred miles away to work in a factory and earn for the family. Sita’s feels loneliness with no friends to share her emotion and to play with her.

In spite of poverty and other difficulties in life, Bond characters never lose hope and ready to face the trouble and tribulation of the life. What shrine forth in the small village people are innocence and simplicity - real charm and attraction for all time? As Sita says, “They don’t need a reason for being angry. They are angry with everything, and we are in the middle of everything.” (225). Sita’s indulges in reasoning which gives the impression of mythical knowledge and has capacity to understand the divinity behind the duality of nature that she might be punished for her deed or Karma in this life or earlier. She is determined to rescue it in the midst of the storm. She tries to make sense of her shattered physical world and her place in the cosmic world. Sita’s conversation with doll implies her mental fear for God anger. Therefore Sita’s rag doll, Mumta, symbolizes wholeness amongst the chaos and disarray. One also finds that the Sita and Mumta relationship is based on **Maslow’s theory of hierachal** that arise the need of love and belongingness persuade a child to built relationship with an inanimate object and start conversation with it. The child considers even dolls and toys to be real.

“The Gods of the mountain are angry,” said Sita.

“Do you think they are angry with me?”

“Why should they be angry with you” asked Mamta.

“They don’t need a reason for being angry.....” (225)

Above conversation suggest, the innermost layer of dream sequences is related with a mythic time at a deeper allegorical level. Sita remember stories told by her grandmother. The stories portrait young ‘Krishna as a symbol ‘ friend of birds;’ Indira as the source of ‘thunder and lightning;’ Vishnu, ‘ whose steed was a great white bird;’ Ganesh with’ elephant head;’ and Hanuman as a symbol ‘ the monkey-god’. (226)Therefore, she is ready to accepts all the changing face and the power of nature and worship in all forms. The most important and powerful deities – such as Shiva, Durga, Kali— are perceived in benevolent and fierce

.Thus, the nature is described as omnipotent characters and omnipotent being three actions as Creator who is Brahma, Preserver who is Vishnu, and Destroyer who is Shiva. She is the destroyer and preserver like Shelley's West Wind. Here, Sita could not accept it as a wild beast because nature acts as harbinger of human life do not harm the humans.

"God creates this world, enters into it and like an actor who assumes different roles on the stage performs various acts" (*Bhagavad Purana* 111)

"Creation, preservation and destruction constitute an eternal cycle of existence. Hari, that is Visnu, represents the principle of preservation and continuity of life. He is a supreme being, sublime source of eternal bliss; the entire universe is just a manifestation of his power. He assumes many forms to destroy evil protect the good and restorethe glory of Dharma."

(Bhagavad Gita 4.8)

Here, one might also see that Bond makes a direct reference to the theory of the *Gita*. In the chapter ten "Vibhuti-Yoga" Lord Krishna says everything emanates from him and he is the primeval origin of all things. There is nothing in the world in the heart of which divine spark is not there "Whatever is the seed of all beings that also am I, O, Arjuna. There is no being, whether moving or unmoving that can exist without me" Neither in Shiva, nor in Buddha, nor in Jesus Christ, but believes in an ordinary man. Bond's credo is similar to that of archetypal devotee of Muse, who deprived pleasure through creation. (Chandhani 164)

So, the law of nature is acknowledged by all characters of Bond. Here, Sita acknowledged the flood as the anger gods in the mountains and patiently waits for their getting appeased "the river was very angry now, it was like a wild breast, a dragon on the rampage, thundering down from the hills and sweeping across the plain, bringing, with it dead animals, uprooted trees, household goods, and huge fish chopped to death by the swirling mud." (230) Though Sita is young 'thin' body frame and meek, she is very confident and remarkably strong. It is there ready to accept/face the odds of life, induced by nature, which makes the character fit, lead a peaceful, truthful and pleasant life. The positive vision and philosophical acceptance of hardship is expressed through the story. One can see that inspite of the sufferings and uncertainty of life, Bond characters are always confident and hopeful. Sita because of her hope, she has escaped on another occasion where he candidly says, "You cannot win any

things if you are uncertain." (*Collected fiction* 174) This is statement from Sita's revealed, "The gods were with us." (175) His sympathizes is always with the sufferers.

No end nor middle nor yet beginning of Thee,

Do I see, O All –God, All –Formed! (Edgerton 16)

The story "Sita and River" is unique in the sense that Bond's moral vision, and aesthetic vision, ethical vision are vividly expressed. The river, the tree and the mountain are used as a symbol of eternity. Bond says that in Hinduism the Peepal tree is a "sacred tree." He also glorifies Lord Krishna. Sita very loves to her grandfathers; she looked after her grandparents very well; as she was obedient, she is respectful, she accepted their decision and stayed alone on the island. Bond praised for Indian attribute that she possess.

Capturing this very moment when he says that Sita bent and touched her grandmother's feet before her departure to town for treatment. Since the stories have the values of India, the young mind use of these stories to understand the cultural values of the country. Bond like Foster travelled this mysterious land with a compassionate, considerate, and generous heart. He writes "To love it through the friends, I made and through the mountains, valleys, fields and forests which have made an indelible impression on my mind. For India is an atmosphere as much as it is a land" (*Scenes from a Writer's Life* xv)

Conclusion

Bond's main objective in his stories is to revive the traditional and ethical and moral, cultural values of India. Bond tries to look for the spirit within and attempts to capture its folk tales, the Jataks tales, and myths and symbol and in addition to the natural elements like hills, valley, plain, mountains, and the people of India as the source of his stories. In bond we find an India surging with hope, dynamism and full of life. India is not a land of full of gloom and hopelessness as one might see in the conception of Chaudhari and Naipaul. Therefore, for Ruskin Bond: "India has been an atmosphere, an emotional more than geographic entity." And, he could sing: Oh India, My India for all your dust there is blossom" (*Scenes from a Writer's Life* 9)

EXTRADITION AND HUMAN RIGHTS IMPLICATIONS

Dr. Sharia Anjum*

Abstract

The international criminal activities today have made domestic criminal law enforcement dependent upon international cooperation. In international law there is no general obligation of extradition as every country outlines the conditions, subject to which requests for extradition are granted. In fact, from the origin of the extradition system, objections stemming from human rights have been the major considerations in the grant or refusal of extradition. This paper attempts to discuss the human rights barriers to extradition. It also discusses few instances where India has encountered with this problem. Now a day's extradition is challenged on the ground that it would infringe the offender's right to fair trial procedures the right to life, bodily integrity and dignity. As a result, the requested State is forced to balance the protection of the human rights of the individual, whose extradition has been requested with the necessity of ensuring that criminal laws of sovereign States are enforced. It is in this background that the article examines the current level of the human rights protections afforded to persons facing extradition in India.

Keywords: *Extradition, Human Rights, Torture, Death penalty, Terrorism*

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Introduction

The States have long accepted that extradition may be denied on human rights ground of the fugitive. International human rights law does not establish a right not to be extradited. On the contrary, as an instrument which enables States to obtain custody of and prosecute the alleged perpetrators of human rights violations, extradition can make a significant contribution to the fight against impunity for such crimes. Human rights law does, however, impose certain restrictions and conditions on the freedom of States to extradite, most importantly by prohibiting the surrender of the wanted person to a risk of serious human rights violations. In some circumstances, this means an absolute bar to extradition, while in others – in particular, cases involving the death penalty – it has long been established practice to grant extradition only if the requesting State gives assurances concerning the treatment of the wanted person upon return. Evolving human rights standards have fundamentally changed the position of the individual in the extradition process.

Transnational criminal activities have become a global problem. To combat this problem there is growing international cooperation among States in criminal matters. Article 1¹ of the United Nations Model Treaty on Extradition obliges States to extradite on the basis of a treaty. However there is no rule in International Law which stops States from extraditing a fugitive in the absence of a treaty², even if the requesting State satisfies the procedural requirements necessary for surrender to be authorized, the transnational fugitive offender can still plead that his extradition would violate provision which tend to be included in all the treaties. Further, there are some generally accepted defenses to criminal charges which can also be utilized in an extradition hearing.

Bilateral extradition treaties as well as multilateral extradition agreements and conventions also provide for specific grounds for refusal to extradite on the part of the requested State. The applicable treaty or national legislation may provide for refusal of extradition in mandatory or discretionary terms; extradition law leaves it to States to define the terms of refusal. By contrast, bars to extradition under international human rights and refugee law impose an obligation on States to refuse extradition where this would result in the violation of fundamental rights of the individual concerned. On the other hand, customary International

¹ <http://www.un.org/documents/ga/res/45/a45r116.htm>(Last visited on 02.05.2015)

² Geoff Gilbert, *Extradition, International and Comparative Law Quarterly*, Vol. 42, Issue 2, 1993, p.442

Law as well as the duty to extradite or prosecute, as contained in a number of international legal instruments, restrict the freedom of States to refuse extradition for certain international crimes. Some of the national and international conventions applicable to extradition have limited the scope of certain grounds for denial, most notably, the political offence exemption. However our concern is to specifically deal with human right. In India, this provision is governed by the Extradition Act, 1962 as well as treaties.

Double Criminality

In order for an extradition to take place the crime for which extradition is sought must be a crime in both the requesting as well as the requested State. From the human rights perspective it serves as the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State.³ Keeping in mind the fact that the difference in criminal laws of different countries and the criminal liability entails serious consequences as deprivation of human right to liberty and dignity, the rule of double criminality is an important safeguard for fugitive. The importance of this principle is best understood when the laws of various countries relating to offences such as adultery, euthanasia, suicide are compared.⁴

Rule of Specialty: This rule protects the fugitive from having to face charges of which he has no prior notice to his transfer, it enforces the double criminality and also prohibits extradition for certain categories of offences like fiscal offences, political or military offences and it also protects from abuse of legal processes of the requested State which is called upon in extradition to renounce its jurisdiction over and protection of the fugitive. Particularly where it seems that the fugitive after return may be prosecuted or prejudiced on political grounds, it has become the constant practice of States to require assurances from the State requesting extradition that it will respect the specialty rule.⁵

Thus the rule of specialty protects the legitimate expectation of the requested state and the fugitive criminal that he will not be prosecuted for an offence other than the one for which his extradition is allowed after employing due process of law. In a way rule of specialty is just

³ I. A Shearer, *Extradition in International Law* (1971), p. 137

⁴ Christopher L. Blakesley, “ The Law of International Extradition: A Comparative Study”, *International Review of Penal Law*, vol. 62 (1991).p.412

⁵ *Encyclopedia of Public International Law*, Vol. 02, Elsvier,1995, p.330

another side of the rule of double criminality. So, this rule also provides double shielded safeguard for the human right to life and liberty.

Political Offence

Although historical evolution shows that extradition began for the purpose of punishing political offenders, but now a days political crimes are considered as an exception.⁶ In 1833, Belgium became the first country to enact a law on non-extradition of political offenders and by the beginning of the 19th century; almost every European extradition treaty contained an exception for political offences. The first general bilateral extradition agreement to include a political offence exemption was the 1834 treaty between Belgium and France.⁷ By 1875, the practice was sufficiently established that the determination of what constituted a political offence was reached in accordance with the laws of the requested State.⁸

Almost all modern extradition treaties provide against the surrender of political offenders and are also specified in Municipal Laws of the States. Section 31(a) of the Indian Extradition Act, 1962 restricts the surrender of a fugitive if his surrender is sought for an offence of a political character, which can be interpreted in two ways. First interpretation is that, surrender of a fugitive criminal shall not take place if the offence is of a political character. The second interpretation of it gives emphasis on the fugitive himself that if the fugitive criminal himself proves to the satisfaction of the magistrate/court in front of whom he may be produced or of the Central Government that his requisition is made to punish him for an offence of political character. However, on occasions fugitives have attempted to avoid return on the basis of the alleged political prosecution. In *Re C G Menon* and another Madras High Court did not consider Menon's allegations that he was a victim of political animosity, as Menon was released for other reasons. In *Re Government of India and Mubarak Ali Ahmed*, the case was decided by the Queen's Bench Division of the High Court of Justice in 1952, where the applicant filed a writ of habeas corpus to prevent his return to India for forgery, the Counsel for the applicant maintained that he has been persecuted for political reasons by India and

⁶ J. N. Saxena, India: Extradition Act 1962, *International and Comparative Law Quarterly*, Vol. 13, Issue 1, 1964, p.125

⁷ I. Stanbrook and C. Stanbrook, *Extradition: Law and Practice*, Oxford University Press, Oxford, 2000, p. 142

⁸ M.C. Bassiouni, *International Extradition: United States Law and Practice*, Oceana Publications, New York, 2002, p.595

was convicted to be a spy of Pakistan. Lord Chief Justice Goddard did not find that the applicant would be persecuted as a political offender and ordered his return.⁹

In explaining the political offence, exception being universally accepted principle, the application of this practice may arise very delicate problems due to the difficulties in determining what constitutes a political offence. No satisfactory and generally acceptable definition of a political offence has been found yet. Attempts have been made to solve this problem by attempting to define the acts, which constitutes political offences.

However, existing treaties and statutes offer little help to this problem. The States that had entered in extradition treaties mostly give a list of offences which should not be considered as political offences. But, if no such offences are listed in the treaty then the matter will be dealt in accordance with the laws of the requested State.¹⁰ Whereas few treaties provide a list of offences which should not be treated as political offences.¹¹ Many international conventions have come into force to specify acts that shall not be regarded as the acts of political character. A list of the same is given in the Schedule to the Extradition Act, 1962.

However, the world gradually recognized that this exception which had originally protected the human rights of the fugitive was being used to crush the human rights of the victims. This problem was resolved through a series of multilateral conventions and numerous bilateral treaties that describe specific acts which regardless of their motivation,¹² will be subject to extradition and will not count as political offences.

It is noteworthy that this exception is being opposed at present because it is high time the violent criminal activities must be punished whether it is politically motivated or not,

⁹ Robert E. Clute, Law and Practice in Commonwealth Extradition, *American Journal of International Law*, Vol. 1, No. 1, 1959, pp.24-25

¹⁰ Article 3 of treaty with French Republic, Notified on 1 June 2007

¹¹

- (i) Extradition treaty between India and Kingdom of Bahrain, 2005, Article 5.1
- (ii) Extradition treaty between India and Republic of Belarus, 2008
- (iii) Extradition treaty between India and Poland, 2008, Article 5.2
- (iv) Extradition treaty between India and Turkey, 2004, Article 5.2
- (v) Extradition treaty between India and Spain, 2003, Article 3.2
- (vi) Extradition treaty between India and Government of United Kingdom of Great Britain and Northern Ireland, 1993, Article 5.2
- (vii) Extradition treaty between India and Republic of Uzbekistan, 2002, Article 6.2
- (viii) Extradition treaty between India and United Arab Emirates, 2000, Article 6.1

¹² Valerie Epps, The Development of the Conceptual Framework Supporting International Extradition, *Loy L. A. International and Comparative Law Review*, Vol. 25, 2003, p.378

particularly the terrorism.¹³ Terrorism has grown to be in different forms which have created a remarkable disturbance in maintaining world public order. It has also been a matter of concern for India and it was prominent when it ratified 1937 convention on terrorism.¹⁴ The interpretation of the concept of a political offence has been particularly divisive with regard to acts considered terrorist crimes by some, acts of legitimate resistance by others. Moreover, as noted above, courts in a number of countries have held that terrorist acts which indiscriminately endanger the lives and physical integrity of civilians, do not qualify as political offences. Some more recent general extradition instruments also exclude the political offence exemption as a ground of refusal, if the fugitive is sought for a conduct, “depoliticized” by other international treaties or conventions, although it may still be relevant in other contexts¹⁵, The need for international cooperation to combat transnational crimes has increased during the last decades particularly following the 11 September 2001 attack. Various treaties have specified terrorism which shall not fall under the political Offence exception.¹⁶ Apart from that, India is a party to International Convention for the Suppression of Terrorist Bombings (which came into force on 23 May 2001), under which India got extradited Abu Salem to which Portugal is also a party.

The universal legal framework against terrorism consists of a set of conventions adopted at the international level to counter international terrorism. The 13 major UN conventions for terrorist activities are fundamental tools in the fight against terrorism to which India is a party.

Double Jeopardy

¹³ Valerie Epps, The Development of the Conceptual Framework Supporting International Extradition, *Loy L. A. International and Comparative Law Review*, Vol. 25, 2003, p.378

¹⁴ S. A. William and J. G. Castel, *Canadian Criminal Law*, Butterworths, Toronto, 1981, p.195

¹⁵ www.unhcr.org/refworld/pdfid/3fe846da4.pdf (Last Visited on 28.12.2014)

¹⁶ (i)Extradition treaty between India and Canada, 1987, Article 5.1(e)

(ii)Extradition treaty between India and Kuwait, 2007, Article 6.1(a)

(iii)Extradition treaty between India and United Arab Emirates, 2000, Article 6.1(c)

(iv)Extradition treaty between India and United Kingdom of Great Britain and Northern Ireland, 1993, Article 5.1(o)

This rule opposes a practice which would subject a person to repeated harassment for the same act or acts. Under this rule, extradition may be refused if the offender has already been tried and discharged or punished, or is still under trial in the requested State, for the offence for which extradition is demanded.¹⁷ The Extradition Act, 1962 does not make a specific mention of it, but the rule is incorporated in Section 403 of the Criminal Procedure Code.¹⁸

In case of *State of Rajasthan v. Hat Singh and Ors.*¹⁹ The Supreme Court of India held that “Article 20 (2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once.” In the US as well in India, the protection against double jeopardy is a constitutional right. At present the countries like Australia, Canada and UK, parts of Asia and the United States guarantee protection against double jeopardy. In fact it forms a part of International Covenant on Civil and Political Rights and European Union Constitutions and numerous documents governing International Criminal Court.²⁰ This provision has been incorporated in extradition treaties. The treaty with Poland provides that “a person shall also not be extradited if in respect of the offence for which his extradition is requested, he has been previously proceeded against in the requested State and convicted or acquitted with final effect.”²¹

Another treaty with Spain²² stipulates that, “the extradition shall not be granted if final judgment has been passed by the competent authorities of the requested State upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested State have decided either not to institute or to terminate proceedings in respect of the same offence or offences.” Some other treaties have also incorporated the same provision in them.²³ Every State has a provision against double jeopardy so that no person shall be put to

¹⁷ Harvard Research Draft Convention on Extradition, Vol. 29, *American Journal of International Law*, 1935, p.145

¹⁸ R.C. Hingorani, *Indian Extradition Law*, Asia Publishing House, Bombay, 1969, p.65

¹⁹ AIR 2003 SC 791

²⁰ *The Encyclopedia of American Civil Liberties*, Paul Finkelman, Vol. 1, Routledge, 2006, p. 1105

²¹ *Ibid.*

²² Extradition treaty between India and Spain, Notified on 8 December 2003, Article 9

²³ (i) Extradition treaty between India and Kuwait, 2007, Article 6.2(a)

(ii) Extradition treaty between India and France, 2007, Article 6.1

criminal trial twice for the same offence. It is a right given to the accused to keep him away from being prosecuted again for the same offence he can take plea of it.

Death Penalty

Since the middle of the nineteenth century there has been a tendency to limit the application of the death penalty as to persons who have been extradited. This may be accomplished by excluding from the application of the extradition treaty persons charged with crime upon which the death penalty can be inflicted according to the laws of the jurisdiction where the charge is pending or the Government may undertake to recommend to its own authorities the commutation of the sentence to life imprisonment.²⁴ Some extradition laws and treaties allow the requested State to deny extradition if the offence for which extradition is asked is punishable by death under the law of the requesting State, no human rights convention outlaws the death penalty; although protocols to ICCPR²⁵, European Convention on Human Rights²⁶²⁶ and American Convention on Human Rights²⁷ do so.

The rationale behind refusing extradition on the ground that the fugitive is likely to incur death penalty is twofold:

1. The abolition of death penalty by a given State is predicated on humanitarian considerations and public policy, and therefore;

²⁴ George Grafton Wilson, *Handbook of International Law*, West Publishing Co, 1939, p.153-54

²⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of Death Penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, Annex, UN GAOR, 4th Session, Supplement No 49 at 206, Un Doc A/44/49(19890, 29 ILM 1464 (1990)

²⁶ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty, *opened for signature* 28 April 1983, Europ. TS. No. 114, 22 ILM 538 (1983)

²⁷ Additional Protocol to the American Convention on Human Rights to Abolish Death Penalty, 8 June 1990, OASTS No.73 ,29, ILM 1447 (1990)

2. It would be abhorrent to that State to grant extradition because this would be using its processes to reach an outcome which is in violation of its laws and public policy²⁸

The European Convention on Extradition in its Article II provides that if the offence for which extradition is requested is punishable by death under the law of the requesting party, and if in respect of such offence the death penalty is not provided for by the law of the requested party gives such assurance as the requested party considers sufficient that the death penalty will not be carried out.²⁹

Section 34 C of the Extradition Act, 1962 makes provision in this regard, which provides that “notwithstanding anything contained in this any other law for the time being in force, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence.” Mostly treaties make provision in this regard. The treaty between India and Bulgaria³⁰ in Article 3 stipulates that “if under the laws of the requesting State the person sought is liable to the death penalty for the offence for which his extradition is requested but the law of the requested state does not provide for death penalty is a similar case, extradition may be refused, unless the requesting State gives assurances as the requested State considers sufficient that the death sentence will not be carried out.”

Other treaties also have such provision. By virtue of this clause India is in a position to defend its extradition requests on the ground that though it retains capital punishment, it has exempted such possibility with regard to extradited individuals.

Now days States are irreconcilably divided over the morality and effectiveness of the death penalty. Hence the inclusion of the death penalty clause in many extradition treaties allowing the requested State to refuse extradition unless satisfactory assurances are given by the

²⁸ M.C. Bassiouni, *op.cit.*, 2002, p.735

²⁹ European Convention on Extradition, 13 December 1957, 597 UNTS 338

³⁰ Extradition treaty between India and Bulgaria, 2008 (Treaty with Poland 2008, Article13; Treaty with Ukraine, 2008, Article 16 and Treaty with Belarus , 2008, Article 15; also make the same provision.)

requesting State that the death penalty will not be imposed- However, even where a bilateral treaty fails to include such a provision; the requesting State should be sensitive to the convictions and values of the requested State and be prepared to give firm assurances that the death penalty will not be imposed on the extradite. This is a subject on which the requesting State cannot in most circumstances impose its values on the requested State.³¹ However, extradition will also be refused if there is a risk that the fugitive, if surrendered, will be subject to torture. Extradition of Kim Davy; mastermind of Purulia Arms Drop case in 1995 was refused by Denmark and Danish High Court remarked that "India has not become party to Convention against Torture"³² India is experiencing the negative impact of its torture scenario on the positive prospects of its extradition requests So, existence of torture practices in the requesting state is a major hurdle for clearance of extradition request. International Law requires that extradition should be refused when its result will not be persecution by the requesting State, of the fugitive criminal on the basis of race, religion, nationality, sex or political opinion. Article 9 of the International Convention Against the Taking of Hostages provides that States should not grant requests for the extradition of offenders under this convention if the alleged offender would be punished on account of his race, religion, nationality, ethnic origin or political opinion.³³

Article 3(2) of the European Convention provides that a person shall not be extradited if the requested party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race: religion: nationality or political opinion, or that that person's position may be prejudiced for any of these reasons³⁴, the United Nations Model Treaty on Extradition 1990³⁵ in its Article 3(b) makes the same provision. Various treaties between India and other foreign States have this provision.³⁶ A recent treaty³⁷ provides that "extradition shall not be

³¹ John Dugard and Christine Van Den Wyngaert, Reconciling Extradition with Human Rights, *American Journal of International Law*, Vol. 92, No. 2, April 1998, p.197

³² http://www.spacewar.com/reports/Danish_appeals_court_rejects_gunrunners_India_extradition_999.html

³³ International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force June 3, 1983

³⁴ European Convention on Extradition .Paris, 13 December 1957

³⁵ GA Res. 45/116, annex, UN GAOR, 45th Sess, Supp. No. 49A at 211, UN Doc A/45?49 (1990),

³⁶ Treaty:

- (i) Extradition treaty between India and South Africa, 2007, Article 3.2
- (ii) Extradition treaty between India and Hong Kong, 1999, Article 6. 1(b)(c)
- (iii) Extradition treaty between India and Tunisia, 2004, Article 6(a)
- (iv)) Extradition treaty between India and Korea, 2005, Article 3(d)

granted if the requested party believes that the request for extradition has been made for the purpose of prosecuting the person on account of his race, religion, nationality, ethnic origin, political opinions, sex of person's position may be prejudiced for any of those reasons; or if that person has not received or would not receive the minimum guarantees in criminal proceedings: as contained in the International Covenant on Civil and Political Rights.”

Insanity and Health of the Fugitive

Extradition may also be refused on humanitarian grounds which include fitness, health and age of the fugitive. A treaty³⁸ provides that if it appears that extradition would be totally incompatible with humanitarian considerations, in particular the state of health or old age of the person sought, the contracting State shall consult to mutually determinate whether the extradition request should continue.

Conclusion

Thus it is clear that human rights considerations have played important role in extradition. Even if conceding to the argument that such considerations were once motivated more by state interests than individual rights. Now a day, the presence of Human Rights ideology brought a visible impact of extradition and possible imposition of death penalty, torture infliction have emerged as strong barriers for positive consideration of extradition requests- India has been a victim of terrorist activities. However, the emerging human right restrictions to extradition, mainly torture, has sent enough signals that India maintains a bad profile of torture would continue to encounter resistance to its extradition requests. It is essential that India should brace itself to make a positive image so far as its profile of human rights is concerned.

(v) Extradition treaty between India and United Kingdom of Great Britain and Northern Ireland, 1993,
Article 9.1

³⁷ Extradition treaty between India and Bulgaria, 2008, Article 3.4

³⁸ Extradition treaty between India and Poland, 2008, Article 3

ROLE OF STATE AND JUDICIARY IN EMPOWERING WOMEN IN MODERN INDIA: AN ANALYSIS

Mr. Sarvesh Kumar Shahi*

Abstract

“A woman is the full circle. Within her is the power to create, nurture and transform.”

- Diane Mariechild

Empowering women is not a new concept in the pretext of the Indian scenario. From the era of Socio-religious movement to the era of globalisation and privatisation, dramatic changes have happened in the role, ambitions and attitude of women. Women have departed from their traditional role of reproducers, mothers and wives only. From a non-entity, they have been able to establish an identity of their own in the modern society. Women have played multiple roles in life and in each role their performance is par excellence. Still Women-folk have to suffer innuendo, physical and emotional nuisance despite of all the changes and developments happened in the contemporary women's world. The position of women in real life is still far from satisfactory. It is a point to wonder about why modern women are still insecure and unhappy, even though attaining so much success in almost every sphere of modern world.

In this paper, the author scrutinizes and analyzes the current legal, political and social status of Indian women with the help of looking into the efforts taken by constitutional machineries such as judiciary and state empowering the women in true sense. Further, the author tried to bring up some useful and logical suggestions for the future empowerment of women.

Keywords: Women Empowerment, Judiciary, Legislature, Executive, Media

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I. Introduction

“Authentic empowerment is the knowing that you are on purpose, doing God's work, peacefully and harmoniously.”

- Wayne Dyer, American motivational speaker.

According to McLeod, the concept ‘Empowerment’ derives from Latin word ‘potere’ which means “to be able”. The term empowerment has different meanings in different socio-cultural and political contexts. World Bank Report 2000/2001 describes empowerment as a process of increasing the capacity of individuals or groups to make choices and to transform those choices into desired actions and outcomes. According to country report of Government of India, “Empowerment means moving from a position of enforced powerlessness to one of power”.

The architect of Indian Constitution was of the opinion that unless and until women are empowered, nothing was going to bring about any change in their destiny. At that time, the women, in the name of sansakaras were tied up with the bondage of superstitions, which they had to carry till the last breath of their lives. They were considered just a matter of joy and a source of amusement. She was, according the Hindu Shashtra, the bonded slave of her father when she was young, to her husband when she was middle-aged and to her son when a mother. Of course, all the epigrams, aphorisms, proverbs, platitudes and truism have been naked truth about the stature of women in India.

It does not mean that efforts have not been made to bring dignity in the life of women. There has been a long tradition of social reforms by our saints and social reformers which include: Raja Rammohan Roy, Ishwar Chandra Vidyasagar, Mahadev Govind Ranade, and Jyotiba Phule, to name a few, who tried their best to bring changes in the life of women.

Their efforts, however, bore fruit to some extent, but did not make too much difference to the lots of the masses.

In this direction, Dr. Ambedkar tried to break down the barriers in the way of advancement of women in India. He laid down the foundation of concrete and sincere efforts by codifying the Common Civil Code for the Hindus and the principle is capable of extension to other sections of the Indian society. Besides, he also made provision in the Constitution to ensure a

dignified social status to women. He, by codifying Hindu Law in respect of marriage, divorce and succession rationalised and restored the dignity of women. Despite all these political measures, women's empowerment remains a distant dream in India. In fact, political empowerment is a key to development in this society. It is a must for an all-around development of women. It is the need of the hour to ensure her participation in the decision-making at home, in community and at the national level. It is for the fulfillment of this need that the Women's Reservation Bill was introduced in the Parliament by the BJP Government. But since then, ruling parties changed in power but the Bill could not see the light of the day.

The political parties do not seem to be honest in their perspectives. But before political empowerment, we must concentrate on imparting social education because without academic and social education, the political empowerment has failed to bring desired result as we have seen in case of 33% reservation in local bodies ensured by the historic 73rd and 74th constitutional amendments. The uneducated women are quite unaware of their rights and privileges and are therefore subject to exploitation at the hands of government machinery, as well by family members.

Therefore, our efforts should be directed towards the all-around development of each and every section of Indian women, not confining the benefit to a particular section of women in society, by giving them their due share. It is a must to protect their chastity, modesty and dignity and ensure their dignified position in society. Without removing social stigma, enduring progress and development could not be achieved. For this, the governmental and non-governmental organisations including media should come forward and play an active role in creating awareness in society.

The task is not too difficult to achieve. The honesty and sincerity on the part of those involved is a must. If the lots of women change, definitely it will have a positive impact on society. Hence, the women's empowerment is the need of the hour.

II. Constitutional status of women

The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. Fundamental Rights, among others, ensure equality before the law and equal protection of law; prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth,

and guarantee equality of opportunity to all citizens in matters relating to employment. Articles 14, 15, 15(3), 16, 39(a), 39(b), 39(c) and 42 of the Constitution are of specific importance in this regard.

If the principle of gender equality is enshrined in the Indian Constitution, then why are Indian women treated as second citizens in their own country? The Constitution officially grants equality to women and also empowers the State to adopt measures of positive discrimination in favour of women. However, the varied forms of discrimination that women in India are subject to are far from positive.

In India gender disparity is found everywhere. The declining ratio of the female population, in the last few decades is a proof of this. The stereotypical image of a woman haunts her everywhere. Domestic violence is commonplace. The underlying causes of gender inequality are related to the socio-economic framework of India. As a result, the women belonging to the weaker sections of the society i.e. the Scheduled Castes/Scheduled Tribes/ Other backward Classes and minorities, do not have easy access to education, health and other productive resources. Therefore, they remain largely marginalized, poor and socially isolated.

III. Role of legislature in empowering women

Several Acts have been passed for the improving the condition of women from time to time. In India, there are numerous laws aimed at empowerment of women in the areas of personal, labour, service and criminal and social economic matters. The Fundamental Law of the land namely Constitution of India guarantees equality for women. It would be proper to refer some of the most important legislations pertaining to empowerment of women.

1. **Indian Penal Code, 1860:** Sections 292, 293 and 294 provide for punishment in sale and exhibit of obscene books objections and for obscene act in public place. Section 304(b) deals about murder of women in connection with demand of dowry. Sections 312 to 318 deal about punishment for causing miscarriage. Section 354 provides punishment for outraging the modesty of any women, S. 366 deals about kidnapping for marriage against her will. Section 366-A deals about procuration of minor girls for sexual purpose. Section 376 deals about punishment for rape. Section 494 protects women from bigamy. Section 497 deals about protection of married women from adultery. Section 498-A of Indian Penal Code deals about subjecting women to

cruelty by her husband or relatives and her husband and S. 509 provides punishment for uttering words and gesture or act intended to insult the modesty of a woman.

2. **Code of Criminal Procedure, 1973:** Under S. 125, Code of Criminal Procedure, a woman has got right to maintenance.
3. **Indian Evidence Act, 1872:** Sections 113(a), 113(b) and 114(c) provide for presumptions as to abetment of suicide by a married woman within 7 years of marriage, as dowry death of a woman and as to absence of consent of woman for sexual intercourse.
4. **Hindu Adoption Maintenance Act, 1956:** Section 18-A provides for obligations of husband to maintain his wife. Section 18(2) provides right of wife to live separately and S. 19 provides for maintenance of widow by her father-in-law.
5. **Hindu Succession Act, 1956:** Section 14 of the Act provides for property of female Hindu to be her absolute property. Section 23 provides right of female legal heirs in the dwelling house.
6. **The Hindu Minority and Guardianship Act, 1956:** Section 6 of the Act provides for mother as a natural guardian for minors below 5 years.
7. **The Hindu Marriage Act, 1955:** Section 13(2) of the Act provides for wife to present a petition for divorce. Section 13(b) provides equal right for wife for getting divorce by mutual consent. Section 24 of the Act provides for relief for interim maintenance and expenses. Section 25 of the Act provides for right to a wife to seek permanent alimony and maintenance and S. 26 of the Act provides right to claim custody of children.
8. **The Dowry Prohibition Act, 1961:** Under the provisions of this Act demand of dowry either before marriage, during marriage and or after the marriage is an offence.
9. **The Muslim Women (Protection of Right on Divorce) Act, 1986:** Under the provisions of the Act provides for maintenance of women by the relatives after the iddat period.
10. **The Factories Act, 1948:** The provisions of this Act provides for health, safety, welfare, and working hours for women labourer working in factories.
11. **The Employees State Insurance Act, 1948:** The Act provides for insurance pension and maternity benefits to women workers.
12. **The Maternity Benefit Act, 1961:** It provides for maternity benefit with full wages for women workers.

13. **The Medical Termination of Pregnancy Act, 1971:** The Act safeguards women from unnecessary and compulsory abortions.
14. **The Child Marriage Restraint Act, 1976:** The Act provides safeguards for girls from child marriage.
15. **The Immoral Trafficking (Prevention) Act, 1986:** The Act safeguards women from prostitution.
16. **The Prenatal Diagnostic Technique (Regulation and Prevention of Measure) Act, 1994:** This Act prohibits diagnosing of pregnant women and also identification of child in the womb whether it is male or female.
17. **The Indecent Representation of Women (Prohibition) Act, 1986:** The Act safeguards women from indecent representation.
18. **The Commission of Sati (Prevention) Act, 1992:** It safeguards women from Sati.
19. **The National Commission for Women Act, 1992:** The Act provides for a setting up a statutory body namely the National Commission for Women to take up remedial measures, and facilitate redressal of grievances and advise the Government on all policy matters relating to women.
20. **The Family Courts Act, 1984:** The Act provides for setting up a Family Court for in-camera proceedings for women.
21. **The Protection of Women from Domestic Violence Act, 2005:** The Act provides for punishment for domestic violence committed by husband and his relatives and also provides legal assistance for women suffering from domestic violence. It also provides interim maintenance to women and also for compensation and damages.

Thus, there are a number of laws to protect women, but what is the use of having these laws when no one follows them? In fact, the people whose business it is, to enforce these laws are the ones who publicly flout them. Besides, not many women are conversant with law and few are aware of the rights and privileges accorded to them by the constitution. So they suffer all forms of discrimination, passively.

IV. Role of Judiciary

Firstly, it is the judiciary which interprets and implements the laws. A judge is an eyewitness to a real-life drama—how the script written by the legislature is played by real-life characters.

Landmark decisions delivered by the Indian judiciary, in particular during the last two decades, bear testimony to the fact that judges cannot be accused of gender injustice. They have shown the requisite sensitivity expected of them. However, all that can be said is that such sensitivity is individual and needs to be institutionalised. The purpose of this meeting is to share the experiences, have an exchange of views and to learn and devise by our experiences a model of gender-justice-sensitisation.

Judges are applying the discretionary power to provide better justice to women in the new context of the Socio-Economic conditions. Judiciary has played an active role in enforcing and strengthening the constitutional goals towards protection/rights of the women of the land. The courts in India have tried to interpret laws in consonance with the international treaties and conventions. Some of the major cases are enumerated below:

In *Vishakha v. State of Rajasthan*¹, the Supreme Court took a serious note of the increasing menace of sexual harassment at workplace and elsewhere. Considering the inadequacy of legislation on the point, the Court even assumed the role of legislature and defined sexual harassment and laid down instruction for the employers. In *Apparel Export Promotion Council v. A. K. Chopra*², the Supreme Court found all facets of gender equality including prevention of sexual harassment in the fundamental rights granted by the Constitution. In *C. B. Muthamma v. Union of India*³, a service rule whereby marriage was a disability for appointment to Foreign Service was declared unconstitutional by the Supreme Court. In *Shobha Rani v. Madhukar*⁴, the Supreme Court held that dowry demand was held enough to amount to cruelty. In *Prathibha Rani v. Suraj Kumar*⁵, the Supreme Court upheld women's right to the Stridhana. In *State of Punjab v. Gurmit Singh*⁶, the Supreme Court held that rape was held to be violative of the right of privacy. In *Bodhisathwa Gowtham v. Subhra Chakraborty*⁷, the Supreme Court observed that rape was not only an offence under the criminal law, but it was a violation of the fundamental right to life and liberty guaranteed by Article 21 of Indian Constitution. In *Saveetha Samvedhi case*⁸, the Supreme Court held that a married daughter was allowed accommodation in parental house. In *Delhi Domestic Working*

¹ AIR 1997 SC 301

² AIR 1999 SC 625

³ AIR 1979 SC 1868

⁴ AIR 1988 SC 121

⁵ AIR 1985 SC 628

⁶ AIR 1996 SC 1393

⁷ AIR 1996 SC 622

⁸ (1996) 1 SCR 1046

*Women's Forum v. Union of India*⁹, the Supreme Court suggested the formulation of a segment for awarding compensation to rape victims at the time of convicting the person found guilty of rape. The Court suggested that the Criminal Injuries Compensation Board or the Court should award compensation to the victims by taking into account, the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurs as a result of rape. In *Gourav Jain v. Union of India*¹⁰, the Supreme Court laid down guidelines including the necessity of counselling, cajoling, and coercing the women to retrieve from prostitution and rehabilitate them.

V. Observation

Thus, it is observed that not only the legislature but judiciary also plays a very vital and important role in case of women empowerment. Judiciary empowers the women by its both traditional and by its activist role. The traditional role of judiciary is to provide justice through interpretation of laws. Some times through the wide interpretation of provision of various legislation and also the provision of constitution judiciary is able to empower the women. Another role of judiciary is the activist role which is popularly known as "Judicial Activism". Where there is no specific law for a specific offence in that case judiciary applies its activist power. As our society is dynamic, the need of the society is also dynamic. Because of the rigidity of law or because of the long and time taking procedure of enactments of laws by legislature, it is unable to keep pace with the fast changing society.

There is always a gap between the advancement of the society and the legal system prevailing in it. This is sometimes causes hardship and injustice to the people. Now women empowerment is a burning issue of our country. And this concept is in progress. So, there are so many areas of women empowerment where there is no law for the protection of women, in that case judiciary is the last hope. Because only judiciary can give justice by applying its activist power e.g. we have already discussed vishakha case where the question regarding the sexual harassment of women in working places was raised and on this area there is no law at that time judiciary by judicial activism declared some guidelines for the protection of women from sexual harassment of women in working place. This guideline was provided by Supreme Court in the year of 1997 and the Bill titled as Protection of Women against Sexual Harassment at Workplace was produced before parliament in 2010 but Bill is still pending.

⁹ (1995) 1 SCC 14

¹⁰ AIR 1997 SC 3012

That means the need of the society is realized by the parliament after 13 years. In case of compensation jurisprudence also judiciary is relaised need to compensate the victim but in criminal law there is no such specific law regarding the compensation jurisprudence. So, it is clear that through judicial activism judiciary is also able to provide progress in the area of women empowerment.

VI. Role of State

Role of State Executive can be understood with the help of table below where several empowerment schemes have been running since Independence of India.

No.	Women Empowerment Programmes	Year of Estb.	Objective
1	Support to Training and employment Programme for Women (STEP)	2003-04	To increase the self-reliance and autonomy of women by enhancing their productivity and enabling them to take up income generaion activities.
2	Rashtriya Mahila Kosh (RMK)	1993	To promote or undertake activities for the promotion of or to provide credit as an instrument of socio- economic change and development through the provision of a package of financial and social development services for the development of women.
3	Rashtriya Mahila Kosh	1993	To facilitate credit support or micro-finance to poor women to start income

			generating activities such as dairy, agriculture, shop-keeping, vending, handicrafts etc.
4	Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (RGSEAG) – ‘Sabla’	2010	It aims at empowering Adolescent girls of 11 to 18 years by improving their nutritional and health status, up gradation of home skills, life skills and vocational skills.
5	Central Social Welfare Board (CSWB)	1953	To promote social welfare activities and implementing welfare programmes for women and children through voluntary organizations.
6	Rashtriya Mahila Kosh - (National Credit Fund for Women)	1993	It extends micro-finance services through a client friendly and hassle-free loaning mechanism for livelihood activities, housing, micro-enterprises, family needs, etc to bring about the socio-economic upliftment of poor women.
7	Indira Gandhi Matritva Sahyog Yojana (IGMSY)	----	To improve the health and nutrition status of pregnant, lactating women and infants
8	Swayam Siddha	2001	At organizing women into Self-Help Groups to form a strong

			institutional base.
9	Short Stay Home for Women and Girls (SSH)	1969	To provide temporary shelter to women and girls who are in social and moral danger due to family problems, mental strain, violence at home, social ostracism, exploitation and other causes.
10	Swadhar	1995	To support women to become independent in spirit, in thought, in action and have full control over their lives rather than be the victim of others actions.
11	Support to Training and Employment Programme for Women (STEP)	1986	To mobilise women in small viable groups and make facilities available through training and access to credit, to provide training for skill upgradation, etc.
12	Development of Women and Children in Rural Areas (DWCRA)	1982	To improve the socio-economic status of the poor women in the rural areas through creation of groups of women for income-generating activities on a self-sustaining basis.

13	Tamil Nadu Corporation for Development of Women	1983	Aims at the socio-economic empowerment of women
14.	Indira Gandhi Matritva Sahayog Yojana	2012	A cash incentive of Rs. 4000 to women (19 years and above) for the first two live births

VII. Conclusion

The legislations, which take care of rights and privileges of women, are numerous in number. But due to ignorance and illiteracy those legislations cannot be properly enforced. The plethora of Indian Legislations aims at women empowerment. The judicial decisions rendered by the Indian Courts depict the active role played by the judiciary to protect women from exploitation at a stage where legislations are uniformed due to lack of adequacy of enforcement machinery. The legislative and judicial initiatives have placed the women in a better place in the society. Yet the woman in India has to go for miles to achieve cent per cent empowerment.

The government of India, by passing timely and essential Acts and implementing rules and regulations trying to empower and strengthen the women. No doubt the government of India has many weapons to fight for women empowerment, the prompt and strict implementation is quite essential. Unless the Acts, Policies, Rules, Regulations, etc, are strictly implemented the idea of women empowerment remains unachieved. Hence the efforts of the government are still inadequate and the process of empowering women in India is long way to go.

One of the basic policy objectives should be universal education of woman, the lack of which tends to perpetuate the unequal status quo. The popular UNESCO (United Nation Education Scientific and Cultural Organization) slogan should come in handy:

“Educate a man and you educate an individual; educate a woman and you educate a family.”

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PUBLIC KISSING: A FREEDOM OF EXPRESSION?

Mr. Susanth Shaji* & Ms. Karthika S. Varma**

Abstract

This paper looks into the need to confer the legality of public kissing in India. ‘Kiss of love’ protest was a non-violent protest against moral policing which started in Kerala and later spread to other parts of India. The movement began when a Facebook page called ‘Kiss of Love’ asked the youth across Kerala to participate in a protest against moral policing at Marine Drive in Cochin. It received opposition from various religious and political groups. The protestors were charged with cases for obscenity across different parts of the country. But the protestors claim it to be their ‘Freedom of Expression’. The real enigmatic question arising here is that, whether public kissing amounts to an obscene act in India or is it a form of their Fundamental Right to Freedom of Expression. This question creeps into the constitutionality of public kissing. This paper analyses the question that whether public kissing can be treated under the definition of obscenity or not.

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1. INTRODUCTION

This paper looks into the need to confer the legality of public kissing in India. ‘Kiss of love’ protest was a non-violent protest against moral policing which started in Kerala and later spread to other parts of India. The movement began when a Facebook page called ‘Kiss of Love’ asked the youth across Kerala to participate in a protest against moral policing at Marine Drive in Cochin. It received opposition from various religious and political groups. The protestors were charged with cases for obscenity across different parts of the country. But the protestors claim it to be their ‘Freedom of Expression’.

In the world in which we live today it is equally important that we should have an understanding of how life is lived and how the human mind is working in those parts of the world. There is also the necessity of knowing the world of today as it is actually lived in different parts by different people¹. Most of the Indian laws and statutes have been adopted from different parts of the world and in all those countries kissing in public is just a mere expression of sharing the pleasantries with one another and not an ‘obscene’ act. Personal liberty encompasses the right to express oneself². The expression of love or affection is manifested by a kiss. The mother kisses her child. The grandfather kisses his grandchildren. The brother kisses his sister. Two friends exchange pleasantries by kissing. Where is the immorality in the act complained of? Now, the real enigmatic question arises, that is, whether public kissing amounts to an obscene act in India or is it a form of their Fundamental Right to Freedom of Expression. This question creeps into the legality of public kissing.

2. OBSCENITY AND PUBLIC KISSING

Section 294 of The Indian Penal Code, 1860 is dealing with ‘Obscene acts and songs’.³ This section was introduced for the original section 294 by the Criminal Law Amendment Act (3 of 1895). This section was intended to prevent obscene acts being performed in public to the annoyance of public at large.⁴ The ingredients of this particular section to be proved are (i) the offender has done any obscene act in any public place and (ii) has so caused annoyance to others. If the act complained is not obscene or not done in any public place or it causes any

¹ Jyothsana Nath Mallik, *Law of Obscenity in India*, Eastern Law House Pvt. Ltd., 1966.

² Harry M. Clor, *Decency and Public Morality*, The University of Chicago, 3rd edition 1969.

³ 294. Obscene acts and songs-Whoever, to the annoyance of others -(a) does any obscene act in any public place, or(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

⁴ Justice V V Raghavan, *Law of Crimes*, India Law House, Vol. 1 5th Edn. 2000

annoyance, the offence is not committed.⁵ There is no precise or arithmetical definition of the word ‘obscene’ which would cover all possible cases can be given. It will have to be judged on the facts and circumstances of each case whether in the context of its surroundings the question that is obscene or not.⁶ The word ‘obscene’ may be taken as a meaning “offensive to chastity or modesty, expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed: impure, as obscene language, obscene pictures” anything “expressing or suggesting unchaste and lustful ideas, impure, indecent, and lewd”.⁷

The word ‘obscene’ is legally defined in Courts as “Tending to stir the sex impulses or to lead to sexually impure thoughts”⁸. Obscene matters excite people and quite often such excitement leads to perversion. Children and the young in society certainly need to be protected against such corrupt influences of obscene matters. Section 292 of The Indian Penal Code, 1860 defines the word obscene as something if it is lascivious or appeals to the prurient interest or if its effect, but the exact definition of the word ‘obscene’ was not defined in s. 294 of IPC. So in order to put an end to these discussions, The Division Bench of The Kerala High Court in *Dhanisha v. Rakhi N Raj*⁹ observed in para. 23 that,

“The upshot of our discussion is that the word ‘obscene’ is not defined differently in these sections but the punishments were prescribed differently in other section depending upon the effect of ‘obscenity’ that causes on the viewer or hearer as the case may be. It is not gatherable from the words used in the sections that the word ‘obscenity’ used in S. 294 of I.P.C. should have a different meaning than what is explained in Ss. 292 and 293 of I.P.C. All these sections come under the same chapter. That also would sufficiently indicate that the said word is to be understood as understood for the purpose of S. 292.”

The test of obscenity was adopted from English law. This was known as Hicklin’s test¹⁰. The test is the one laid down by Cockburn C. J. in the case *R. v. Hicklin*. The test laid down in this case is, ‘whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall’. The standard of obscenity is the resultant of the cultural values of a given

⁵ *Pawan Kumar v. State of Haryana*, AIR 1996 SC 3300

⁶ K.D. Gaur, *Commentary On The Indian Penal Code* Universal Law Publishing Co. 2013 2nd Edition p. 693

⁷ *Re: D. Pandurangan and Anr.*, AIR 1953 Mad 418; *Public Prosecutor v. Sabapathy A D*, AIR 1958 Mad 210

⁸ Richard G. Fox, *The Concept of Obscenity*, The Law Books Company Limited, 1967.

⁹ *Dhanisha v. Rakhi N Raj*, 2012 (2) KLT 55

¹⁰ *R. v. Hicklin*, L.R.3 Q.B. 360 (1868)

society at a given time¹¹. Of late the Supreme Court of India in a plethora of cases has held that the test to be applied is the Community Standard Test to trace elements of obscenity in a given circumstance. The Apex court in *S. Khushboo v. Kanniamal & Anr.*¹², observed that “obscenity should be gauged with respect to contemporary community standards”. In other words, the standard of obscenity is the resultant of the cultural values of a given society at a given time. “Circumstances always differ and the court has to take into account all the factors before it comes to the conclusion as to whether or not an act is obscene.....ideas having social importance will *prima facie* be protected unless obscenity is so gross and decided that the interest of the public dictates the other way”.¹³ Standards of contemporary society in India are fast changing and regarding the contemporary community standards, it that is not the standard of a group of susceptible or sensitive persons that can be held as the standard of the community.¹⁴ So now the pertinent question at this juncture is that whether the contemporary standards of Indian Community are such that it could tolerate a protest in form of kissing in public.

Kiss of love protestors will probably contend that the Indian society is so developed that a mere act of kissing cannot cause annoyance to anyone. The Supreme Court of India has made it clear that ‘no case can be made out of two people consensually hugging and/or kissing. This verdict came in response to a petition filed by actor Richard Gere to quash the arrest warrant issued by a Jaipur court. The arrest warrant was issued after the actor had taken Shilpa Shetty in his embrace and kissed her on the cheek at an AIDS awareness programme. The Delhi Court has also held that it is inconvincible that even if couples engage in public kissing, it cannot attract S. 294 I.P.C.¹⁵ The Supreme Court in the year 1965 had said that “The world is now able to tolerate much more than formerly, having coming indurate by literature of different sorts.”¹⁶ This was the view of the Court way back in the year 1965 and the present matter is concerned with a situation in the year 2014 and while judging whether an act of kissing is obscene, “regard must be had to contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.”¹⁷ Nowadays porn sites are available in the internet and in the field of art and cinema also Indian society is entertaining

¹¹ Harry M. Clor, *Obscenity and Public Morality*, The University of Chicago Press, 1969, 3rd edition.

¹² *S. Khushboo v. Kanniamal & Anr.*, (2010) 5 SCC 600

¹³ *Ranjit D. Udeshi v. The State*, 1965 SCR (1) 65

¹⁴ *Chandrakanth Kalyandas Kakodar v. State of Maharashtra*, 1970 SCR (2) 80

¹⁵ *A & B v. State Thr. N.C.T. Of Delhi & Anr.*, 2010 Cri LJ 669

¹⁶ *Supra* 11

¹⁷ *Aveek Sarkar & Anr. v. State of West Bengal & Ors.* (2014) 4 SCC 257

situations which even a quarter of century ago would be considered derogatory to public morality. So if we are making an assumption with this regard, all those things which are mentioned above should also be regarded as something which is obscene if mere act of kissing and that too in the form of a protest is seen as obscene.

But just like a coin is always having two sides, you will have to flip it and scan the other side of the coin. So far the protestors have made their views vivid. Now the Society and the State's version must be contemplated. Indeed the protestor's part that contemporary community standards must be taken into consideration is uncanny. But then by this very act of kissing in public, is this contemporary Indian community getting annoyed is a fact which is to be given due importance. Here springs up the second ingredient of S.294 of I.P.C. that is annoyance.

The term 'annoyance'¹⁸ can be defined as a harm done to a person in body or mind. The word indicates an act done as the result of which harm is caused to another. 'Annoyance' is a wider term than nuisance and if a thing reasonably troubles the mind and pleasure not of a fanciful person or a skilled person who knows the truth, but of an ordinary sensible person; if you find there is anything which disturbs his reasonable peace of mind, that seems to an annoyance although it may not appear to amount to physical detriment to comfort¹⁹. When it says 'annoyance to others' is a prerequisite to invoke the provision, then the issue of 'obscenity or indecency per se' will not arise until and unless there is evidence on record to show that a person at a given time witnessing particular obscene act was actually annoyed or not.²⁰

Unless annoyance is caused the act will not be punishable. Annoyance caused to the members of the public is sufficient to prove the offence under this section and the prosecution case does not suffer for lack of proof of annoyance merely because the two girls who were the aimed victims of the obscene act were not produced as witnesses.²¹ In almost all the cases it must be inferred from the proved facts.²² Offences under Section 294 I.P.C. does not limit the scope of the word "others" to mean the person who is the intended victim of the obscene act of the accused²³. It is enough that the obscene act is committed in public and causes annoyance to

¹⁸ K. J. Ayer, *Judicial Dictionary* The Law Book Company (P) Ltd. 11th edition 1992.

¹⁹ *Todheatley v.Benham*, 40 Ch D 98;

²⁰ *Narendra H. Khurna & Ors. v. Commissioner of Police & Anr.*, 2004 Cri LJ 3393.

²¹ *Zafar Ahmed Khan v. State*, AIR 1963 All 105: 1963 (1) Cri LJ 273.

²² *Patel H.M. Malle Gowda v. The State of Mysore*, 1973 Cri L J 1047

²³ A. K. Sarkar, *The Law and Obscenity*, N. M. Tripathi Pvt. Ltd., 1967.

anybody, he is the contemplated victim of the offender or not²⁴. Hence we can reach a conclusion that only a small sect of people is supporting this kind of activity because of the conservative religious practices that still exists in our society. Recently a video was released, *India's Daughter* which is a documentary film directed by [Leslee Udwin](#) for B.B.C. The film is based on the [2012 Delhi gang rape](#) and murder of Jyoti Singh, a 23-year-old woman who was a [physiotherapy](#) student. In that clipping, the defense lawyer Adv. M.L. Sharma states brazenly, "Indian culture is the best culture. In our culture there is no place for a woman." This is the mindset of our society and so we cannot even adopt a practice like 'Public Kissing' as it will surely cause annoyance to some or the other person. However, in a country like India, 'Kiss of Love' and other similar activities are a question of morality and culture, and "Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy."²⁵

3. FREEDOM OF EXPRESSION & PUBLIC KISSING

Article 19(1) (a) guarantees to all citizens the freedom of speech and expression. The court has characterized this right as a 'basic human right'.²⁶ Universal Declaration of Human Rights²⁷ and International Convention on Civil and Political Rights²⁸ have also recognized the enshrined principles of freedom of expression. This freedom alone makes it possible for people to formulate their own views and opinions.²⁹ Freedom of thought, in order to be useful to man, must have its complementary freedom, that of speech and expression. If speech and expression are muzzled, then a country cannot be called as a democratic country. In India, Article 19³⁰ of the Constitution guarantees certain freedoms to the citizens. For the progress of

²⁴ *Zafar Ahmed Khan v. State*, AIR 1963 All 105: 1963 (1) Cri LJ 273.

²⁵ *Supra* 10

²⁶ *Life Insurance Corporation of India v. Manubhai D. Shah*, AIR 1993 SC 171

²⁷ Art. 19 of UDHR- "Freedom of expression is the right of every individual to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of the frontiers."

²⁸ Art. 19(2) of ICCPR- Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

²⁹ *Union of India v. Motion Pictures Association*, AIR 1999 SC 2334

³⁰ **Protection of certain rights regarding freedom of speech, etc.** – All citizens shall have the right –

- (a) To freedom of speech and expression;
- (b) To assemble peaceably and without arms;
- (c) To form associations or unions;
- (d) To move freely throughout the territory of India;
- (e) To reside and settle in any part of the territory of India;
- (g) to practise any profession, or to carry on any occupation, trade or business.

the society it is necessary to have the widest possible dissemination of the freedom of expression. Freedom of expression is a sacred right. Its genesis lies in the inherent human urge to articulate itself.

Right to Dissent and protest is the essence of a democracy and for the success of democracy and democratic institutions honest dissent is to be respected by persons in authority.³¹ The right to peacefully and lawfully assemble together and to freely express oneself coupled with the right to know about such expression is guaranteed under Article 19(1)(a) of the Constitution of India. Such a right is inherent and is also coupled with the right to freedom and liberty which have been conferred under Article 21 of the Constitution of India.³² The people of a democratic country like ours have a right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the Government on any subject of social or national importance.³³

The Kiss of Love activists are of the view that by their act of public kissing, they are only exercising their freedom of expression and their right to protest under Article 19(1)(a) of the Constitution. The protest was made by means of a peaceful assembly. There was no show of force at all. An act deemed by law to be an offence, when performed as protest, demands a response from us different from that of criminal investigation. An act of protest tries to draw our attention to an injustice or it challenges what the protesters think are illegitimate prohibitions. To use the language of criminal law to describe it would be a serious misconstrual. It is also possible for them to argue that the message or the context in which they did the act was nothing but a bona fide one that they only did this act as means to cease the violence under the grab of moral policing.

The Hon`ble Supreme Court in Aveek Sarkar`s³⁴ case held that the test of obscenity must square with the freedom of speech and expression guaranteed under the constitution and the learned Judge observed that the message the photograph wants to convey is that the colour of skin matters little and love champions over colour. The Supreme Court while dealing with the question of obscenity in the context of film called Bandit Queen pointed out that the so-called objectionable scenes in the film have to be considered in the context of the message that the

³¹ *Balachandra L Jarkiholi & Ors. v. B.S Yeddyurappa & Ors*, 2011 (7) SCC 1; See also *Ramprakash v. State of Madhya Pradesh*, 1992 AIR (MP) 151

³² *Re Ramlila Maidan Incident v. Home Secretary, Union of India & Ors.*, (2012) 5 SCC 1

³³ *Supra* 30

³⁴ *Aveek Sarkar & Anr. v. State of West Bengal & Ors.*, (2014) 4 SCC 257

film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit.³⁵ If the message sought to be conveyed is indeed crucial in determining the obscenity of a picture published in a magazine, then an act of kissing in public too will have to be seen in its entirety before being penalized. Hence the protestors will conclude that it was a mere expression of love and concern to each other and also the message that they intended to communicate through their act was nothing, but to curb the violence against young lovers under the name of moral policing.

However the arguments of Kiss of Love Activists cannot be said to be picture perfect and has only little leeway with it. The right to freedom of speech and expression has been described that the ‘touchstone of individual liberty’ but in no country is there any absolute freedom of expression³⁶. The constitutional guarantee of freedom of speech and expression is not meant for providing a shield for acts offensive to morality and decency. Since the freedom of expression is a great right, so must be the responsibilities of the citizens exercising it. He must be under an obligation to maintain the decency and morality in the society in which he lives. In India the entire law according to which restrictions may be imposed on the freedom of expression is codified in clause (2) of Article 19. Right to Protest is also subject to curtailment by law only in terms of public order, decency or morality.³⁷ No person can thus abridge the right to protest which has been recognized as a right of a citizen and the same can be restricted only by laws made in tune with Article 19(2) of the constitution.³⁸

Not only should the restriction, in order to be valid, relate to any of the grounds mentioned in the relevant limitation clause, but the relationship between impugned legislation and any of the relevant specified grounds must be *rational*³⁹ or *proximate*⁴⁰. The words in the interest of imply that the restriction imposed under any of the limitation clauses in Article 19, in order to be valid, must be *proximately* related to a ground specified in the relevant limitation clause, that very expression enables the Legislature to restrict the exercise of the fundamental right as soon as a threat of injury to the social interest protected by the relevant ground or proximate

³⁵ *Bobby Art International & Ors. v. Om Pal Singh Hoon*, (1996) 4 SCC 1

³⁶ Durga Das Basu, *Commentary on the Constitution of India*, Wadhwa and Company, 8th edition 2007.

³⁷ *Dow Chemical International Pvt. Ltd v. Nithyanandam & Ors.*, 2009(6) MLJ 321

³⁸ *C. Lakshmi Narain v. The Government of Tamil Nadu & Ors.*, 1999(3) LW 516

³⁹ *Ghosh v. Joseph*, AIR 1963 SC 812

⁴⁰ *Sodhi Shamsher v. State of Pepsu*, AIR 1954 SC 276

tendency thereof is manifest⁴¹. It is not bound to wait until the mischief has actually taken place.

‘Public order’ is an expression of wide connotation and includes public safety or interest and signifies that state of tranquility prevailing among the members of a political society as a result of internal regulations suffered by this government which they have instituted. Danger to human life and safety and disturbance of public tranquility also fall within the purview of this expression.⁴² Tranquility is the absence of disorder involving breach of local significance in contradiction to national upheaval.

Kiss of Love campaigns in public places created a situation where in the number of viewers were more than that of activists and there were protest against the activists by religious groups and other people. Such a situation makes the state left with no options but to take action against this public disorder wherein they try to move on with the interests of society rather than the Kiss of Love activists. And it is nothing but the basic principle without which no democracy cannot cherish i.e., when there is a greater evil and a lesser evil greater evil should be focused. The right to freedom of speech and expression cannot rise above national interest and interest of society, which is but another name for the interest of general public. It is true that Article 19(2) does not use the words ‘national interests’, ‘interest of society’, but several grounds mentioned in clause (2) are ultimately referable to the interest of nation and “interests of society.”⁴³

4. CONCLUSION

Morality and decency are fundamental as fundamental rights themselves. A fundamental right is like the moon and morality like the disc light surrounding it. Decency indicates the action that must be in conformity with current standard of behaviour or propriety. Decency must be the absence of indecency. Authors would like to refer to Lord Macaulay’s statement while he addressed the British Parliament in 1835:-

“I have travelled across the length and breadth of India and I have not seen one person who is a beggar, who is a thief etc. Such wealth I have seen in this country, such high moral values, people of such caliber, that i do not think we would ever conquer this country, unless we break the very backbone of this nation, which is the spiritual and

⁴¹ *Virendra v. State of Punjab*, AIR 195 SC 896 (899); *Supdt. v. Ram Manohar*, AIR 1960 SC 633

⁴² *Romesh Thappar v. State*, AIR 1950 SC 124

⁴³ *Secy. Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, AIR 1995 SC 1236

cultural heritage and therefore, I purpose that we replace the old and ancient education system, the culture, for if the Indians think that all that is foreign and English is good and greater than their own, they will lose their self-esteem, their native culture and they will become what we want them, a truly dominated nation.”

A society is made up of a community of ideas, both political and moral ideas, which provide the way in which its members should behave and govern their lives. It is not the physical bonds which keeps the society together, but the invisible bonds of common thought. The morals existing in a society are not only aimed at protecting the existence of the society from outside intervention but also the fact that the society itself can regulate the activities of its individuals. Just as society may use its law to prevent treason, it may use it to prevent a corruption of that conformity which ties it together. A man's sins may only affect himself and it cannot be the concern of the society. But, as mentioned in the Wolfenden Report published in the year 1957 by Lord Wolfenden, if prostitution or homosexuality is carried out in private, only the concerned parties are affected. But what if a major section of society engages in the same? This was the question raised by Lord Devlin in his book. In that book he quoted that “It will lead to nothing but degradation of morals in the society. Same is the case with gambling, betting, drinking etc.”⁴⁴

According to him morality is sphere in which there is a public interest and private interest, often in conflict and the problem is to reconcile the two. And for this purpose, the moral assent of each and every individual cannot be obtained, for it cannot be based on the opinion of the majority. It would be too much to require the individual assent of everyone. Devlin says, for this purpose ‘English law has evolved and regularly uses a standard which does not depend on the counting of heads.’ It is that of the ***man in Clapham Omnibus*** or a reasonable man and is not to be confused with a rational man.⁴⁵

It is high time to raise and consider these questions by each and every one in Indian society. Have we ended up entangled in the cases mentioned by Macaulay and Devlin? For all its high rates of literacy and health indices, the India is still conservative, highly patriarchal and stuck in an era where women are not considered equals and are not even respected. Religious institutions will not be comfortable with such a move and are likely to oppose such a public display of affection. Is it the State action making this obscene act taking in consideration the larger interest of the society or the protestor's claim to be given due weight?

⁴⁴Patrick Devlin, *The Enforcement of Morals*, Liberty Fund 2010 Reprint Edn.

⁴⁵ *Supra* 44

The need of the hour is to bring a halt to this ever debating issue. The courts being the guardian of the justice and fundamental rights of its citizens must travel into the deep roots of this issue and lift up the society from this large pit full of darkness to the light. Hence authors are handing over this dilemma to the great legal minds.

WHISTLE BLOWERS PROTECTION: LADDER TO ACHIEVE GOOD GOVERNANCE

Mr. Karn Marwaha*

Abstract

India is a democratic state, we all are aware of this fact but we should also know that being democratic state, India needs to have transparency and accountability in its governance. Indian legislators have recently passed an act named Whistle blowers Protection Act, 2011, which is a giant step or we could say that it will provide ladder to the government to achieve true democracy and good governance. Whistleblowing is a tool by which government and other agencies could be made accountable to the general public.

From the past incidences we have seen that social reality of ‘obligation of trust’ has not been followed by the government, which led to certain unexpected incidences in the past such as killing of Satyendra Dubey, Shanmugam Manjunath etc., therefore India needs to have a efficacious policy to protect the honest Whistle blowers or we could say to protect activist who tries to bring transparency and accountability in the governance.

Author in this article deals with the issues pertaining to the Whistle Blowers Protection Act, 2011, which needs to be resolved before making it enforceable, otherwise India would be facing disastrous result of this act and the very basic object of the act i.e. to safeguard the activist will not be achieved. This article examines the loop holes that need to be plugged in as soon as possible. Author examines whistle blowing as a true democratic concept and efficacious factors that will encourage the whistle blowing. Author has suggested some recommendation that needs to be taken into account so that constructive management could be done.

Keywords: corruption, unethical practices, efficacious policy, victimisation, special protection group.

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1. INTRODUCTION

Corruption, being a deeply rooted evil in our society, affects the same as it drains away the resources of our country thereby leading to distrust in justness of democratic institutions. This happens when the resources meant for public use comes in the hands of those few who forces controls over these resources which enhances the existing inequalities. It is recognized by constitutional law that holder of the public office has an obligation of trust, and a fiduciary duty towards the people but, this principle is far away from social reality and yet corruption is omnipresent. The reason behind such practices is the knowledge that they cannot be caught. Hence, there has to be a mechanism to make erring public authorities accountable for corruption. But despite such practices of corrupt officials, often justice prevails due to the role performed by some activist through their active intervention in the same organization within which they are working. These activists are known as whistleblowers. The term “whistleblower” comes from the common practice of law enforcement officers and referees blowing a whistle to indicate an illegal action. Whistleblowers can be internal as well as external. Internal whistleblower reports illegal and unauthorized acts to their co-worker or superior of the company whereas, external whistleblower reports to the entities outside the organization like media, watchdog agencies etc. whistleblowers, being an employee of an organization are privy to many secrets and information pertaining to their organization. Such intervention can be in the form of raising voices against corruption or through the act of leaking and revealing information pertaining to any unethical, immoral or illegal actions to the competent authorities.

Whistleblowing works as a tool to improve the organizational quality of a nation or we could say whistleblowing is a key to make government officials accountable. Whistleblowers protection leads to transparency and accountability which leads to good governance, so we could say, whistleblower protection ultimately results in the good governance. Whistleblowers are major players in maintaining good governance, transparency and accountability as they plays vital role in bringing to the notice, instances of maladministration and corruption in public as well as private organization.

The whistleblowers who report in good faith about suspected acts of corruption are often subjected to harassment in the form of discretionary and retaliatory actions which may sometimes have fatal consequences like in the case of Satyendra Dubey, Shanmugam Manjunath etc. This calls for statutory protection of the individuals performing the role of

whistleblowers by making disclosures in public interest so as to encourage the exposure of wrongdoings in the company and curb the fear of being victimized for their action. Unless the people are assured that they will be protected under law for making a disclosure on illegal action, not many will come forward to do such an act.

A bill for protection of whistleblowers was first initiated in 1993 by Mr. N. Vittal (the then chief vigilance commissioner). In 1991 he requested the law commission to draft a bill encouraging the disclosures of corrupt practices by public functionaries then in December 2001 law commission has also recommended that in order to eliminate corruption, a law to protect whistle blowers was essential. In January 2003, the draft of Public Interest Disclosure (Protection of informer) Bill, 2002 was circulated which was not passed by the parliament. In response to a petition (Writ Petition (Civil) 539/2003.) filed after the murder of Satyendra Dubey, the Supreme Court directed that a machinery be put in place for acting on complaints from whistleblowers till a law is enacted.

Giant leap was made in May 2004, when the government notified a resolution (Resolution no. 89 dated April 21, 2004) in 2004 that gave the Central Vigilance Commission (CVC) the power to act on complaints from whistleblowers or we can say power to receive the written complaints for disclosure on any allegation of corruption or misuse of office. In the year 2006 ‘The Whistle Blowers (Protection in the public Interest Disclosure) Bill was introduced, main objective of the bill was to provide civil and criminal immunity to whistle blowers. Later in 2007, the report of Second Administrative Reform Commissions also recommended that a specific law should be there to protect the whistle blowers. Then in 2011 a bill on protection of whistleblowers’ was laid before the parliament as a drive to eliminate corruption in country’s bureaucracy which later came into existence as *The Whistleblowers Protection Act, 2011*. Enforcement of this law has been left to the discretion of Central Government. The Central Government has not enforced the law till date.

This Act provides a mechanism to receive complaints and inquire into the allegations of corruption or willful misuse of power by the public servants. Although, the Act has come into existence but on bare perusal it seems to be inadequate and still needs more amendments for efficient outcomes or else the zeal of whistleblowers will fade away. The need of exhaustive and complete law is also necessary so that the evils like corruption can be rooted out completely and effectively.

2. CONCEPTUAL UNDERSTANDING

To understand the concept of whistle blowers protection, one has to be acquainted with the terms which are related to the concept. Whistle Blowers Protection Act itself prescribes certain definition to understand the concept in its first chapter. There are certain definitions, which needs to be looked at into.

a. Whistleblowing: The term “whistleblowing” can be defined as:

- (1) Bringing an activity to a sharp conclusion as if by the blast of a whistle.¹
- (2) Raising a concern about malpractice within an organization or through an independent structure associated with it.²
- (3) Giving information (usually to the authorities) about illegal or underhand practices.³
- (4) Exposing to the press, a malpractice or cover-up, in the business of a government office.⁴
- (5) It involves the act of reporting wrongdoing within an organization to internal or external parties.⁵
- (6) “An act of a man or a woman, who, believing in the public interest overrides the interest of the organization he serves, publicly blows the whistle if the organization is involved in corrupt, illegal, fraudulent or harmful activity.”⁶

So we can say whistleblowing is a term, which is used to denote the action of a person which unmasks the illegal and unauthorized acts done by the officials or we could say, an act by which a person raises his concerns about the malpractices prevailing in the organization. Whistleblowing has proven to be an effective weapon in hands of righteous few of the society to bring out the illegal and malpractices of the organization. Whistleblowing is done with the

¹ Oxford English Dictionary

² UK Committee on Standards in Public Life.

³ Chambers Dictionary.

⁴ US Brewers Dictionary

⁵ Anila V Menon, Whistleblowers impact and implications 28 (The Icfai University Press, 2007)

⁶ Ralph Nader, Peter Petkas & Kate Blackwell , Whistle-blowing 28 (Banham Press 1972), http://www.whistleblowing-cee.org/about_whistleblowing/#1 (last visited Mar. 20, 2015).

intention to make the law enforcement authorities aware about the malpractices prevailing in the organization. Whistleblowing is done with an intention to make people aware about the illegal practices and to save them from harm.

b. Whistleblower: According to R.M Green (1994): A whistleblower is an employee who, perceiving an organizational practice that he believes to be illegal or unethical, seeks to stop this practice by alerting top management or failing that by notifying authorities outside the organization.

Whistleblowers are part of society's alarm and self-repair system, bringing attention to the problems before they become far more damaging⁷

Whistleblower is a person who discloses about the misconduct and corruption going on in an organisation.

c. Internal Whistleblower: a whistleblower who reports the misconduct or illegal behaviour of a fellow employee or superior within a company. We can say if an offence is being committed within an organisation without the knowledge of senior officials or management, then in this case senior managers or officials could be made the recipients of the whistleblowers disclosure. Internal whistleblower helps the organisation in a positive way as an organisation gets the chance to deal with the problem efficaciously and to correct their discrepancies internally.

d. External whistleblower: whistleblowers who report their actions to entities such as the media, law enforcement, and watchdog agencies. We can say where whistleblower fears with the internal whistleblowing, they could opt to blow the whistle externally.

e. Disclosure: This word has a major role to play in the act, as what could be included in the disclosure have to be ascertained. "Disclosure" means a complaint relating to,—

(i) An attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988;

⁷ C. Fred Alford, *Whistleblowers: Broken Lives and Organizational Power* (Cornell Univ. Press, Ithaca, NY, 2001), <http://www.bmartin.cc/pubs/05overland.html#fn1> (last visited Mar. 20, 2015).

(ii) Wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party;

(iii) Attempt to commit or commission of a criminal offence by a public servant, made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosure referred to in sub-section (2) of section 4⁸.

3. HIGHLIGHTS OF THE WHISTLE BLOWER PROTECTION ACT

The act seeks to protect whistleblowers, i.e. persons making a public interest disclosure related to an act of corruption, misuse of power, or criminal offence by a public servant. Any public servant or any other person including a non-governmental organization may make such a disclosure to the Central or State Vigilance Commission. Every complaint has to include the identity of the complainant. The Vigilance Commission shall not disclose the identity of the complainant except to the head of the department if he deems it necessary. The act penalizes any person who has disclosed the identity of the complainant. The Bill prescribes penalties for knowingly making false complaints.

Key Features

Procedure of Inquiry

First, the Vigilance Commission has to verify the identity of the complainant, and then conceal his identity (unless the complainant has revealed it to any other authority). Then it shall decide whether the matter needs to be investigated based on the disclosure or after making discreet inquiries. If it decides to investigate, it shall seek an explanation from the head of the concerned organization. The Vigilance Commission shall not reveal the identity of the complainant to the head of the organization unless it is of the opinion that it is necessary to do so. The head of the organization cannot reveal the identity of the complainant. After conducting the inquiry, if the Vigilance Commission feels that the complaint is frivolous or there is no sufficient ground to proceed, it shall close the matter. If the inquiry substantiates allegation of corruption or misuse of power, it shall recommend certain measures to the public authority (anybody falling within the jurisdiction of the Vigilance Commission). Measures include initiating proceedings against the concerned

⁸ Section 2(d), The Whistleblowers Protection Act, 2011

public servant, taking steps to redress the loss to the government, and recommending criminal proceedings to the appropriate authority. Every public authority shall create a mechanism to deal with inquiries into disclosures. The mechanism shall be supervised by the Vigilance Commission. The Vigilance Commission may take the assistance of the Central Bureau of Investigation or police authorities to make inquiries or to obtain information.

Exemption from Inquiry

The Vigilance Commission shall not entertain any matter (a) if it has been decided by a Court or Tribunal, (b) if a public inquiry has been ordered, or (c) if the complaint is made five years after the action⁹. The Bill exempts disclosure of proceedings of the Cabinet if it is likely to affect the sovereignty of India, security of the state, friendly relations with foreign states, public order, decency or morality¹⁰. Such an exemption has to be certified by the Secretary to the central or state government.

Safeguards for Persons Making Disclosure

A person shall not be victimized or proceeded against merely on the grounds that he has made a disclosure or assisted in an inquiry, therefore provisions for the safeguards of person disclosing the information has been given under the act. Vigilance Commission shall protect the identity of the complainant and related documents, unless it decides against doing so, or is required by a court to do so.

Penalties

The Act lays down penalties for different offences. For revealing the identity of complainant negligently or due to mala fide reasons, the penalty is imprisonment for up to 3 years and a fine of up to Rs 50,000. For knowingly making false or misleading disclosures with mala fide intentions, the penalty is imprisonment up to 2 years and a fine of up to Rs 30,000. But on the other hand provision of appeal has also been laid down in the act, any person aggrieved by an order of the Vigilance Commission relating to imposition of penalty for not furnishing reports or revealing identity of complainant may file an appeal to the High Court within 60 days.

4. SHORTCOMINGS OF THE ACT

⁹ Section-6(1) of The Whistle Blowers Protection Act, 2011

¹⁰ Section-8 of The Whistle Blowers Protection Act, 2011

Victimization:

The act has provided the provisions to balance the need to protect honest officials from undue harassment with protecting persons making a public interest disclosure by punishing any person making false complaints. However, it does not provide any penalty for victimizing a complainant.

The Central Government shall ensure that no person or a public servant who has made a disclosure under this Act is victimised by initiation of any proceedings or otherwise merely on the ground that such person or a public servant had made a disclosure or rendered assistance in inquiry under this Act¹¹ but nowhere it has defined this term. We have to be concerned about the word ‘Victimisation’, which requires to be looked at upon because this word has not been defined anywhere in the act. Person could be harassed by different acts of employer, which needs to be mentioned in the act itself, otherwise it will be at the sack of judiciary to define the word and in future it could face discrepancies.

Standing committee recommended that term “victimization” should be defined in the act. It has also recommended that witnesses and other persons who support the whistleblower should be accorded the same protection, but nothing was added to the act.

Anonymous complaints:

Standing committee report¹² & Fourth Report of the Second Administrative Reforms Commission¹³ both had suggested that there should be a foolproof mechanism to ensure that the identity of the complainant is not compromised. This is important because without such a mechanism it would deter prospective complainants, but act was passed without any amendment made to this provision, i.e. it has not been allowed till date. There might be chances that many false accusations will arise due to anonymous resources, but there should not be any presumption regarding the complaints i.e. anonymous complaints should not be regarded as less deserving of investigation, this thing would certainly lead to consumption of money but it could resolve the problem of public resources.

¹¹ Section 11(1) of the Whistle Blowers Protection Act, 2011

¹² Standing Committee on Personnel, Public Grievances, Law and Justice

¹³ “Ethics in Governance,” Fourth Report of the Second Administrative Reforms Commission

It is true that, if Whistle Blowers Protection Act makes way for anonymous complaints, then there will be all possibilities of spurious complaints or complaints falling short of legal substance, but if we want true transparency then government needs to take this action.

Burden of proof:

Each disclosure shall be accompanied by full particulars and supporting documents¹⁴. Standing committee had recommended that Undue burden should not be placed on the complainant to provide proof to substantiate his case. As long as he is able to make out a *prima facie* case, the Vigilance Commissioner should follow up on the case. Whistle blowers protection act have not included this suggestion given by the standing committee.

Inclusion of private sector:

Fourth Report of the Second Administrative Reforms Commission had suggested that whistle blowers protection should cover corporate whistleblowers unearthing fraud or serious damage to public interest, but this has not been included in the act.

Private sector contributes a lot in our economy, so anything related to private sector should not be left at the discretion of some officials. Many of the authors might not be in support to include private sector under the regime of this act, as many of the private sector companies will not be able to follow the requirement laid down by the policies, but to ensure transparency, accountability which further leads to good governance this step is also necessary.

Effective policies could be adopted by the private sector to ensure that they are also concern with the safeguards which needs to attribute to the whistle blowers, which ultimately helps them only. For efficacious policy:

- Compliance policy should involve board of directors in any whistle blowers complaint. Independent members of board of directors should receive the complaints.
- Legitimate whistle blowers should be rewarded so that employees will be encouraged to participate in the functioning of the government.
- Legitimate whistle blowers should not have their employment terminated without prior approval of the independent directors.

¹⁴ Section 4(4) of Whistle Blowers Protection Act, 2011

Penalty:

Section 17¹⁵ provides for the penalty in cases of frivolous complaints, Standing Committee had recommended that the penalty for frivolous or mala fide complaints should be substantially reduced. It had also suggested that while deciding whether a disclosure is frivolous, the intention of the complainant should be examined rather than the outcome of the inquiry. The complainant should also have the right to appeal to the High Court. Whistle blowers protection act, 2011 is still having provision relating to penalty.

Exclusion of Special Protection Group:

Provision of this act is not applicable to the armed forces of the Union, being the Special Protection Group¹⁶. The Special Protection Group has the duty with them to protect the most important officials of the state. They have access to all private and official matters & they have maximum access to the information regarding those officials. The Whistle Blowers Protection Act, 2011 does not secure these group, that means if any member of Special Protection Group complains or disclose any illegal activity or mal practices then they won't be protected under this act. Such exclusion will certainly reduce the confidence of the public in the legislature & it will also discourage the honesty in the public officials.

5. CONCLUSION

India is a democratic country, where people expects good governance from the government, by good governance we mean, government should be accountable to people. People should be made aware of every action and step of government. Whistleblower protection is not only important for the individual who blows the whistle but it is vital for the people at large, as protection to that person could unmask various corrupt and illegal practices prevailing in different authorities, which eventually gives benefit to the country. In the past, Whistleblowers have proved to be an effective tool to curb away corruption but with lack of protection for them, they have to often face victimization. With an aim to protect whistleblowers and curb victimization and harassment against them, The Whistleblowers Protection Act, 2011 came into force.

¹⁵ Any person who makes any disclosure mala fide and knowingly that it was incorrect or false or misleading shall be punishable with imprisonment for a term which may extend up to two years and also to fine which may extend up to thirty thousand rupees.

¹⁶ Section 2 of the Whistle Blowers Protection Act, 2011

Transparency and accountability is a must have for a democratic country like India. The strongest ever step taken to achieve it was the Right to Information Act. It provides the right to know to the citizens. This includes information as to corruption of officials and this is where the role of whistleblowers starts. Therefore, we can say that in a way the Whistleblowers Protection Act, 2011 is extension of RTI and also supplements the same. It signifies that, this legislation needs to be efficacious in implementation so that it could curb the illegal practices.

Researcher has thrown light on the provisions of Whistleblowers Protection Act, 2011, which are clearly lacking behind from achieving its object. Whistleblowers are assets of the society but they might get victimized by weak legislation. Law should be made in such a way so that whistleblowers should not be victimized because there are chances that whistleblowers get victimized by both employer and colleague. India could face serious trouble in providing protection to whistleblowers, Indian legislatures should identify the loop holes prevailing in the legislation of different countries and should make efforts to plug in those loop holes so that India would not face any such problem. Existing legislation on the subject is not substantial legislation. It needs to be amended so that efficacious provisions could be made. Analysis made by the researcher shows that there is strong need for consistency and operational requirements provided by the Indian legislation.

COMPETITION ISSUES WITH INTELLECTUAL PROPERTY RIGHTS IN AGRICULTURE SECTOR

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Abstract

Intellectual Property Rights create monopolies while **Competition Law** fights against monopolies. This is the general perception and how these two streams balance each other is the moot question. It is a fact that Intellectual Property Rights constitute monopolies for a limited period of time and to incentivise the innovation process and thereby propelling development and society. Competition law by itself doesn't condemn the mere possession of monopoly power, but rather certain exercises of or efforts to obtain it, might be allowed to interfere with the monopoly. Through patents on seed, Transnational Seed Company, **Monsanto** has become the "Life Lord" of this world, collecting rents for life's renewal from farmers, the original breeders. This paper focuses on how **Monsanto** has exploited the lives of thousands of farmers with its **Bt Cotton Patent** which ultimately gained it 95% control over the Cotton Seeds Industry in India. The present Competition Act, 2002 is not equipped to deal with interplay between competition provisions and Intellectual Property protection and hence the aim and object of this paper is to highlight the intellectual property rights related to agriculture with the main focus on **seeds industry** and how it is being exploited.

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1. INTRODUCTION

Agriculture sector is the primary sector of India with maximum population of the country engaged in it. The term ‘Agriculture’ as per Webster’s New International Dictionary refer to “the art or science of cultivating the ground, including rearing and management of livestock, husbandry farming and also including in its broad science farming, horticulture, forestry, cheese making etc”. The term ‘agriculture’ is defined broadly and differently under various laws, perhaps, based on the purposed and objective of respective Acts¹.

Intellectual Property Rights on the other hand are like any other property rights; they allow the innovator, or owner of a patent, trademark or copyright to benefit from his or her own creative work and investment. Broadly speaking, intellectual property is the legal rights associated with creative effort in certain industries and includes computer programs, films, designs, inventions, artistic and literal work etc.² Thus it prevents other persons from taking undue advantage and benefits from other people’s investments. In this article we are mainly concerned with the intellectual property rights related to agriculture with the main focus on seeds industry and we shall be dealing with its impact vis-à-vis competition in India.

The relationship between Intellectual Property Rights and Competition Law is relatively new. With the growth of both these fields, the similarities and overlapping regulations are coming into light. Both in competition and IP, we are looking for solutions which are not too restrictive and not too lax. And between competition policy and IP, we are seeking a balance which preserves private incentives to invest and create, while ensuring that we are not creating undue barriers to future competition and innovation.

Competition Law and its Scope in Agriculture

With the increase in the complexity of the issues at stake, skill requirements for the adequate functioning of a competition authority have risen significantly in recent years. The issue of administrative structures and skills is not independent of the nature of competition law a country should adopt. There is a basic tension between complexity and simplicity. The administrative and resource costs of simple *per se* rules are likely to be lower than a more elaborate rule of reason approach.

¹ Sec 2(b), The State Agricultural Credit Corporation Act (60 of 1968), 1968.

² Bainbridge, David. *Intellectual Property Rights*, 5th ed. London, 2002, Longman. Print.

The issue of genetically modified seeds implicates the careful balance of the antitrust laws and the intellectual property laws. These regimes employ different means to the same ends of enhancing consumer welfare and promoting innovation. The antitrust laws preserve the competitive spur to innovation, and the intellectual property laws create incentives for innovation.³ Antitrust law recognizes the critical role that intellectual-property rights play in driving innovation and values those rights.⁴ For example, antitrust law typically does not limit the prices that a patent holder may charge to license that patent. As the Seventh Circuit held, the “price of” a patented product “cannot violate the Sherman Act: a patent holder is entitled to charge whatever the traffic will bear.”⁵ However, if conduct goes beyond the appropriate use of intellectual property and harms competition, it should be disciplined by appropriate antitrust enforcement. The Division stands ready to take the appropriate action in those cases. Thus, if the patent holder has crossed the bounds of the antitrust laws and abused his rights in a manner that leads to competitive harm, the Division is prepared to challenge that action. There may also be opportunities for clarification of how patent and antitrust law should align.

1.1 Areas of Study

By this Article we have tried to bring up the problems faced by the farmers due to genetically modified seeds and also throw some light on the laws regarding the subject.

The article is divided into 3 chapters. Chapter 1 is the basic and general chapter and deals with the Intellectual property laws in the agriculture sector and the scope of competition law. Chapter 2 deals specifically with IPR in seed Sector and its Monopoly effects and mainly deals with BT cotton, BT brinjal, their side effects and implications. Chapter 3 talks about the role of MRTP Act in the said areas and role of CCI and Competition Act 2002. Chapter 4 concludes the report and gives suggestions for reform in the law and need for awareness.

2. IPR IN SEED SECTOR AND ITS MONOPOLY EFFECTS

India's formal seed industry was effectively launched with the introduction of the Seeds Act in 1966, it was a policy that gave statutory backing to a system designed to govern, manage,

³ “Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition.” www.ftc.gov. U.S. Dep’t Of Justice & Fed. Trade Comm’n, April 2007. Web. 1 Mar. 2015

⁴ Varney, Christine. “Promoting Innovation Through Patent and Antitrust Law and Policy.” www.justice.gov. 26 May. 2010. Web. 28 Feb. 2015.

⁵ Schor v. Abbott Labs, 457 F.3d 608, 610 (7th Cir. 2006).

and regulate the production and distribution of seed for key food security crops. The industry operated through state monopolies and state certification agencies that relied primarily on publicly developed open-pollinated varieties, particularly modern rice and wheat varieties. Launch of the World Bank–aided National Seeds Project in three phases (1977–1978, 1978–1979, and 1990–1991) promoted the availability of high-quality, high-yielding variety seeds in India. Establishment of state seed corporations under the project further strengthened the seed infrastructure in the country and contributed to shaping an organized seed industry.

In 1983, the Seed Control Order began regulating private seed production and distribution by bringing seed under the umbrella of the Essential Commodities Act of 1955, which provides for the control of the production, supply, and distribution of and trade in certain commodities including rice, wheat, pulses, and oilseeds. In applying the Essential Commodities Act to seed, the government required seed dealers to obtain licenses and introduced regulations over the trade in seeds of non-notified varieties and hybrids conducted by the private sector.

The Industrial Licensing Policy of 1987 dereserved the seed industry, thus permitting large Indian companies (including companies having not more than 40 percent foreign ownership) to produce and market seeds in India. In 1988, the Indian government introduced the New Policy for Seed Development, a reform that led to significant change in the structure and regulation of the country's seed industry.⁶ The policy relaxed seed trade norms within the country; reduced import restrictions on germplasm, seed, and seed-processing equipment; and encouraged foreign company participation in the seed industry. The policy opened the door for private investment in high-value hybrids for vegetables, cereals, and cotton. The New Industrial Policy of 1991 further relaxed restrictions over India's seed industry by permitting foreign direct investment and technology transfers, while the Export and Import Policy of 2002–2007 lifted the restrictions on exports of all cultivated (other than wild varieties) seeds except for jute and onion.

2.1 Intellectual Property laws for seed industry

Intellectual property rights became a concern in Indian agriculture and in the seed industry when India joined the World Trade Organization (WTO) in 1995 and signed on to WTO's

⁶ Kolady, Deepthi. Spielman, David J. and Cavalieri, Anthony J. "Intellectual Property Rights, Private Investment in Research, and Productivity Growth in Indian Agriculture A Review of Evidence and Options." www.ifpri.org. International Food Policy Research Institute. November, 2010. Web. 1 Feb. 2015.

Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. Article 27.3(b) requires signatory countries to provide protection for plants in the form of patents or a system created specifically for the purpose ("sui generis"), or a combination of both.

In 2001, in line with the TRIPS guidelines, the government passed the Protection of Plant Varieties and Farmers' Rights Act (PPV&FR Act) with the objective of (1) providing an effective system for protection of plant varieties; (2) protecting the rights of farmers and plant breeders; (3) encouraging the development of new varieties of plants; (4) stimulating R&D investment and seed industry growth; and (5) ensuring the availability of high-quality seeds and planting materials to farmers. The PPV&FR Act provides for protection of novel and extant varieties.⁷

Currently, in addition to a few (five) multinational seed companies, the Indian seed market is host to an estimated 410 domestic seed companies, 10 of which can be classified as large in size, 50 as medium, and 350 as small.⁸ The top 10 companies in the private sector accounted for about 25 percent of the total volume in the private sector, and more than 80 percent of companies operated as trading companies with no research investments in 2005.⁹

2.2 Consolidation and merger of seed industry

With the five MNC's in the Indian market, industries that began with a large number of competing firms eventually became dominated by one firm (a monopoly), or more commonly, a small number of large firms (an oligopoly). The process was also assisted by government policies, particularly when economic power translated into political power: larger firms were more successful in lobbying for government actions that resulted in an uneven playing field, to the benefit of the big.¹⁰ The result of these positive feedback loops is that circuits of accumulation become even more concentrated, or controlled by fewer and fewer players.¹¹ Monsanto being the most dominating industry and the agreement between Monsanto and Mahyco controlled the seed industry in India.

⁷ Kochupillai, Mrinalini. "The Indian PPV&FR Act,2001 Historical and Implementational Perspectives." *nopr.niscair.res.in*. Journal of Intellectual Property Rights, Vol. 16, March 2011. Web. 15 Feb. 2015.

⁸ Supra 7

⁹ Supra7

¹⁰ Hannaford, S.G. *Market Domination - The Impact of Industry Consolidation on Competition, Innovation, and Consumer Choice*. Praeger: Westport, CT, USA, 2007. Print.

¹¹ Heffernan, W, et al. *Consolidation in the Food and Agriculture System; National Farmers Union*. Washington, DC, 1999. Print.

At first, patented seeds were bundled with other inputs to protect profits in agrochemical divisions-Monsanto's agreement to purchase their herbicide-tolerant transgenic seeds required farmers to use their proprietary glyphosate herbicide, rather than a generic. Transgenic seeds were increasingly becoming a profit center in their own right, however. In addition, the patent protections of these seeds were being extended to non-transgenic seeds; filing claims on traits identified through genomic sequencing (marker assisted breeding) encouraged consolidation among non-commodity focused seed companies, such as those specializing in fruits and vegetables. Acquiring firms have paid significant premiums for seed companies in recent years, sometimes exceeding three times annual sales.¹² Although rates of profit in the seed industry were already very high compared to other industries, these premiums suggested an expectation of recouping such investments with even higher rates of profit in the future.¹³

The top three seed firms currently control 85% of transgenic corn patents, and 70% of non-corn transgenic plant patents in the US, for example. Although the Global South is the locus of the majority of the world's agricultural biodiversity, the seed industry is dominated by firms from North America and Europe that utilize intellectual property protections to exploit this wealth.¹⁴

2.3 BT Cotton and its monopolization

With the advent of Industrial policy India was the first country in the world to commercialize cotton hybrids. The first cotton hybrid H-4 was intra-*hirsutum* and was produced by Dr. C. T. Patel in 1970 at the Surat agricultural experiment station of the Gujarat Agricultural University. The first private sector cotton hybrid was MECH 11 commercialized by Mahyco in 1979.

Monsanto has a presence in India through its equity stake with Mahyco and its joint venture with Mahyco in marketing activities. It is also the owner of the cotton business of Emergent

¹² Paul, H.; Steinbrecher, R.; Michaels, L.; Kuyek, D. *Hungry Corporations: Transnational Biotech Companies Colonise the Food Chain*. London, UK, 2004. Print.

¹³ Harl, N.E. "The age of contract agriculture: consequences of concentration in input supply." *ageconsearch.umn.edu*. Journal of Agribusiness 18(1), Special Issue. March, 2000. Web. 23 Feb. 2015.

¹⁴ Paul, H.; Steinbrecher, R.; Michaels, L.; Kuyek, D. *Hungry Corporations: Transnational Biotech Companies Colonise the Food Chain*. London, UK, 2004. Print.

Genetics that acquired Mahendra Hybrid Seeds (with the Mahalaxmi brand) and Paras Extra Growth Ltd (with Paras Brahma and Paras Krishna brands from Hindustan Lever).¹⁵

The monopolization started with, giant corporations starting to control local seed companies through buyouts, joint ventures and licensing arrangements, leading to a seed monopoly. There are two routes to Bt hybrids. Either a firm can license an already approved gene construct from a technology provider or it can undertake R&D on its own to develop its own Bt gene. Most seed firms in India have chosen the first option of obtaining a Bt gene on license.

However, it was only in the 1990s that other seed companies released their cotton hybrids.¹⁶. These hybrids contained the Bt gene *cry1Ac* owned by the U.S. firm Monsanto which licensed the gene to MMB in India. BT Cotton *Bacillus thuringiensis* is a soil borne bacterium toxic to insect pests and safe to higher animals. It is widely used as a bacterial insecticide. Subsequently, MMB has sub-licensed the gene to 20 other firms in India (as of April, 2005) to incorporate it into their cotton hybrids. As of 2006, 44 cotton hybrids (from 14 seed companies) using this gene construct had been approved for different cotton zones in India there are four largest hybrid seed markets: namely Maharashtra, Gujarat, Andhra Pradesh and Madhya Pradesh. The firms that figure in the top 5 in each of the 4 states are an indication of the number of firms that have successful brands.¹⁷

In the 2004 season, illegal Bt was priced anywhere between Rs. 800 to Rs. 1200 per packet. With its seemingly effective performance and its lower price, illegal Bt is a threat to legal seed, whether Bt or otherwise.

The proposed Seed Bill 2004, which has been blocked by a massive nationwide Gandhian Seed Satyagraha by farmers, aims at forcing every farmer to register the varieties they have evolved over millennia. This compulsory registration and licensing system robs farmers of their fundamental freedoms. State regulation extinguishes biodiversity, and pushes all farmers into dependency on patented, corporate seed. Such compulsory licensing has been the main vehicle of destruction of biodiversity and farmers rights in U.S. and Europe.

¹⁵ Ibid

¹⁶ Shelar, Mahesh. "Competition and Monopoly in the Indian Cotton Seed Market." www.epw.in. Economic and Political Weekly, Vol - XLII No. 37, 15 September, 2007. Web. 28 Feb. 2015.

¹⁷ Ibid

2.4 Implications due to Seed Monopoly in BT Cotton

MMB's position as the dominant gene supplier is not protected by intellectual property laws. It has imposed monocultures on farmers. Mixed croppings of cotton with cereals, legumes, oilseeds, vegetables is replaced with a monoculture of Bt-cotton hybrids. The creation of seed monopolies and with it the creation of unpayable debt to a new species of money lender, the agents of the seed and chemical companies, has led to hundreds of thousands of Indian farmers killing themselves since 1997. The suicides first started in the district of Warangal in Andhra Pradesh. Peasants in Warangal used to grow millets, pulses, oilseeds. Overnight, Warangal was converted to a cotton growing district based on non-renewable hybrids which need irrigation and are prone to pest attacks. An outburst of farmers' suicide spread across four states of India over the last decade. According to official data, more than 160,000 farmers have committed suicide in India since 1997. These four states are Maharashtra, Andhra Pradesh, Karnataka and Punjab. The suicides are most frequent where farmers grow cotton and have been a direct result of the creation of seed monopolies. According to official data, more than 160,000 farmers have committed suicide in India since 1997.¹⁸

The Government of Andhra Pradesh filed a case in the Monopoly and Restrictive Trade Practices Act (MRTP), India's Anti-Trust Law, argued that Monsanto's seed monopolies were the primary cause of farmers' suicides in Andhra Pradesh. Monsanto was forced to reduce its prices of Bt- cotton seeds. The high costs of seeds and other inputs were combined with falling prices of cotton due to \$4billion U.S. subsidy and the dumping of this subsidized cotton on India by using the W.T.O. to force India to remove Quantitative Restrictions on agricultural imports. Rising costs of production and falling prices of the product is a recipe for indebtedness, and indebtedness is the main cause of farmers' suicides. This is why farmers' suicides are most prevalent in the cotton belt on which seed industries own claim is rapidly becoming a Bt-cotton belt. Bt-cotton is thus heavily implicated in farmers' suicides.

The technology of engineering Bt-genes into cotton was aimed primarily at controlling pests. However, new pests have emerged in Bt-cotton, leading to higher use of pesticides. In Vidarbha region of Maharashtra, which has the highest suicides, the area under Bt-cotton has increased from 0.200 million ha in 2004 to 2.880 million ha in 2007. Costs of pesticides for farmers has increased from Rs. 921 million to Rs. 13,264 billion in the same period,

¹⁸ Dr. Shiva, Vandana. "Seed monopolies, genetic engineering and farmers suicides" www.globalresearch.ca. Centre for Research on Globalization, 5 April, 2013. Web. 27 Feb. 2015.

which is a 13 fold increase. A pest control technology that fails to control pests might be good for seed corporations which are also agrichemical corporations. For farmers it translates into suicide.¹⁹

Monsanto and a couple of other TNCs have boundless financial power which they would unleash anytime anywhere to get decisions in their favour and to carry on R&D operations which are immensely costly. Mahyco, deals with these activities, but Monsanto has the controlling 26 per cent share in this company. Thus by itself and through its subsidiaries Monsanto controls the Genetically Modified (GM) seed market of India. In fact it has a dominant position in the world GM seed market.²⁰

It was much interestingly said by Dr P.M. Bhargava, who was the Supreme Court appointed member of the GEAC and who is himself an eminent biotechnologist, found that “*Mahyco did not conduct eight essential tests before recommending the product to the GEAC. Mahyco is in a way controlled by Monsanto. There had never been any independent appraisal of the long-term effects of Bt Brinjal on human health and environment.*”²¹

Companies provided free pesticides with the seeds, conducted feast for farmers, using religious leaders and respected villagers as spokespersons, extensive advertorials showcasing “fake” success stories of farmers, discounts for advance bookings and creating a perception that the seeds are in short supply Bt cotton has been sold in the country by Mahyco-Monsanto by giving false and misleading advertisements. One such misleading advertisement was recently pulled up by Advertising Standards Council of India. Paid news, advertorials with fake success stories have been exposed in 2011 in Maharashtra.

3. ROLE OF MRTP ACT AND CCI IN CURBING THE MONOPOLY PRACTICES

The competition law in India which is primarily governed by the Competition Act, 2002; an act that attempts to make a shift from curbing ‘monopolies’ under the archaic MRTP Act, 1969 to curbing practices having ‘adverse effects on competition’ and promoting and

¹⁹ Watal, Jayashree. “Intellectual Property Rights In Indian Agriculture.” *icrier.org*. Indian Council For Research On International Economic Relations, July, 1998. Web. 15 March. 2015.

²⁰ Ibid

²¹ “Cultivation Of Genetically Modified Food Crops—Prospects And Effects.” *164.100.47.134/lsscommittee/Agriculture/GM_Report.pdf*. Ministry of Agriculture, 37th Report, August, 2012. Web. 15 March. 2015.

sustaining competition. While a majority of the procedural provisions of the Act with respect to setting up the Competition Commission of India (CCI) have entered into force, several substantive provisions of the Act dealing with ‘anti-competitive agreements’, ‘abuse of dominant position’ and ‘regulation of combinations’ have yet to take effect. In the case of BT brinjal and BT cotton both Competition Commission of India has acted responsibly and has tried to solve the issues to an extent.

The MRTPA punished large market shares or dominance. The report highlights that this is inappropriate in conditions when markets might be linked to each other or when the perceived contours of a market hide several segments, each dominated by a different firm. Moreover, it is quite possible for a firm to become dominant in a market on account of its superior productivity or the superior quality of its products. Mahyco Monsanto Bio-Tech (India) has been found guilty of monopolistic TRADE practices on account of charging an exorbitant trait fee - Rs 1,250 for every 450 gm packet - for Bollgard Technology (Bt) cotton seed in India by the Director-General Investigation and Registration (DGI&R).

According to DGI&R, the investigative arm of Monopolies & Restrictive TRADE Practices Commission (MRTC), Mahyco Monsanto has failed to explain the rationale for the high fee.

“The benefits accruing to the farmers cannot be the basis for fixing the trait fee per packet. The reason for charging such an exorbitant trait fee appears to be the monopolistic position enjoyed by the respondent in respect of Bt cotton seeds,” according to a report submitted by Ex DGI&R joint secretary S Chandra.

According to the report, the cost of production for a packet of seeds ranges between Rs 300 and Rs 500. The MRTC had on October 20 2010 directed DGI&R to investigate the allegations of unfair TRADE practices under Section 29 (o) of the MRTP Act, 1969, against Mahyco Monsanto, a 50:50 joint venture between Indian company Mahyco and multinational Monsanto.

The company has already slashed the price of Bt cotton seeds from Rs 1,250 to Rs 900 for 450 grams. While claiming that it had been incurring an expenditure of more than \$500 million (Rs 2,200 crore) every year on research and development over the past three years, the company had argued that there was neither distortion of competition nor any unjustified cost imposed on farmers.

It said that Bt cotton needs less pesticides and as a result, the farmers expenses have gone down. There were only three Indian and two foreign Bt genes companies in the process of research and commercialization. And among the list of 36 institutions and 34 companies engaged in R&D of transgenic crops, some are the sub-licensees of Mahyco Monsanto, it stated, adding “till such time such companies or institutions are not in a position to enter the MARKET, the respondent (Mahyco Monsanto) is in a position to charge for this technology arbitrarily and unreasonably.”

Exorbitant seed prices have been controlled by MRTP Act. The monopoly control by Monsanto has led to exorbitant pricing of Bt cotton seeds which were initially priced between Rs 1650-1800 for 450 gms of Bt cotton seeds (in 2004), as against Rs 350 for hybrid seeds and less than Rs 100 for desi cotton seeds.²² After the seed prices were brought under control through the MRTP Act and Essential Commodities Act, Monsanto has taken the A.P. and Gujarat governments to Court to decontrol seed prices.

4. CONCLUSION AND SUGGESTIONS

There is an array of challenges facing the agriculture sector, many, if not most, of which fall outside the purview of the antitrust laws. The antitrust laws focus on competition and the competitive process, and do not serve directly other policy goals like fairness, safety, promotion of foreign trade, and environmental welfare. The BT Cotton seeds may have increased the yields but at the cost of thousands of farmers dying due to indebtedness and crop failure, it was a success in only some parts of country like Gujarat. There are various other alternatives as suggested later to BT cotton which also increases the productivity and are less costly. The step taken by the judiciary to fix the price of seeds at 450 rupees per packet is a commendable step. In conclusion there are a few suggestions for the Indian Competition Authorities:

- The basic function of competition law and IPR protection are same, two means to the same end, i.e. welfare of the consumers. They complement each other for the same purpose. This concept to be included in the guideline in future.

²² Sainath.P, “The largest wave of suicides in history.” www.counterpunch.org, Neo Liberal Terrorism in India, February 12, 2009. Web. 28 Feb. 2015.

- The concept of abuses of IPR is not defined in any legislation in India. Hence, the understanding of it shall not be restricted to the narrow scope of case laws of other countries like the US and EU.
- The definition of “Abuse of IPR” shall be like this, “unjustifiable use of IPR and damage to the interest of consumers and the Indian Society at large.”
- The borderline between IPR abuse and violation of competition law should be clearly defined in order to punish the competition law violators.
- If the acquisition of IPR with the purpose of strengthening the monopoly power in the market should be regulated properly with technology transfer guidelines in India.
- Excessive pricing or high prices not related to any objective criteria is the essence of exploitation and fair should be ensured in IPR protected products through competition policies.
- Pricing in developing and developed countries should be based on consumer capacity to pay and not based on discriminatory prices which are violative of competition law.
- Competition provisions can be used as a social tool to protect the interest of small and medium enterprises against the invasion of patented products in the market and to preserve the social and economic welfare of the country.
- In India, the Competition Act does not include high prices as abuse of dominant position. Section 4 of the Competition Act to be amended to include high prices as well.

Through competition advocacy we can assist other public/private entities in finding solutions that maintain or enhance competition and do not, indirectly, retard such. In this study we have tried to highlight certain issues which are prevalent in the seed sector and due to which there have been a lot of problems and anti- competitive practices in the particular areas where the innumerable farmers have committed suicide due to high prices of seeds and the subsequent crop failures.

THE GENERAL ANTI AVOIDANCE RULE: AN INSIGHT

Mr. Pabitra Dutta* & Mr. Shubham Sharma**

Abstract

The article deals with the hotly debated issue of General Anti-avoidance Rules. These rules were brought in by the government in order to curb and penalize tax avoidance. A case law wise evolution of GAAR has been given. These rules take a shift from the status quo which stated that tax evasion was a crime and tax avoidance was not. There are however, similar avoidance provisions already in the Act in the form of Specific Anti avoidance rules.

The changes sought to be brought in have been elucidated on. A light on key changes in definitions of certain tax terminologies has also been put.

After these rules were announced, there was a huge hue and cry by the corporates about its implementation as they believed it to be anti-trade and as a mean to further harass them by ill-reputed tax authorities.

An attempt has been made by the authors to discuss the merits and demerits of the said provisions, on the basis of which a conclusion is submitted.

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INTRODUCTION

General Anti-Avoidance Rules or GAAR are rules or measures which empower tax authorities to call a business transaction or arrangement “impermissible avoidance arrangement” and thereby deny tax benefits to the parties when the transactions have no commercial substance. Tax avoidance is a major concern for probably every country in the world as the assesee develops a complex scheme of arrangement to ensure that the tax payable is way lesser than the actual tax to be payed. These rules were first proposed by the then Finance Minister Dr. Pranab Mukherjee¹. It was introduced into the Income Tax Act, 1961 by the Finance Act, 2012. However, huge investor outcry had bent the hand of the then UPA Government and the imposition was deferred to April 1, 2016². In the Budget of 2015, presented on 28th February 2015, Shri Arun Jaitley, incumbent Finance Minister, further deferred the application of GAAR by two years i.e. 1st April 2017.

These rules were brought in the form of new Sections 95 to 102 of the Income Tax Act, 1961³. This article shall strive to trace the evolution of these Rules with the help of landmark case laws and relevant provisions.

It is *sine qua non* to appreciate the contrariety between **Tax Avoidance** and **Tax Evasion** for fully appreciating the need for GAAR provisions. The **Organisation for Economic Co-operation and Development (OECD)** has defined tax evasion as “*A term that is difficult to define but which is generally used to mean illegal arrangements where the liability of tax is hidden or ignored i.e. the tax payer pays less tax than he is legally obligated to pay by hiding income or information from tax authorities*”⁴. In simple words, it basically means that intentional steps are taken by the tax payer to evade the tax that can be described as outside the four corners of the law.

Tax Avoidance on the other hand has been defined by the OECD as “*term used to describe an arrangement of a tax payer’s affairs that is intended to reduce his liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent*

¹ Proposed in the Budget for FY 2012 - 2013

² As per the Finance Act, 2013

³ Finance Act, 2013

⁴ OECD, Glossary of Tax Terms

*of the law it purports to follow*⁵. The key distinction here is that in tax avoidance, there is no hiding of facts from the authorities and it remains within the boundaries of law.

Another term which is sometimes used while analysing tax avoidance and tax evasion is ‘tax planning’. The OECD defines tax planning as “*arrangement of a person’s business and/or private affairs in order to minimise tax liability*”⁶. In some cases, the distinguishing line between tax avoidance and tax planning becomes obscure and unclear.

The consequences of tax evasion have always been punitive. However, there is renewed focus on means of tax avoidance and measures required to check them. An illustration of an avoidance transaction would be a transaction entered into with the sole objective of avoiding tax. The substance i.e. the objective of the transaction rather its form determines the tax consequences, although a few exceptions are involved in this. The goals of anti-avoidance legislation are deferral, re-characterization, elimination and shifting of the taxed amount. The Hon’ble Supreme Court discussed anti-avoidance in great detail in the landmark Vodafone Judgment but much before this, its ruling in the McDowell’s case was considered to be a watershed.

With the application of General Anti-Avoidance Rules, every transaction must have a ‘substance’ to it .i.e. some objective other than reducing tax liability. ‘Substance’ here stands for the ‘economic substance’ of the transaction which refers to objective behind the transaction. The substance of the transaction rather its form determines the tax consequences, although a few exceptions are involved in this. The ‘form’ of the transaction is only the label the interested parties attach to their arrangement or transaction.

GAAR regulations recognise the fact that it may not be always feasible for the judiciary of this country to determine the unforeseen implications of the transactions which are carried out for the purposes of tax and resemble in some or the other way to tax avoidance. Though the taxpayer is free to choose the most tax efficient method of giving its taxes, there must be commercial justification of the choice taken and the tax benefit which is consideration of the arrangement must not be the only reason. Considering this aspect of GAAR, India has to be careful and vigilant in addressing the proper application of these provisions so that these do not become an end onto themselves. The goals of this tax avoiding legislation are deferral, re-

⁵ OECD, Glossary of Tax Terms

⁶ OECD, Glossary of Tax Terms

characterization, elimination and shifting of the taxed amount which are sought to be achieved by our country with the implementation of these provisions. Tax-avoidance is not a new phenomenon in India and this was held in the Vodafone judgment given by our Supreme Court.

CASE-WISE EVOLUTION OF GAAR

There were no significant concerns in English society regarding tax avoidance, as distinct from tax evasion, until 1906 when a Select Committee was appointed to consider certain income tax matters and, for the first time in English tax literature, use the term “tax avoidance”.

Before the First World War the rates of Income Tax were acceptably low and often it was not worth the bother for the tax payers to take steps to avoid it. It was only after the war that the finance deficits of the nation were felt for the first time by the tax payers. There was a steep increase in tax and this led to the increasing desire amongst the tax payers to take to legally avoid tax through whatever means available to them.

In the battle between the unwilling tax payer and the Legislature, the case of the Duke of Westminster has proved to be a landmark case. It has been a precedent for many a subsequent tax dispute. The Duke of Westminster, in an attempt to avoid tax, stopped paying non-deductible wages to his gardeners and had instead, agreed to make them payments of income in the form of annuities, which were tax deductible. Naturally, the Inland Revenue Commission (IRC) objected on the grounds that even though the payments were annuities in their legal form, they were the same as wages in substance. The case was appealed to the Tax Court which held that the annuities were non-deductible. The Judge stated that,

“Looking, not at the form, but at the substance, of the thing, this must be regarded, in the case of the servants remaining in His Grace's employ, as wages”

This was further appealed to the House of Lords, the apex court of the United Kingdoms, who rejected the ‘substance over form’ claim and ruled in favour of the Duke. Lord Tomlin of the House of Lords stated,

“The true nature of the legal obligation and nothing else is the substance. Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is

less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.”

The ruling of the House of Lords in favour of the Duke has been cited in subsequent disputes decades hence and to this day remains to be a major argument in all ‘substance over form’ appeals. The concept Tax Avoidance was thus probably discussed for the first time in **Duke of Westminster v. Inland Revenue Commission**⁷.

Misra J. in McDowell & Co. Ltd. v. CTO⁸ held that:

‘Tax planning may be legitimate provided it is within the framework of law. Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid payment of tax by resorting to dubious methods’.

The Supreme Court of India in the **Azadi Bachao Andolan Case**⁹ justified the concept of ‘treaty shopping’. It is basically a graphic expression used to describe the act of a resident of a third country taking advantage of the fiscal treaty between two countries. The concept of ‘round tripping’ was also deliberated upon in this case. Round tripping is nothing but the round trip of money from the domestic jurisdiction after secret hibernation and noxious mutation in other countries. Both these devices basically provide or rather facilitate the deflection of legitimate tax incidence. The Supreme Court in this case held that the contention that the DTAC between Mauritius and India is *ultra vires* is not acceptable, even though the DTAC is susceptible to treaty shopping by residents of a third country. It further held that a tax treaty or convention must be given a liberal interpretation and a holistic view must be taken in this regard. Further it held that an act which is otherwise valid in law cannot be treated as non-est merely on the basis of some underlying motive which supposedly resulted in some economic detriment or prejudice to the national interest as perceived by the respondents.

⁷ [1935] All ER 259

⁸ AIR 1986 SC 649

⁹ (2004) 1 CompLJ 50 SC

The **Vodafone judgement¹⁰** is regarded as a landmark judgement in tax avoidance. The Mumbai High Court ruled in favour of the tax authorities but upon appeal, the Supreme Court completely turned the tables in favour of Vodafone. The Supreme Court noted that:

- Gains arising on sale of the share of CGP were not taxable in India since the share of CGP resided outside India that is Cayman Islands.
- Vodafone was not liable to withhold tax from payment of the sale consideration for acquisition of CGP.

A significant aspect of the judgement was the strong emphasis on ‘form over substance’ of the transaction – a fundamental principle of taxation that was read into law by the Supreme Court in the landmark case of the Azadi Bachao Andolan which recognized the validity of the Mauritius route for investment into India. In the interest of certainty, Courts will only look at the form of transaction which tax payers can legitimately structure with a view to mitigate tax liability within the four corners of the law. Therefore, it was also inferred that as long as the transaction is not a sham, Courts cannot disregard the form of the transaction or look through legally constituted entities on the basis of any underlying economic motive or ramification.

The above cases drew the attention of the Revenue Department towards GAAR provisions.

SPECIFIC ANTI-AVOIDANCE RULES

At this juncture it should be worth noting that there are already Specific Anti-Avoidance Rules (SAAR) which are in place and are distinct from GAAR. As the name suggests, these are specific rules which target specific arrangements and also lay down the condition under which they may be invoked. Under the existing Indian laws, a number of arrangements have been made over the years to specifically counter certain situations. Some of the provisions are contained in Chapter X of the Income Tax Act, 1961 while others are spread over other Chapters. Some of these are:

- Provision in respect of revocable transfer of assets. – Section 61.
- Provision relating to clubbing of income which prevents shifting of income from one person to another for tax reasons. – Section 64.

¹⁰ (2012) 6 SCC 613

- Provision targeting avoidance of Income Tax by transactions resulting in transfer of income to non-residents. – Section 93.

However, they may be distinguished from GAAR on the following pedestals:

- (i) Scope: Their scope is narrow and specific as compared to GAAR.
- (ii) Certainty: SAARs provide certainty to the tax payers while planning out their transactions or before formalizing any arrangement.
- (iii) Discretion of the Tax Authority: SAAR does not grant any discretion to the Tax Authority whereas GAAR necessarily involves granting discretion to the tax authorities to invalidate arrangements as impermissible tax avoidance.

The above discussion may lead a person to think that SAAR and GAAR effectively serve the same purpose. Though the same may be true but what differs is the extent and reach of the said rules and the reliance each lays on the discretion of the tax authorities. SAAR is a set of rules which target specific ‘known’ arrangements of tax avoidance. They specifically lay down the conditions under which they may be invoked. They cater to arrangements that the legislators envisages as representing arrangements which may already have happened or which could potentially happen for tax avoidance.

Analysis of GAAR in India:

GAAR provisions have been exclusively mentioned in Chapter X-A in the Income Tax Act, 1961 which consists of Sections 95 to 102.

Arrangement has been provided a wider meaning to *include any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, operation, scheme, agreement or understanding.*¹¹

Tax-benefit includes:

“(a) A reduction or avoidance or deferral of tax or other amount payable under this Act; or

(b) An increase in a refund of tax or other amount under this Act; or

¹¹ Section 102(1) of the Income Tax Act, 1961

- (c) A reduction or avoidance or deferral of tax or other amount that would be payable under this Act, as a result of a tax treaty; or
- (d) An increase in a refund of tax or other amount under this Act as a result of a tax treaty; or
- (e) A reduction in total income including increase in loss, in relevant year or any previous year.”¹²

‘Funds’ as per Section 102 has been amended and it now includes any cash or cash equivalent. It also includes any right or obligation to receive, or pay, the cash or cash equivalent. The term ‘party’ now also includes any person including a permanent establishment which participates or takes part in an arrangement. The term ‘asset’ now includes property, or right, of any kind.

As is evident, all the terms have been provided with a broad canvas with plenty of scope for interpretation by tax authorities.

Section 95 of the Act states that any arrangement done specifically to avoid taxes is not permissible and may attract punitive sanctions.

An impermissible avoidance arrangement shall mean an arrangement, the main purpose or one of the main purposes of which is to obtain tax benefit and it –

- a) “creates rights, or obligations, which are not ordinarily created between persons dealing at arm’s length;
- b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;
- c) lacks commercial substance or is deemed to lack commercial substance under Section 97, in whole or in part; or
- d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.”¹³

Section 97 effectively lays down the pre-requisites of an impermissible arrangement. An arrangement will lack commercial purpose if the substance or effect of the entire arrangement as a whole does not match or is inconsistent in significant manner from the form of its starting or individual steps. It will also include activities such as round trip financing and all

¹² Section 102(10) of the Act

¹³ Section 96 of the Act

the elements which have the effect of offsetting or cancelling each other. It will also include all transactions which are conducted through one or more persons and disguises the value, location, source, ownership or control of funds which is the subject matter of such transaction and the location of an asset or of a transaction or of the place of residence of any party which would not have been so located for any substantial commercial purpose other than obtaining a tax benefit for a party.

Round trip financing has been defined to be a form of barter in which an asset is exchanged for the same or similar asset at the same price and includes any arrangement in which through a series of transactions-

- “(a) funds are transferred among the parties to the arrangement; and*
- (b) such transactions do not have any substantial commercial purpose other than obtaining the tax benefit without having any regard to—*
- (A) whether or not the funds involved in the round trip financing can be traced to any funds transferred to, or received by, any party in connection with the arrangement;*
- (B) the time, or sequence, in which the funds involved in the round trip financing are transferred or received; or*
- (C) the means by, or manner in, or mode through, which funds involved in the round trip financing are transferred or received.”¹⁴*

Section 98 lays down that if an arrangement is declared to be an impermissible avoidance arrangement, then the consequences in relation to tax of the arrangement, including denial of tax benefit or a benefit under a tax treaty, shall be determined, in such manner as is deemed appropriate in the circumstances of the case, including looking through any arrangement by disregarding any corporate structure.

In determining whether a tax benefit exists, **Section 99** states that parties who are connected persons in relation to each other may be treated as one and the same person while any accommodating person may be disregarded. Also any such accommodating party may be treated as one and the same person. It also confers the discretion upon the Revenue Authorities that the arrangement may be considered or looked through by disregarding any corporate structure.

¹⁴ Section 97(2) of the Act

Under the provisions of GAAR, for determining whether an arrangement lacks commercial substance factors namely period or time of arrangement, payment of taxes under the arrangement or existence of exit route under an arrangement shall not be considered as relevant. The very fact that an arrangement resulted in a tax benefit would be sufficient to prove that the main purpose of the arrangement in the first place was to obtain tax benefit. But the same may be negated if the concerned person proves that tax avoidance was not the only motive of the arrangement and that there also exists a *substance* to the transaction with the tax benefit being an added incentive.

India has DTAA with 82 countries and the possibility of a treaty override cannot be overlooked. Article 18 of the Vienna Convention casts a direct obligation on the parties to not defeat the purpose and object of the treaty. Article 33 lays down the principle of '*pacta sunt servanda*' that is every treaty must be followed in good faith. However, with this new legislation a new problem may arise before the revenue department as to the applicability of the treaty.

With the same in mind, it shall now be appropriate to observe the merits and demerits of GAAR.

MERITS OF GAAR:

The various merits of the GAAR provision have been enlisted below:

- The legislation of GAAR will basically apply to 'abnormal' arrangements. It will basically target at those 'highly abusive contrived and artificial schemes which are widely regarded as intolerable by the law of a particular country'. The right of the taxpayers will be well protected and hence the question of excessive burden on an individual taxpayer will not arise. The taxpayers will have to basically show that the decisions which were made with regard to arrangements were reasonable in a commercial that is a non-tax sense, even though they were ultimately made to make a tax saving and not a tax avoidance per se.
- There exists a proposal to move burden of proof from the taxpayer to the tax authorities and the ability to obtain an Advance Ruling will reduce some of the rigor and uncertainty accompanying the original proposal.
- Further the deferment of GAAR provisions till 2016 has provided time and opportunity for a better comprehensive consideration of the proposals in the light of

the rules and guidelines which will be available well in advance. It also allowed stakeholders to give their input in light of its impending implementation.

- It is only morally correct for an entity to be of benefit the people of the country which is providing it its livelihood. The Indian government acknowledges the fact there are tax havens abroad, and this money needs to be brought into the country. At the same time it also accepts that the finances of the country are not in the best shape. GAAR will basically be focussed on discouraging investments of entities in illegal tax havens inside or outside the country whose primary aim is to cut the burden of taxes and to put a curb on them. The country is running huge trade deficit and consequent high current account deficits.

DEMERITS OF GAAR:

The concept of GAAR has been under heavy debate both in India and abroad. Even where GAAR has been implemented, the response it receives has been of the mixed sort.

- The implementation of the GAAR could slowdown investments. Most foreign investors prefer to invest in foreign nations due to cost benefits in the form of favourable government policies, cheap labour and/or tax benefits. The Associated Chambers of Commerce and Industry of India (ASSOCHAM) have said that the centre needs to carry out a study to analyse the post implementation benefits of GAAR before it is actually implemented. It would be an impediment for honouring the DTAA with Mauritius and Singapore.
- The concept of GAAR very much rests upon the principle of ‘intention to avoid tax’. The GAARs in all countries have laid stress on the Tax Authority to prove *male fide* intent of the tax payer before the GAAR can be invoked as is the case in Canada, where GAAR is in the midst of many controversies on account of confusion on the evidentiary issues in GAAR. It is a cardinal principle of interpretation of statutes that a statute based on an uncertainty is unjust and hence, void ab initio
- According to GAAR, tax benefit availed of through a transaction whose sole objective was the exemption of the said tax is impermissible. However, it is to be noted that the Income Tax laws of most countries allow for the tax payer to plan his transactions such that he is liable to pay least to the state. Thus, these two principles do not go hand in hand and violate each other.

The implementation of GAAR has already hit rough weather as Mauritius has already expressed its reservations with regards to the same. They contend that a law in 2013 should not override treaty obligations of 1983. The Japanese Government, which is India's fourth largest investor, had also voiced its concern about the enactment of GAAR.

CONCLUSION

The GAAR provisions are like a double edged sword and would need to be judicially invoked by the revenue authorities. In order for the GAAR to fulfil its design intent, genuine transactions consummated in a tax efficient manner need to be distinguished from sham transactions or colourable devices used for evading tax. Debates about the need for GAAR usually focus on competing policy interests such as the need for integrity of the tax system as against the legitimate interests of tax payers to organize their affairs in a normal commercial way and the community benefits of economic growth resulting from business investment.

Internationally, tax avoidance has been a major area of concern and several countries have expressed concern over the issues of tax evasions and tax avoidance. While countries like Australia have enacted GAAR as early as 1981 some of the leading nations such as the UK and USA have taken a more cautious approach. The GAAR enacted in the USA is very different from the provisions enacted in other countries. Though it claims to be a codified law, but instead of codifying it incorporates a judge-made law by reference. This is a unique feature of the American GAAR. In India, the various SAARs had sufficed the purpose of curbing tax evasion or avoidance. However, the ever growing ingenuity of the tax payer cannot be tackled by such transaction specific provisions. The tax payer is bound to figure out lacunas in the system and then exploit it. In this light, the GAAR provisions will effectively curb the tax avoidance activities to a great extent. However, the scope of the proposed GAAR provisions is exceptionally wide.

The Courts in India have examined the issue of tax avoidance and have laid down principles as to what constitutes Tax Avoidance. It is imperative that Tax Avoidance be clearly defined. The discretion of the revenue department must also be at a minimum. The burden of proof must be shouldered by the revenue rather than the tax payer. These are just some of the measures that are vital to an acceptable GAAR. In our humble opinion, the proposed provisions of GAAR cannot be implemented in its present state. As a growing economy which is seeking an inflow of foreign investment, such ambiguity in tax provisions is

anathema to investor confidence. However, with all stake holders and representatives of the Government at the drawing board, the authors are confident that a mutually acceptable and nationally beneficial GAAR can be enacted.

INDIAN LENIENCY REGIME: NEED FOR TRANSPARENCY

Ms. Ayushi Puntambekar *

Abstract

'Competition is always a good thing. It forces us to do our best. A monopoly renders people complacent and satisfied with mediocrity.'

- Nancy Pearcey

The article analyzes the meaning of the ‘Supreme Evil of Anti-trust’ i.e. Cartels. It provides an overview about the prevailing cartelization in the economy and the current cartel deterrence laws under the Competition Act, 2002. The aim of the article is about the Need for improvement in the Leniency regime. It gives an overview about the Leniency Programme adopted in the United States and European Union and explains about the evolution of the Indian Leniency Programme. The object of the article is about the early detection of cartels through the leniency scheme. Leniency has been accepted as one of the best tool for cartel busting however, since its inception in India, there has been no leniency application. Article analyzes the provisions of the Lesser Penalty Regulations Act, 2009. Further, it makes some suggestions to improve the Leniency programme in order to attain transparency and techniques for better cartel detection.

Keywords: Cartels; Competition Policy; Leniency; Immunity; Self- Reporting.

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1. INTRODUCTION

Cartelization deforms free competition in market whereas the Competition law aims at regulation and maintenance of free competition in the market. Cartels are formal agreements between enterprises.¹ To explain it, when any person goes to buy any particular product and price of product is fixed by all the sellers by mutual understanding, it will be considered as Cartel in that market. Supreme rule of any cartel is to maintain the secret of its existence. Cartels can only have an undesirable effect on competition and to strain them, is the main object of all the anti-trust legislations in the world. Its conduct eventually leads to artificial price raising, reduction in consumer choices and an impediment to business innovation. Thus, cartels are considered as the antipole of competition and only have negative impact upon the consumers' benefit. When there is cartel influence in any relevant market, the consumers are the very first who gets affected and then comes the economy of a country. Adam Smith who is considered as the Father of Modern Economics said, business collusion was an omnipresent temptation, a '*conspiracy against the public*'.² Thus, cartels are presumed to have Appreciable Adverse Effect on Competition (AAEC).

This article is an attempt at analyzing the meaning of the most talked anti-competitive agreement i.e. Cartels, its current state of affairs in Indian economy and the need for an improved Leniency programme in order to fight against the cartels.

Leniency Programme (LP) is universally accepted as being the best way to investigate cartels. This is because the activity is so secretive that insider information is necessary to break the agreement.³ An increasing number of anti-trust legislations operate leniency programmes (also known as immunity or amnesty programme). In India, in accordance with the provisions of the Lesser Penalty Regulations 2009⁴, the Competition Commission of India (CCI) has the powers to run the 'Leniency Programme'. Main challenge for the CCI is how it can detect the presence of a cartel and secondly, is to discourage the formation of new cartels by imposing

¹ Sec 2(h), Indian Competition Act, 2002.

² [1776] 1937 p. 128

³ 10 Massimo Motta, *Competition Policy; Theory and Practice*, (Cambridge: Cambridge University Press, 2004), at p. 193.

⁴ The Competition Commission of India (Lesser Penalty) Regulations, 2009. Dated: 13-8-2009

heavy penalties. However as most cartels are never uncovered, competition authorities are forced to draw inferences about the prevalence of cartelization.⁵

The article gives an overview about the prevailing cartelization and the need for reframing the laws relating to ‘Leniency Programme’. The structure of this article is as follows: Part II of the article maps the prevalent cartelization in Indian economy, the existing cartel deterrence laws. Part III marks the historical development of the Leniency programme. The article also takes into account the existing leniency provisions in the US and EU systems and explains the Indian Leniency scheme and some landmark cases of cartel detection through leniency. Part IV puts forth certain alternatives including improving leniency system with respect to increasing deterrence as far as cartel enforcement are concerned. Part V then follows with concluding remarks.

2. CARTELS AND INDIAN ECONOMY

People who combine together to keep up prices do not shout it from the house tops. They keep it quiet. They make their own arrangements in the cellular, where no one can see. They will not put anything into writing nor even into words.⁶

Cartel is a kind of Horizontal agreement⁷ which includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or , trade in goods or provision of service.⁸ Mario Monti, the former commissioner for Competition (EU), once described cartels as ‘cancers on the open market economy’.⁹ Although, the primary question involves is what exactly will be considered as a cartel behavior. The most common practice by any cartel involves price-fixing. Apart from that , it must also inclined towards eliminating the competition who offers product at lower price established by the cartel, eliminate discounts , determine the credit terms which will be extended to the customers.¹⁰ A “hard-core” cartel objects to fix prices, make rigged bids (collusive tenders), establish output

⁵ Cartelization, Antitrust & Globalization in the US & Europe : By Mark S. Leclair (*Preface* xiv)

⁶ Registrar of Restrictive Trade agreements v. W.H. Smith (1968) 3 All ER 721

⁷ Defined in Sec 3(3), the Competition Act, 2002.

⁸ Section 2(c), the Competition Act, 2002.

⁹ Available at:

www.europa.eu/rapid/pressReleaseAction.do?reference=SPEECH/00/295&format=HTML&aged=0&language=EN&Tguilanguage=en.

¹⁰ Rai, Qureshi & Saroliya (2003), “Restrictive and Unfair Trade Practices –Where Stands the Consumer?” CUTS, India, p. 16

restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.¹¹

It is recognized all over the world that competition increases quality products, innovation, reduces costs, lessens the economic abuse and thus, promotes economic democracy. Indian economy is still developing after the economic reforms of 1991 and requires strong hold on the competition for the welfare of the consumers. Certain factors in our economy like the barriers to entry, low technological improvement, homogenous products and uniformity in costs or efficiency etc., contributed to the formation of cartels in India.¹² Although, cartels are included in the definition of ‘agreements’ which are likely to have AAEC on the market are declared void by the Competition Act, 2002.¹³ Yet, in the past two decades we saw that Indian market was target of number of cartels like cement, tyres, soda ash, vitamin cartel etc. One of the reasons is less fear of punishment and cartel detection which encourages the cartel formation. It divulges that the current competition law prevailing needs reframing in order to promote fair and free competition.

Sec. 19 of the Act empowers CCI to inquire into any alleged information received; reference made by the Central government or it may also take *suo motu* cognizance to inquire into certain agreements. After inquiring if the commission finds any positive violation then, the CCI under Sec. 27 of the Act may impose “a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher”. Further, individuals involved in the anti-competitive conduct are also liable to be punished. The question involved is the effectiveness of our current laws at deterring cartel behavior, considering the secretive nature of cartels; it is very arduous task to detect cartels. It is to be noted that participation in a cartel activity is not a criminal offence in India and can be subjected to penalty only as provided in Sec. 27. In Australia, the introduction of stricter penalties (including criminal) for cartel activities has reported an increase in leniency applications.¹⁴ However, for an effective antitrust compliance one needs to consider two basic objectives, firstly, prevention of formation of anti- competitive agreements and imposing strict punishments and secondly, the

¹¹ Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation, OECD Journal of Competition Law and Policy, Vol. 8, No-1, June 2006, OECD Publishing)

¹² Combating Cartel in Markets- Issues and Challenges- G.R. Bhatia

¹³ Hereafter referred as Act.

¹⁴ “Cartel crackdown sparks whistleblowers’ chorus”, *Australian Financial Review*, 1-2 August 2009.

early detection of that certain agreement. This article mainly focuses on the second objective, which is often not given much importance.

3. HISTORICAL DEVELOPMENT OF LENIENCY

In criminal law, there is a provision for pardon, wholly or partly, in respect of offences perpetrated, if the guilty admits the offence and turns as on approver to bring home the guilt of others.¹⁵ This principle of criminal law established in cartel bursting since cartels are not easy to identify. Leniency programme is a type of whistle-blower protection, i.e. an official system of offering lenient treatment to a cartel member who reports to the Commission about the cartel.¹⁶ Leniency is a crucial tool for cartel detection for antitrust authorities all over the world. The origin of the Leniency or Amnesty Programme is found in the antitrust laws of the United States.¹⁷

US LENIENCY PROGRAMME

The current leniency program at the US Department of Justice (DOJ), Antitrust Division dates back to 1993, however, it is said that the US DOJ already recommended leniency programme since 1978, but the previous laws were considered less ample in terms of reductions in penalties and also to apply for leniency when cases were already under investigation. In simple terms, the previous act didn't offer immunity rather it was 'Discretionary'. As a result, not many leniency applications were made during that period. Also, as per the Sherman Act, maximum corporate fin imposed was \$10 million in 1990. On 10th August 1993, the programme underwent a revision, widening the scope of leniency for the legal entities as well as individuals -and to avoid criminal prosecution. The US program, is set forth in two documents – the Corporate Leniency and the Individual Leniency Policy- that give potential applicants a high degree of assurance that, if they take the risk of coming forward, they will get the reward.¹⁸ In particular, Section A of the new Corporate Leniency Program made the awarding of complete amnesty automatic under the condition that no investigation is underway before the applicant comes forward, and possible even after an investigation has begun as long as at the time of the report the DOJ does not have already sufficient evidence. Also, as long as reporting is a "truly corporate act", amnesty is granted to

¹⁵ Bhatia Supra at 12

¹⁶ Available at : www.cci.gov.in

¹⁷ Hereafter referred as US.

¹⁸ Criminal Enforcement Of Antitrust Laws: The U.S. Model – By Thomas O. Barnett

all individual officers, directors, and employees of the applicant who cooperate with the investigation.¹⁹ Since the US program was revised in 1993 to make the scope of amnesty clearer and somewhat broader, the number of applications has multiplied to more than 20 per year and led to dozens of convictions and to fines totaling well over USD 1 billion.²⁰ One of the prime reasons behind increased number of applications was considered as introduction of criminal penalty and to avoid individual liability. Also, the object of the programme entirely shifted to the prosecution of international cartels having greater degree of harm on US market and consumers. Some landmark cartel busting through amnesty were the \$100 million fine obtained in 1996 from Archer Daniels Midland Company for its participation in the international lysine and citric acid cartels, \$500million and \$225 million fines against F. Hoffmann-La Roche and BASF for their participation in the international vitamin cartel in 1999, and the \$160 million fine agreed to by Infineon Technologies AG in prosecution against the international DRAM cartel. The Division has obtained corporate fines at or above the former \$10 million statutory maximum in 46 cases and fines of \$100 million or more against seven corporations.²¹ The program operated by the US antitrust is one of the most effective cartel busting tools in the history of antitrust enforcement which is evident from the fact that US leniency model was adopted by over fifty countries in past two decades.

EU LENIENCY PROGRAMME

Article 101²² of the EU Treaty prohibits explicitly the existence of cartels. After the success of the US Leniency programme, the European Union (EU) introduced the first amnesty programme in 1996, followed by two revisions in the year 2002 and 2006 respectively. Although, the EU took a very careful approach and adopted the programme which missed out some of the features of the US Leniency, like not having criminal charges for cartels, yet the leniency programme was a great success after the revision of 2002 & 2006. The procedures are fairly simple: leniency applicants have to submit a fax application, but are advised to call the Commission officials beforehand to obtain some assistance, which can be done directly or through a legal adviser. During the contact, the firm can find out if there is an ongoing investigation in the relevant market. If the firm is not first in line, it may cooperate and

¹⁹ Leniency and Whistleblowers in Antitrust- By Giancarlo Spagnolo

²⁰ OECD- Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002)

²¹ ‘INTERNATIONAL ANTI-CARTEL ENFORCEMENT’- R. HEWITT PATE; 2004 ICN Cartels Workshop Sydney, Australia.

²² Article 101 of the Treaty on the Functioning of the European Union, formerly Article 81 of the European Community Treaty.

qualify for a fine reduction under the LP.²³ Also, when an undertaking is the first one to disclose the existence of the cartel and its participation to the Commission, it will be granted immunity (prime condition being that the undertaking must be the first to submit the information and evidence to the commission or the commission must not yet have sufficient evidence to carry out the investigation on its own motion).

While the EC decided only 10 cartel cases in the 1995-1999 period, the number increased to 30 in the period from 2000-2004 and to 33 in the 2005-2009 period.²⁴ Some economists consider this increase in the cartel detections was due to introduction of the Leniency. While taking an overview of the EU Leniency policy, we came to the conclusion that the policy of 1996 lacked transparency. Although, it did grant immunity and reduction of fines yet it was found that the commission received 188 applications for some form of fine cancellation or reduction between 1996 and 2002; in 17 cases, a fine was not imposed or a very large or substantial reduction in fine was granted.²⁵ However, not many applications were granted immunity. The first decision applying the LP to a cartel case was in 1998, on a cartel involving British Sugar. The complaint was made in 1994 and after the introduction of the LP, all four cartel members applied for leniency. Three reductions of 10% and one of 50% were granted.²⁶ Revisions in the Leniency policy in the year 2002 and 2006 made it more transparent and ‘generous’. Guidelines of 2002 provided for higher reductions in the fines and 2006 were in terms of clarification and additional flexibility to the previous LP Notice, regarding the immunity thresholds and the conditions for fine reductions, as well as the introduction of a discretionary marker system, so as to preserve an informant’s position as being the first to come forward and disclose the cartel.²⁷ The EU Leniency Policy is so successful that the number of cases found through pre-investigation reporting is 83% in 2008, 86% in 2009 and 100% in 2010-2013.²⁸

INDIAN LENIENCY PROGRAMME

²³ ‘The EU Leniency Programme and Recidivism’ - Catarina Marv~ao

²⁴ European Commission (2013), Cartel Statistics (situation as of 5 December 2013), Available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

²⁵ European Parliament, Parliamentary questions: Joint answer given by Ms. Kroes on behalf of the Commission to written questions E-0890/09, E-0891/09, E-0892/09, 2 April 2009.

²⁶ Supra at 23.

²⁷ CEPS Special Report; ‘*The Modernization of EU Anti-Cartel Enforcement: Will the Commission grasp the opportunity?*’- Alan Riley (2010)

²⁸ Supra at 23

After the success of the US and EU Leniency program, the Competition Commission of India (Lesser Penalty) Regulations were first introduced in 2009. The prime advantage for CCI was that the Leniency policy in other anti-trust legislations was already well developed and the Commission was able to draw the positive aspects from them. It is however said that the Indian Leniency regime is loosely based on the EU system. Cartels are illegal within the ambit of Sec. 3(3) of the Act. The Competition Commission under Sec. 27 of the Act may impose a penalty on the person or organization which can be up to three times its profit for the years cartel agreement prevailed or 10% of the turnover for the same period, whichever is higher. Unlike the US Leniency, there is no criminal liability for cartel conduct. The leniency programme only extends to the civil fines imposed on cartel members. Before the commencement of the Leniency programme in 2009 just like the other countries, in India too cartels have been alleged in various sectors, namely cement, steel, tyres, family planning device (Copper T). India is also believed to be the victim of overseas cartel in soda ash, vitamins, petrol etc. The business houses are affected most by cartels as the cost of procuring inputs is enhanced or choice is restricted making them uncompetitive.²⁹ The most effective way for cartel detection was to have an efficient leniency programme. Sec. 46 in the Act provides for a leniency regime, wherein the Commission may impose a ‘lesser penalty ‘on a member of an alleged cartel if it is convinced about certain findings and the member has made a ‘full, true and vital disclosure’. The grant of leniency is further laid down in the Lesser Penalty Regulations, 2009. Under the Lesser Penalty Regulations, up to 100% reductions in the fine may be granted to the member who at first provides the evidence to the CCI to establish the violation of the Act. Consequently, the second and third applicants in priority may receive *up to* 50 percent and 30 percent respectively. Also, the first applicant to apply for leniency may be granted full immunity but it is up to the discretion of the Commission whether it wants to grant immunity or not. It also depends upon the timing of the application made, evidence already available with the Commission, quality of the information and the circumstances of the case.

Procedure for applying for Leniency is fairly simple: The applicant can make application either orally, or through email or fax to the designated authority. The priority status of the applicant shall be marked and date and time of receipt shall be recorded. The application must be received by the Commission along with the evidence within 15 days of the first communication made; in order for the applicant to secure his priority for leniency. The

²⁹ Supra at 12

applicant shall disable the involvement with the cartel and shall provide full cooperation to the Commission. After the evidence submitted by the first applicant has been evaluated, next applicant shall be considered. The identity of the applicant and all the information and evidence is confidential.

It is been 5 years since the existence of the Leniency Programme. To this date, no member of the alleged cartel has applied for leniency. This certainly raises questions about the current leniency policies adopted in the country. It must also be kept in mind that the success of Leniency policies of the developed economies such as US and EU came after some revisions in their policies and years of experience. Indian Leniency is still in its growing period and thus, can be more improved after removing the drawbacks and implementing new methods for cartel detections and increasing leniency applications discussed in the next part.

4. IMPROVING THE FUNCTIONING OF LENIENCY AND INTRODUCTION OF EFFECTIVE INVESTIGATING TECHNIQUES

It is believed that, the US and EU authorities have prosecuted about 100 international cartels during this period.³⁰ The record, however, has been much lower in the developing world. This, arguably, was not due to the fact that cartels are less common in these developing economies, but because the law enforcement agencies there were less equipped to deal with them.³¹ However, it cannot be denied that our current policy lacks transparency which is evident from the statement of the Commission that the leniency still has not been used so far.³² Revision in the current leniency regime is much needed for increasing the leniency applications. Since, the Indian Leniency has adopted the features of the successful regimes; there are some suggestions made to improve the functioning of the leniency and some effective cartel detection techniques.

A. IMPROVING THE LENIENCY: Following are certain suggestions made which have been adopted and are running successfully in developed anti-trust authorities around the globe.

- **Increasing the importance of First Applicant:** The common feature of both EU and the US leniency was that absolute immunity was provided to the first applicant who self-

³⁰ Connor, John (2003), “Private International Cartels: Effectiveness, Welfare and Anti-Cartel Enforcement”, available at <http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=11506&ftype=.pdf>

³¹ Supra at 21

³² Be a cartel whistleblower and win: CCI; The Indian Express, New Delhi, July 24,2012

reports and provides evidence to the commission about the existence of a cartel. In India, there is a provision for providing up to 100% reduction in fines, however, it is discretionary. The Commission may or may not grant immunity and reduction in fines to the first applicant. There is a need for change in this provision. The concept of absolute grant of immunity to the first ‘whistleblower’ is so successful that out of 173 criminal cartel cases filed between 2004-2010, 129 cases involved a successful leniency.³³ It must also be pointed that the US Leniency policy of 1978 included the ‘prosecution discretionary’ power of the Commission and thus, was not able to attract many leniency applications. Our Leniency must include the feature of ‘Absolute Immunity’ to first applicant who self-reports.

- **Criminalization:** It was previously mentioned that Indian Leniency is inspired from the EU system which provides for only civil fines. Focusing on the US model (which provides for criminal liabilities) is very important because it has helped in reducing the involvement of the US in some prominent international cartels such as Vitamins and Air Cargo cases.³⁴ It is argued by some economists that even if criminal sanctions are introduced in Indian Leniency, the chances of self-reporting (leniency) would be very few owing to the fact that grant of ‘Absolute immunity’ is as per discretion of the Commission. However, introducing criminal sanctions in India is sure to have an increase in cartel deterrence and the ‘race to self-reporting’ which would increase the leniency applications.
- **Increasing Awareness:** Another reason behind the negligible rate of leniency is lack of awareness of the Leniency programme. Publicity and awareness is very crucial for Leniency programmes because, firstly, to elicit information from cartels not under investigation and secondly, to prevent cartel formation by reducing trust among potential co-conspirators with the increased likelihood that one of them could turn the others in.³⁵ Also, there is a need educate and aware business organizations and individuals dealing in different market at different level. Need for awareness for Leniency is evident in the wake of the decision of the Commission slapping a fine of Rs 6307 crores on 11 companies involved in the cement cartel.³⁶ Thus, the Commission needs to heavily bank upon the Leniency awareness in order to increase cartel detection through leniency.

³³ ‘Stakeholder View on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection’, United States Government Accountability Office Report to Congressional Committees (July 2011), available at <http://www.gao.gov/new.items/d11619.pdf>.

³⁴ Richard Whish and David Bailey, *The International Dimension of Competition Law*, Oxford University Press at 488 (2012)

³⁵ Supra at 19

³⁶ The Economic Times, ‘CCI slaps Rs 6200 cr penalty on 11 cement firms for cartel sale’, June 21, 2012.

- **Paperless Procedure:** Another impressive feature of the US Leniency Model is that the entire procedure for filing the application and grant for Leniency is Paperless. The US Model doesn't focus on the written evidence; whereas, under Indian regime, providing the application with the evidence and documents within 15 days of the first contact is the foremost condition to secure the leniency spot. It is argued that there is a substantial threat that the evidence provided by them might be used against them. Making the entire procedure paperless would insure the full participation of the applicants.
- **Repeat Offenders:** It has been found that in certain economies some member or 'ring leader' of one cartel are also involved in some other cartel prevalent in different market. Vitamin cartel had its presence in all over the world and operated for more than 10 years. After its busting, the EU Leniency policy adopted new guidelines with the view to fine repeat offenders more. Other solution could be to remove the benefit of leniency to repeat offenders; however, it might reduce certain leniency applications. The concept of Cartel profiling is still not introduced in India. "Cartel profiling" means to focus on other markets where discovered cartelists are also active. Both common corporate members and an individual active in one cartel can lead, via earlier employment and relationships, to other cartels.³⁷ Also, the Leniency "plus" programmes that link leniency in regard to one cartel with a second cartel has also proved successful, suggesting that many participants are involved in multiple cartels. In the United Kingdom for example, there has been a series of related leniency applications in the construction industry.³⁸ The Leniency Plus programme if introduced in India, would be helped in detection of domestic as well international cartel having their effect in Indian market which would increase the Leniency applications.
- **Transparency:** Currently, there is a need to make the Leniency regime more transparent and these suggestions if not completely but to a certain extent helps the objective of the Leniency Programme given by the Competition Authority of India. By reducing the discretionary power of the Commission, increasing the awareness regarding whistleblowing and banking heavily upon adopting tougher cartel deterrence laws, transparency in the Leniency policy could be achieved.

B. EFFECTIVE INVESTIGATING TECHNIQUES: An Overview of some of the investigating techniques adapted over the world has been provided such as:

³⁷ 'The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries'; United Nations Conference on Trade and Development, TD/RBP/CONF.7/4.

³⁸ The fight against cartels: is a 'mixed' approach to enforcement the answer?- John Fingleton, Marie-Barbe Girard, Simon Williams.

- **Formation of a separate unit:** In the Competition Commission of India, there are currently seven divisions working in the economic, combination, legal field etc. There is a need for formation of separate ‘Cartel Detection’ Division. Separate division for detection of cartel with increased investigative powers would certainly increase the deterrence as far as the anti-cartel enforcement is concerned.
- **Memorandum of Understand (MOU) Agreements:** Domestic competition laws may not be able to deal with the anti- competitive processes across the borders. Hence, MOUs/ Cooperation agreements at the international level are required. These are necessary in addition to sectoral agreements like TRIPS and GATS.³⁹
- **Dawn Raids:** Upon request by the Federal Competition Agency, the Austrian Cartel Court issues a search warrant (provided there is reasonable suspicion of a cartel infringement). With a search warrant, the Federal Competition Agency can, similar to the EU Commission, enter premises, search documents and computers, etc. Notably, the inspection can start without the search warrant being served on the undertakings concerned; the law only provides that it must be served within 24 hours.⁴⁰
- **Incentives and Rewards:** Under US law, the Civil False Claims Act enables a private citizen to bring an action in the name of the US Government claiming fraud by government contractors and other entities that use government funds, and the litigant is then able to share in any money received. This legislation was used in the case of a bid-rigging cartel of wastewater treatment projects in Egypt funded by USAID, representing the first time that the legislation had been used to expose a large multinational cartel.⁴¹

5. CONCLUSION

Leniency Regime introduced in 2009 has so far proved to be much more difficult duty carry out as expected. It is not possible for the US and EU model to work here as the socio-political and economic conditions prevailing are very different from these countries. While leniency is the best tool to cure the cartelization, it is only effective when paired with transparency in working of the Commission and significant punishments with heavier fines. The need for the day is to draw successful provisions adopted in the developed economies

³⁹ ‘Competition Leverage Over Globalization: Bifocal Vision of Indian Law’- Anurag K Agrawal

⁴⁰ Florian Neumayr, bpv Hügel Rechtsanwälte OG, Dawn Raids: The (New) Austrian Way, available at <http://kluwercompetitionlawblog.com/2012/07/17/dawn-raids-the-new-austrian-way/>

⁴¹ Speech by Bill Koviar, available at www.ftc.gov/speeches/other/030514biicl.htm

and harmonization with our policies. Maintaining any cartel is a very difficult task. A Leniency programme is very effective tool for cartel busting and has numerous benefits such as it is a cost efficient method, saves time of the court, higher the reduction and immunity offered, tougher shall be the chances of survival of cartels. Changes in current Leniency Regime will remove the inadequacies such as the lack of transparency and draw more and more applications for Leniency in the coming phase.

JUVENILE DELINQUENCY

Ms. Radhika Bhakoo*

Abstract

Children are the future of a Nation. They continue the very existence of human race. But, the complexity arises when this innocent component of our society indulges in a socially deviant or socially undesirable behaviour which is unacceptable to the society and is also known as delinquent behaviour.

Young children these days have begun to get mature at young ages due to the high level of exposure that they have. Also sociological factors like poverty, broken families, peer pressure wherein the peers are indulged in delinquent and criminal acts. All such reasons as to why do juveniles enter the stage of delinquency, and measures that are helpful in prevention of children from becoming delinquents and the laws relating to children, all would be dealt by the paper.

Keywords: Juvenile delinquency, law relating children, comparison with international law (with attention to Nirbhaya Delhi Gang rape case), Juvenile Justice (Care and Protection of Children) Bill 2014, Prevention of Juvenile Delinquency.

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INTRODUCTION

Children these days due to the exposure have begun to indulge in a socially deviant or socially undesirable behaviour which is unacceptable to the society and is also known as delinquent behaviour.

The theme of this paper is based on juvenile delinquency. The paper aims to throw light on the following heads:

- (i) who is a child;
- (ii) what is juvenile delinquency;
- (iii) reasons for juvenile delinquency;
- (iv) law relating to children covering aspects of Indian law as well as international law; v) juvenile law regarding age in other countries;
- (v) Juvenile Justice (Care and Protection) Bill, 2014;
- (vi) prevention of juvenile delinquency and lastly, the conclusion.

The researcher has tried to cover all aspects of juvenile delinquency and laws related to it. Along with explicitly stating the laws the researcher has also analysed them for the best possible understanding of the reader.

WHO IS A CHILD?

"The hallmark of culture and advance of civilisation consists in the fulfilment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to its full stature, physical, mental, moral and spiritual. It is the birth right of every child that cries for justice from the world as a whole."

- Justice V. R. Krishna Iyer¹

The hon'ble Supreme Court declared that a child is a national asset in, *Sheela Barse and another v. Union of India*². Children not only are future generation thereby continuing human race but also make our lives wonderful. They are like seeds that need to be watered with love, affection, protection; knowledge and then they turn into adults just like big trees.

¹ Jurisprudence of juvenile justice: a preambular perspective

² AIR 1986 SC 1873

UNDER INDIAN LAW

For determining who is a child age plays a great role . In India, there are various legislations relating to the age of child like The Children Act, 1960; The Juvenile Justice(Care and Protection of Children) Act,2000; The Child Labour(Prohibition and Regulation) Act,1986 etc. As per Section 2(a) of the Immoral Traffic Prevention Act, 1956 a child is a person who has not completed 16 years of age. Whereas Section 27 of The Code of Criminal Procedure, 1973 states that “juvenile” means a person who is under the age of 16 years. According to the Factories Act, 1948, child means a person who has not completed 15 years of age. As per Section 2(11) of the Child Labour (Prohibition and Regulation) act, 1986 child means a person who has not completed the age of 14 years.

INTERNATIONAL SCENARIO

United Nations Convention on the Rights of the Child defines a child as, every human being below the age of 18 years.

It seems to the researcher that as per international law, no crimes could be committed by juveniles. All conventions like UDHR, ICESCR, ICCPR, UN Convention on Rights of Children are all more concerned towards well being, protection, safeguards and development of children. Provisions in all conventions have a basic theme of protection and well being of children and no where there is any provision talking about delinquent juveniles or crimes committed by juveniles. This view seems very narrow and it appears to the researcher that international law has shown a very narrow approach by covering only child protection and well being and leaving the issues of delinquency and crimes committed by juveniles untouched.

WHAT IS JUVENILE DELINQUENCY?

“Every young boy or girl in his heart of hearts craves recognition and love and he or she becomes the devoted slave of any one who shows him or her kindness and consideration.”

- Rabindra Nath Tagore

The term “juvenile” is derived from the latin word “*juvenis*” meaning young; and “delinquency” is derived from the latin word “*delinquere*” meaning to leave or abandon. Originally the word referred to parents who neglected and abandoned their children. In

present day, it is applied to those children who indulge in harmful and wrongful activities. Delinquency refers to an act or conduct of the juvenile that is socially undesirable. Delinquent juveniles do not follow settled social and legal dictum.

Juvenile Delinquency in general can be said to mean crimes committed by juveniles. With the increase in urbanization and industrialisation and also an unaccountable growth in the population is leading to more and more children being neglected especially those in the Below the Poverty Line range.

JUVENILE/CHILD IN CONFLICT WITH LAW?

Section 2(l) of the Juvenile Justice Act, 2000 has defined “juvenile in conflict with law” as a juvenile who is alleged to have committed an offence and has not completed eighteen years of age as on the date of commission of such offence. Usually children in conflict with law are seen to commit petty offences like vagrancy, begging, alcohol use or truancy; while some might have committed serious offences.

In my point of view, children entering the stage of conflict with law are often dragged into such offences by adults because they know that juveniles cannot be tried as adults in court of law and hence exploit the children and get the offences committed by them. Also apart from this stereotyping, prejudice and discrimination also brings a child in conflict with law. A child gets filled with feelings of hatred, revenge, jealousy looking at other children who have better quality of life and thus their personality becomes a negative one and they end up being in conflict with law doing acts that are socially unacceptable.

REASONS FOR JUVENILE DELINQUENCY

“Children are great imitators. So give them something great to imitate”.

In a country like India where the population of slum dwellers is far more than the educated class, it is likely to be one of the main reasons for juvenile delinquency. In my opinion juveniles in conflict with law are a result of frustration, anger, thwarting towards the society. Such children lack opportunities and resources in life to fully express themselves and work as per their capabilities. Another major cause of juvenile delinquency is Broken families. Studies have found out that children who receive neglected or hostile parenting are more likely to indulge into juvenile delinquency since they do not receive caring and nurturing

environment at home which is an imperative for children in those tender years of their lives. Children are more exposed to drugs and such substances nowadays due to which they often enter that path of delinquency. Further, they also get influenced by the Bollywood movies that often show criminal sort of behaviour.

LAW RELATING TO CHILDREN

With the increasing incidences of juvenile delinquency and crimes being committed by juveniles, there has been a strong need for the regulation of children through law. juvenile delinquency and juveniles in conflict with law have been a grave concern not only in India but other International organisations and countries as well.

International Provisions

Children are a subject of concern at not only national but an international level also. In a civilized society we cannot neglect the importance of child welfare because the welfare of entire community, its growth and development depends upon the health and well being of children. Children are both national as well as international assets.

The United Nations General Assembly in November, 1985 adopted the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules")* whose aim is to further the wellbeing of juveniles and their families. It states that a person is most susceptible to deviant behaviour when s/he is a juvenile hence they need maximum attention, care and protection at this stage. They should be humanely dealt in conflict with the law.³

In 1989, the United Nations General Assembly adopted the UN Convention on the Rights of the Child, which provides a set of standards to be adhered by all state parties in securing the best interests of child on the principles of non-discrimination and non-exploitation. It sets a standard in legal and social services. It also emphasises social reintegration of child victims without resorting to judicial proceedings to the extent possible. The Government Of India ratified CRC in the year 1992 agreeing to hold itself accountable for its action in front of the international community.

Position in India

³ UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Res. 40/33, Sess. 40, A/RES/40/33, 3, 29/11/1985 available at <http://www.ncrjs.gov/pdffiles1/Digitization/14527INCJRS.pdf>- last seen at 15/03/2015 at 16:38 pm

Children are innocent and must not be punished harshly and be tried differently as that of adult criminals. The reason is that young offenders should not be sent to prisons as this would expose them to hard core criminals and affect them in a very negative manner. There are constitutional provisions and various other laws and legislations pertaining to juveniles that are inculcated in the Indian juvenile justice mechanism.

The Constitution of India provides and protects the rights and interests of children. Not only does it grants rights to the children but also lays down the duties of the state to ensure that their needs are met and rights are safeguarded.

Article 15(3) directs the state to make special provisions for the children; article 39(e) ensures that the tender age of children is not abused. Opportunities and facilities are also to be provided to children so that they may develop in a healthy manner, in conditions of dignity and freedom, and protected against exploitation, moral and material abandonment.⁴ Another desirable feature is to provide free and compulsory education to all children upto the age of fourteen years.⁵ But which of course turns out to be a failed feature in practical terms.

The Apprentices Act, 1850 was the first legislation dealing with children in conflict with law providing for binding over of children under the age of fifteen years found to have committed petty offences as apprentices. Then came the Reformatory Schools Act, 1897 which provided that children upto the age of fifteen years may be sent to reformatory cells.

Then the Juvenile Justice act, 1986 was enacted by the parliament to bring a uniform juvenile justice mechanism throughout the country. The Act provides for care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication and disposal of matters relating to delinquent juveniles. Section 2(a) defined the term juvenile as “a boy who has not attained the age of 16 years; and a girl who has not attained the age of 18 years” but this definition was amended by the Juvenile Justice Act, 2000 wherein the age limit of both a boy and girl was raised upto 18 years of age. The relevant date for determining the age of the juvenile would be on which the offence have been committed and not when the juvenile is produced in the court.⁶

⁴ Article 39(f), Constitution of India

⁵ Article 45, Constitution of India

⁶ Section 2(k), the Juvenile Justice (Care and Protection of Children) Act, 2000

The Juvenile Justice Act, 2000 lays down that a juvenile in conflict with law may be kept under Observation Homes while a juvenile in need of care and protection need to be kept in a Children home during the pendency of the proceedings before the competent authority. However the earlier laws provided for all juveniles to be kept in observation homes during the pendency of their proceedings, presuming all to be innocent until proven guilty. The maximum period of detention was 3 years remand to special homes, no juvenile could be awarded a punishment exceeding 3 years irrespective of the gravity or veracity of the offence committed and the Juvenile Justice Act, 2000 provides immunity to the children who are below 18 years of age at the time of commission of the alleged offence from the trial in criminal court or any punishment under criminal law in light of section 17 of the Act.

The main purpose of this Act can be viewed as protection of children who require care, keeping in mind their developmental needs. This piece of legislation adopts an approach that strives to take measures in the best interest of the child during adjudication and disposition of cases.

There are bodies set up for rehabilitation and reformation of the juvenile offenders. One of such bodies is the Juvenile justice Board set up in various districts by the state government to hold enquiries and Observation Home where the juvenile in conflict with law is kept during trial which is set up in every district by the state government in collaboration with voluntary organisations. Special homes are also set up by the state governments in every district for the juveniles who are in need of care and protection as per Section 9 of the Act.

There are also *Child Welfare Committees* and *Children's home* responsible for taking care of children in need of rehabilitation and protection. Shelter homes are also established which functions as drop-in-centres for the children in need of urgent support. The main function of a shelter home is restoration of and protection to a child who is deprived of his family.

No doubt that the Juvenile Justice (Care and Protection) Act, 2000 aims at child protection and welfare, but it has failed to serve the basic purpose that every legislation has i.e. creating a fear in the mind of the criminals; acting as a deterrent. The Act has given too much protection and safeguards to juvenile. The shield is to such an extent that even if a juvenile commits a crime intentionally s/he can still get away from the criminal proceedings merely by taking plea of their age and of them being juveniles. India is a party to the United Nations Convention on Rights of Child and hence it is obligatory for us to incorporate the rules of the

convention in our domestic law but at the same time it should not be forgotten that law needs to change with society. The State cannot afford to regulate the dynamic society with static laws. Change in society demands change in laws that fit into society most precisely. In today's era which is so advanced wherein children have all sorts of exposure to technology, societal relationships the condition is in complete contradistinction with what it was before. Looking at the rate of increase in crimes committed by juveniles it is very important for the legislation to take action. A very recent example of this would be the 16th December Delhi Gang rape case wherein a juvenile was also an accused out of the 6 men who were charged of having committed rape. In today's era where relationships have become so complicated, where children advance at early stages of life, where children are aware of maximum happenings of our society how can we expect and even think that they are not mature enough to understand that rape and murder are heinous crimes. Letting go off such juveniles will only degrade the situation and be against the public interest at large. It is no doubt true that the 2000 Act is a superior piece of legislation but in the author's opinion has shortcomings keeping in mind the present society. The present society demands relevant changes in the legal aspects. It is a prime feature that every criminal shall be punished for the wrong committed and none should be left unpunished; hence it is very important to look into the facts and circumstances of the cases and the crimes should be looked upon as the intention with which they were committed and the age shall be no defence. The Author would want to suggest reducing the age of criminality to 16 years which would be very much in consonance with the present state of society. To support this suggestion the Author would want to draw the reader's attention towards the age issue i.e. the age of criminality in other countries.

JUVENILE LAW REGARDING AGE IN OTHER COUNTRIES (THE AGE OF CRIMINALITY)

United States of America

In U.S.A the age ranges between 16 to 18 years. In most states it is 18 years while in some it is 16 and 17 years. U.S also has juvenile courts but their main purpose is rehabilitation and not punishment. Juvenile courts cannot impose punishment but only rehabilitation measures.

The jurisdiction of juvenile courts automatically ceases to exist if a juvenile above a certain age (13 or 15 years on an average) commits a serious offence. The jurisdiction of the juvenile court is waived and the case gets transferred to the adult court where the juvenile is then tried

as an adult. The prosecutor is required to prove and try to get the case transferred to the juvenile court.

United Kingdom

In UK juvenile between the age of 10 to 18 years are usually taken as to be criminally responsible and can be tried by the adult court or the youth court depending on the gravity of the offence committed by them. Youth court is a special type of court equivalent to that of a Magistrate's court for ages between 10 to 18 years. This court can issue community sentence, behavioural programmes, reparation orders, youth detention and rehabilitation programmes which last 3 years. But for serious offences like rape , murder the cases get transferred from youth court to the crown court which is equal to that of a sessions court. The crown court then tries the juvenile as an adult and if a youth is jointly tried with an adult the charge is framed together.

France

In France there can be no criminal charge against a child below 10 years of age and for children between 10 to 13 years of age there can be no harsh punishment only educational penalties are allowed and 13 to 16 years of age group get half the punishment as that of adults. 16 to 18 years of age are remanded to criminal court and the plea of juvenility can be set aside.

The point to be noted here is that in all the above countries if the crime is a heinous one as that of rape or murder the plea of juvenility can be set aside and juvenile is treated as an adult.

In light of what happened in the Delhi gangrape case which caused utter dismay and chaos in the country, people displayed their hurt and rage and caused great agitation. A 23 year old girl was gangraped by 6 men out of which the person committing the most heinous act of putting the iron rod was a juvenile. The fact that him being a juvenile made him walk away with merely 3 years of remand home whereas all the other were given death penalty caused a huge discontent in the hearts and minds of the people of the country and a question was raised as to what is the criteria of classifying that whether a juvenile be tried in a juvenile court or criminal court.

Pertaining to this question there came up a proposal for amending the age of juveniles and reducing it to 16 from 18 years.

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) BILL, 2014

The Juvenile Justice (Care and Protection of Children) bill, 2014 was introduced by the Minister of Women and Child Development, Maneka Gandhi in Lok Sabha on 11th August, 2014. It repeals the Juvenile Justice (Care and Protection of Children) Act, 2000.

The bill seeks to address children in the age group of 16 – 18 years of age group, in conflict with law, as increased incidents of crimes committed by them have been reported in the past few years. It defines child as anyone below the age of 18 years and also lays down a possibility to try 16-18 years age group as adults in case of commission of heinous crimes(crimes for which minimum punishment is 7 years under IPC). 2 or more Juvenile Justice Boards for each district are proposed to be established for dealing with children in conflict with law which shall comprise a judicial or metropolitan magistrate and 2 social workers out of which one shall be a woman. The powers and responsibilities of the Juvenile Justice Board include:

- a) Ensuring legal aid for the juvenile
- b) Adjudicating and disposing of cases of children in conflict with law
- c) Conducting regular inspection of adult jails to ensure no child is lodged in such jails
- d) Conducting inspection visits of residential facilities for such children

It also provides for establishment of a Children's court under the Commission for Protection of child Rights Act, 2005 or Special Courts under the Protection of Children from Sexual Offences Act, 2012. It will try 16-18 years old that commit heinous offences after confirming them fit to be tried as adults. It ensures that child in conflict with law is kept in place of safety until he attains the age of 21 years where reformatory services such as counselling, etc are done, after which he is transferred to a jail. The courts shall ensure periodic follow up reports by District Child Protection Units.

States shall also constitute one or more Child Welfare Committees for each district dealing with children in need of care and protection which should conduct inquiries.

A Special Juvenile Police Units and Child Welfare Police Officers will also be established in each district, consisting of a police officer and 2 social workers. One Child welfare Police Officer will be present in every police station.⁷

The above Bill is in consonance with the present society and very well depicts the state of present society. In light of the instances taking place and the pace at which the crime rate of juveniles is increasing it is very necessary to bring this kind of change so that the children could be stopped from entering into the dark path of crimes and be redirected toward the path where avoidable suffering and noxious negativity is extirpated. Children are the future and if they begin to indulge in such heinous activities from such young ages then what will happen to the future of our nation. Hence there is a strong need for amending the law and keeping a check on the increasing crime levels by juveniles.

The following few methods can be of significant use for reducing the instances of juvenile delinquency to a certain extent.

PREVENTION OF JUVENILE DELINQUENCY

Juvenile Delinquency is nothing that cannot be solved. Removing the very reasons that cause juvenile delinquency will help in curing the situation. The first very step can be counselling the parents of broken families, making them understand that their couple conflicts should not be affecting their children, moreover there should be a high degree of involvement of parents in their child's activities this brings within a child feelings of security, protection, love and the child feels more wanted. This inculcates a positive attitude within the child. Further, schools by providing recreational activities like yoga and meditation, maintaining a strong teacher student relationship can help. Lastly, but most importantly children need to be empowered they need to be showed as to what all they are capable of doing, appreciating even small endeavours done by them will boost their self-confidence a lot. Making children aware of their abilities and providing them with adequate opportunities will help generation of feelings of love and security among them thus keeping them far away from delinquent behaviour.

CONCLUSION

⁷ <http://www.prssindia.org/uploads/media/Juvenile%20Justice/Bill%20Summary-%20Juvenile%20justice.pdf>

Me not only being the researcher of this paper but as a responsible citizen am forced to believe that the present Juvenile Justice Act has utmostly failed if one views the incident of the Delhi Gang rape that occurred on 16th December 2012 wherein a 23 year old physiotherapy student who was travelling with a male friend was brutally gang raped by 6 men in a private bus and after rape was thrown out of the moving bus without any clothes because of which she eventually died after 13 days of struggle in a hospital in Singapore. She was not only raped but had an iron rod inserted inside her private part and her intestine was literally pulled out. The irony is that the iron rod and pulling out the intestine was done by a person who was a juvenile out of those 6 men. All the 5 men were sentenced to death but the juvenile who was found to be of 17 years and 6 months of age as shown by the documents produced in the court was merely given 3 years imprisonment that too in a special home.

I wonder as to what is it that happens in a day or few months that hasn't happened in 17 years that an individual becomes triable by a criminal court only after the age of 18 years. What difference does a date or a month bring; I wonder. Analysing the Delhi Gang rape case it has rather been a shame and a slap on the face of us and our country which has not been able to create fear in the minds of criminals even after having so many legislations. Inspite of the fact that the most brutal act in the instant matter was committed by a juvenile he still didn't get punishment in accordance to the veracity of crime committed.

Our criminal law takes into consideration "*Actus Reus*" and "*Mens Rea*" while holding an individual criminally responsible but unfortunately in case of the Juvenile Justice Act the "*Actus Reus*" part is very well protected by the Act and "*Mens Rea*" is never ever taken into consideration only. Majority of our laws trace their origin in the English law so when even in U.K a juvenile is held guilty of crime like rape and murder committed then why doesn't Indian law follow this principle of the English law as well. The Juvenile Justice Act is acting as a blanket and providing a strong shield to juveniles who because of this have absolutely no fear of law and commit heinous crimes like rape and murder.

No doubt that reducing the age of juveniles to 16 years as proposed by the Juvenile Justice bill,2014 will violate the definition of child given in the CRC but there is also a point to be noted here that all in the International Conventions are to be intertwined in the domestic law of a country for a smooth functioning but if by including the international conventions in domestic law is not helping is not proving as helpful then there should be no hesitation in

moving ahead and altering the provisions of domestic law even if not in consonance with the international conventions.

The proposal is not to make the age of juvenile as 16 years but it is, that if crime is committed by juvenile between the age group of 16 – 18 years then the gravity of the offence must be looked into and if the offence is of a heinous nature like that of rape or murder or offences that are punishable with imprisonment upto 7 years in such cases the juvenile shall be tried by a criminal court and not juvenile court.

The mere requirement being demanded here is to take mens rea also into consideration for juveniles. If it is clearly evident that a juvenile while was committing the offence was very well aware of the consequences and was very conscious of the acts he was indulging into then the juvenile must be held criminally liable and be treated at par with adults.

The researcher would want to suggest the following parameters that should be taken into consideration for deciding whether a juvenile shall be tried by the criminal courts:

- Intention of the juvenile while committing the act
- Awareness of consequences of the act
- Whether the juvenile is capable of understanding the act being done by him/ her
- Mental maturity should be judged not physical age
- Whether juvenile is mature enough to understand the offence committed by him to be violation of law and against public policy

If really the mens rea or mental maturity is not being taken into consideration then in that case an adult of 30 years of age committing a crime shall also be tried in a juvenile court for having committed the act unintentionally not being mentally alert.

The researcher is in strong favour of accepting the Juvenile Justice Bill, 2014 and incorporating the changes prescribed therein as it is not against any international convention or law but is only providing a broader ambit to the Juvenile law in India. It is nothing that is not being practiced by any other country in the world but instead incorporating such law will also bring our nation at par with other nations practicing such law and will also serve as a real deterrent that is the very basic characteristic of law in any country. The present law inspite of serving as a deterrent is only providing shield to juveniles but by accepting the new bill of 2014 it will actually serve the purpose of legislation and will definitely act as a deterrent.

NATURE AND SCOPE OF DICHOTOMIES IN THE EFFECTIVE PROTECTION OF TRADITIONAL KNOWLEDGE

Ms. Shivani Misra*

Abstract

Intellectual Property Law aspires to protect fruits of human creativity and intelligence. At its core lies the fundamental belief that human knowledge is sacrosanct. Knowledge that is fostered by indigenous population too deserves this protection. This traditionally preserved information, better known as “traditional knowledge”, is embedded in the culture and civilization of the indigenous population and faces the risk of exploitation. To prevent avaricious exploitation, intellectual property laws must seek to provide robust protection traditional knowledge. This paper commences with emphasizing upon the need to grant immunity to traditional knowledge. It continues with elaborating upon the nature of protection deservedly provided to indigenous creativity. Various approaches to such conservation have also been discussed. International conventions such as the TRIPS Agreement, Nagoya Protocol and the Convention on Biodiversity too have been discussed.

United Nations has been instrumental in achieving protection of indigenous communities. The paper emphasizes on the role of the United Nations Environment Programme in achieving its objective. At the national level, Indian intellectual property laws provide sanctuary to traditional knowledge. India’s Traditional Knowledge Digital Library has played a critical role in protecting the country’s traditional knowledge. The paper examines the efficacy of domestic laws on this subject. India prides itself on possessing a rich natural and cultural history. Need is thus felt to protect its rich heritage. The paper discusses attempts at encroaching upon its cultural sovereignty through “bio-piracy”. Intellectual property laws face various obstacles that must be overcome to realise the potential of traditional knowledge.

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*"We, of our time, have played our part in the perseverance, and we have pledged ourselves to the dead generations who have preserved intact for us this glorious heritage, that we, too, will strive to be faithful to the end, and pass on this tradition unblemished."*¹

INTRODUCTION

The wide matrixes of laws that govern intellectual property aspire to protect the fundamentals of human creativity, skill and knowledge. Knowledge has been one of the most coveted possessions of mankind since the industrial revolution.² Since the advent of technology, processes have been revolutionized and developments have been seen in all spheres of human activity. Thus, protection is warranted in order to promote and encourage creative works of the human intellect. Amidst the knowledge generated due to technical expertise there is immense knowledge stored in the relics of history and culture. For this, one must refer to cultures that exist in isolation like the indigenous peoples³ of the world. Indigenous people are characterised by closely knit societies. They possess great knowledge of the world around them. This knowhow enables them to develop and master the resources to their disposal and are often delicately intertwined in their culture and religion. This is commonly known as traditional knowledge. Traditional Knowledge refers to —tradition- based literary, artistic, or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information and other tradition- based innovations and creations resulting from intellectual activity in the industrial scientific, literary or artistic fields⁴. Developing nations have urged for the protection of for traditional forms of creativity and innovation, knowledge that is generally available in the public domain. Rampant exploitation of traditional knowledge has taken place for commercial purposes and this has been possible by the extremely corporate nature in which intellectual property laws developed. Thus, there

¹ Eamon de Valera

² Carlos M. Correa, Intellectual Property, the WTO and Developing Countries: the TRIPS Agreement and Policy Options 3-4

³ Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system

⁴ WIPO, —Traditional knowledge- operational terms and definitions| Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3rd session, Geneva, June13-21, 2002, WIPO/GRTKF/IC/3/9, page-11,

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_ic_3_9.pdf.

is a need to protect and preserve traditional knowledge. This paper aims to examine the issues that are involved in the protection of traditional knowledge. It also seeks to delineate, with the help of judicial pronouncements, the scope of property rights vested in traditional knowledge.

INDIGENOUS SOCIETIES AND TRADITIONAL KNOWLWDGE

Indigenous people are the custodians of some of the most biologically diverse communities of the world⁵. However, the global indigenous population has been facing indiscriminate marginalization. Lands have been taken over in the name of development without adequate compensation. Poverty, conflict and societal exclusion have plagued their pristine way of life and means of livelihood. Their cohesiveness as communities have been damaged or threatened and the integrity of their cultures remains undermined⁶. However, they are the reservoirs of knowledge that has been passed from generations. These people are most often unaware of the value of their knowledge and thus are uncertain of the benefits of protecting this knowledge. For better comprehension of traditional knowledge and its relevance in the lives of the indigenous people it is pertinent to understand the meaning and scope of traditional knowledge. Traditional knowledge is so vast in its magnitude that defining it is not clear of ambiguities. Amid this definitional uncertainty, one strand of scholars has argued that traditional knowledge belongs to specific ethnic groups or the cultural heritage of minority.

Under the Scheme of the WIPO, traditional knowledge refers to —tradition- based literary, artistic, or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information and other tradition- based innovations and creations resulting from intellectual activity in the industrial scientific, literary or artistic fields⁷. It has also been seen that the term traditional knowledge is used not only to describe a category of knowledge but also to carry particular political messages, including criticizing

⁵ State of the World's Indigenous Peoples, Department of Economic and Social Affairs, Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, United Nations publication, ISBN 92-1-130283-7

⁶ JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (Oxford University Press 1996).

⁷ WIPO, —Traditional knowledge- operational terms and definitions| Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3rd session, Geneva, June13-21, 2002, WIPO/GRTKF/IC/3/9, page-11(2002)

Western approaches to development, protecting the environment of a particular group, and highlighting an exploitative Western stance toward nature.⁸

Thus, Traditional knowledge is not the sole creation of an individual. It is the knowledge that is embedded in the culture and in the evolution of civilizations. Most importantly, it is a reflection of the response of people to their surroundings in order to maximise the efficiency of resources at their disposal.

NEED FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

As has been reiterated earlier, traditional knowledge base is the knowledge accumulated by societies in their own evolutionary processes. Most of the legal matrix that lays the edifice of laws relating to intellectual property aim to protect individual creators from moral and economic infringement of their creations.

Arguments made by developing nations reflect the view that their traditional knowledge has been the basis for the research leading to high-priced inventions, the benefit of which is reaped by developed nations.⁹ For instance, the US patent office had granted a patent for turmeric in 1995. The benefits of turmeric and its latent qualities have long been used in Indian households. It has been a part of the culture of people and is deeply etched in the lifestyle of people. This was the argument raised by the Council for Scientific and Industrial Research in its opposition to the grant of such patent, the Council further noted that in such application of turmeric was a ‘prior art’¹⁰. There have been many such oppositions made in India and in other international jurisdictions, the key element of these are that such oppositions are a manifestation of the concerns that indigenous communities have towards protecting their knowledge. They are also reflections of the rising awareness on the worth of traditional knowledge and the benefits of protection from commercial exploitation. These concerns have been voiced over time and new issues have also been added. For example, the significance of traditional knowledge in sustainable development and biodiversity conservation has been gaining importance lately.

NATURE OF PROTECTION GRANTED TO TRADITIONAL KNOWLEDGE

⁸ Shiva, *Biopiracy: The Plunder of Nature*, and Shiva, *Protect or Plunder?*

⁹ Craig D. Jacoby & Charles Weiss, Recognizing Property Rights In Traditional Biocultural Contribution, 16 Stan. Envtl. L.J. 74, 75-81 (1997).

¹⁰ *Trade and Development Case Studies* , available at <<http://www.itd.org/issues/india6.htm>>

Traditional knowledge protection is sought under two broad categories viz., positive and defensive protection. Defensive protection implies protection from accusation of knowledge by outsiders. The defensive system is centred on changes to the Patent System. Contrary to this, the positivist theories focus on protection by intellectual property rights¹¹. This prevents use without assent and therefore ensures that the use is within accepted cultural limitations. This approach seems to join the various elements of protection however; jurists have noted that the progressive appropriation of traditional knowledge through IPR has an impact upon the ownership of the knowledge.¹²

Positivist Protection:

The World Intellectual Property Organization demarcates traditional knowledge as being distinct from folklore and genetic resources. This is important to identify the intellectual property right that is deemed to be infringed for the identified categories. For example, folklore¹³ finds protection under copyright laws. The duration of copyright protection is an uncertainty. In countries such as Ghana, rights relating to folklore are vested in the head of the State and exist in perpetuity¹⁴.

Defensive Protection:

Defensive protection entails that outsiders are barred from infringing existing knowledge of the indigenous communities. India relies greatly on the defensive approach to protect her traditional knowledge by effectively creating a traditional knowledge database that will help patent examiners for easy retrieval of traditional knowledge-related information, thus avoiding the possibility of granting patents to unoriginal inventions. The Traditional Knowledge Digital Library uses a unique classification system now internationally known as Traditional Knowledge-Resource Classification. This system is based on the International Patent Classification System.

¹¹ Coenraad J. Visser, Making Intellectual Property Laws Work for Traditional Knowledge, in Poor People's Knowledge

¹² Bieber Kelmm S And Cottier T, Traditional Knowledge- Basic Issues And Perspectives, Oxfordshire, 2005

¹³ Described by WIPO as Traditional cultural expressions (TCEs), also called "expressions of folklore", may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.

¹⁴ Copyright Law, P.N.D.C.L. No. 690, § 4 (May 17, 2005) (Ghana), available at http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=1789.

INTERNATIONAL LAW AND THE EXISTING SYSTEM FOR PROTECTION OF TRADITIONAL KNOWLEDGE

The Trade Related Intellectual Property Rights System (TRIPS) remains one of the largest agreements to manage intellectual property issues at the international level. TRIPS reflected a dichotomy in regard to enforcing intellectual property rights to protect commercial and moral exploitation and ensure equal treatment on one hand, and the need of protection of non-conventional IPR's on the other. It is seen that the TRIPS does not incorporate provisions relating to the protection of traditional knowledge. As observed, intellectual property laws have been designed in ways to suit monopolistic tendencies of developed nations. Scientists from these nations invent and these inventions are backed by multinationals; unfortunately, in such an atmosphere compromising on rights of the indigenous minority is not seen as infelicitous. The WTO has shown such apathy in mandating developing nations to assimilate product patent in their intellectual property systems.

International legal instruments have become involved in structuring the laws and policies to preserve traditional knowledge. The United Nations declaration on the rights of Indigenous peoples was adopted to be a tool that would significantly protect the rights of indigenous communities of the world and lay down a standard for fair treatment. The declaration documents that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions¹⁵. With 144 votes in favour, it is well assumed that the declaration is symbolic of global consensus towards the protection of traditional knowledge. Other instruments under the aegis of the United Nations also demonstrate similar rights being granted. The nexus between preservation of traditional knowledge and sustainable development has been appreciated by the United Nations Environment Programme (UNEP) and has achieved developments under the Convention on Biodiversity. The Convention recognises the sovereign rights of states over their biodiversity

¹⁵ Article 31, United Nations Declaration of the rights of Indigenous Peoples (available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

and knowledge, and accordingly gives the state rights to regulate access, on mutually agreed terms, and subject to prior informed consent¹⁶. It further enjoins the respect, preservation and maintenance of traditional knowledge, while also laying emphasis on the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices¹⁷. The Johannesburg plan of Implementation also recognizes the rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices, and, with the approval and involvement of the holders of such knowledge, innovations and practices, develop and implement benefit -sharing mechanisms on mutually agreed terms for the use of such knowledge, innovations and practices¹⁸. The plan also calls for a participatory model between the different stakeholders in the issues regarding utilization of traditional knowledge¹⁹. These policy decisions are strengthened by the Nagoya Protocol. The Nagoya Protocol on Access to Genetic Resources and Sharing of Benefits to the Convention on Biological Diversity, adopted in October 2010²⁰. The Protocol received the requisite ratifications in the period of India's Presidency of the Conference of the Parties. The then Minister of State on Environment, Forests and Climate Change, Mr P. Javedkar stated; "The Nagoya Protocol on Access and Benefit Sharing translates and gives practical effect to the equity provisions of the Convention on Biological Diversity. A new era is now ushered in for implementation of CBD that would contribute to achieving sustainable development and a glorious future for all living beings inhabiting our mother Earth.²¹"

The Nagoya Protocol is the first of its kind as it creates a binding responsibility of part of the government of States that have ratified it to ensure equitable benefit sharing. The Nagoya Protocol includes a sweeping plan to protect biodiversity by setting targets for 2020. Nations agreed to make 17 per cent of the globe's land area and 10 per cent of coastal and marine areas into protected regions, as opposed to the current levels of 13 and one per cent²². It is also instrumental in creating a framework that promotes the use of genetic resources and

¹⁶ Article 15, Convention on Biological Diversity

¹⁷ Article 8(j), Convention on Biological Diversity

¹⁸ Article 44 (j), Johannesburg Plan of Implementation

¹⁹ Article 44 (l), Johannesburg Plan of Implementation

²⁰ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>

²¹ PRESS RELEASE, Governments fulfil their commitment: Access and benefit-sharing treaty receives required number of ratifications to enter into force (available at: <http://www.cbd.int/doc/press/2014/pr-2014-07-14-Nagoya-Protocol-en.pdf>)

²² Jebaraj, Priscilla. "Nagoya Protocol, a big victory for India", The Hindu (available online at: <http://www.thehindu.com/news/national/article859977.ece>)

associated traditional knowledge while strengthening the opportunities for fair and equitable sharing of benefits from their use. It aims to do so by requiring member countries to take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilisation of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge²³. The Protocol requires states to ensure that access to and use of Indigenous peoples' and local communities' genetic resources and traditional knowledge is subject to their prior informed consent.²⁴ This is applicable to states that house the indigenous peoples and also on states to which the traditional knowledge is imported. It also requires states to take the customary laws of Indigenous peoples and local communities into consideration in implementing the Protocol²⁵. Further, the protocol also recognizes the difficulties in trans-boundary issues and suggests a Global Multilateral benefit sharing Mechanism for situations where no prior consent can be gathered²⁶.

NATIONAL STATUS OF PROTECTION OF TRADITIONAL KNOWLEDGE

According to the World Intellectual Property Organisation, Intellectual Property is divided into two categories: Industrial Property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs²⁷. The Indian legislations are also in consonance with the above categorization and have been used for the protection of embezzlement of traditional knowledge. However, this poses its own set of challenges. For instance, protection under the Patent Act²⁸ is granted with three preconditions, viz novelty, inventiveness and industrial applications. This is because invention is not defined per se, but in relation to the fulfilment of these criteria. This makes implementation a very complex process²⁹. The problem with traditional knowledge is that it exists since a long period of time. It is the common knowledge shared by a community and it

²³ Article 5, Nagoya Protocol

²⁴ Article 6 and Article 7, Nagoya Protocol

²⁵ Article 12, Nagoya Protocol

²⁶ Article 10, Nagoya Protocol

²⁷ WIPO, *What is Intellectual Property*, available at <http://www.wipo.int/about-ip/en/>

²⁸ Patent Act, 1970

²⁹ For instance, In India, the Supreme Court determined that Novartis would not be awarded a new patent over Gleevec (a cancer treating drug), basically because the “new” “invention” was not deemed significantly different from the original version of the drug.

involves with the community. Therefore, the requirements of novelty and invention are not usually met. The Patents Act declares that an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components is not to be considered as an invention under the act³⁰. Protection may also be granted under the Geographical Indicators Act³¹. Geographic Indicators recognize and reward producers for their age-long cultural contribution to livelihood, lateral learning, conservation and social networking by adding premium value to their products. By recognizing the cultural contributions and creativity of Traditional Knowledge holders, they may contribute to the preservation and evolution of the culture³². Under the Trademark Act indigenous products even agricultural and biological products can be protected. These kinds of protection results from changing the Intellectual Property Laws and mould them to incorporate protective measures.

One of the most developed an innovative ways of protecting traditional knowledge is by documenting and cataloguing the traditional knowledge in the form of the Traditional Knowledge Digital Library. The library proves useful for research workers in preventing extinction of rare species. It also aids patent examiners for easy retrieval of traditional knowledge-related information, thus avoiding the possibility of granting patents to unoriginal inventions. The Library uses registered Traditional Knowledge for defensive purposes. The information is accessed by Intellectual Property Authorities to review novelty requirements. This in turn would lead to contesting patents internationally which involves major costs. The effectiveness of the Traditional knowledge Digital Library can be cited in the words of Johannes Christian Wichard, Deputy DG World Intellectual Property Organization who said; “India is recognized as a world leader in the fight against misappropriation of Traditional Knowledge. India's Traditional Knowledge Digital Library has set an example for other countries to follow”³³. The World Intellectual property Organization has further observed that with the coming up of the Digital Library there has been a sharp decline in the patent applications for Indian medicinal systems particularly in relation to medicinal plants.³⁴ Thus,

³⁰ Section 3(p), Patents Act, 1970

³¹ Geographical Indications of Goods (Regulations and protection)Act

³² Anu Bala, Traditional Knowledge and Intellectual Property Rights: An Indian Perspective

³³ Rupali Mukherjee, Traditional knowledge, culture can be patented, Times of India, available at <http://timesofindia.indiatimes.com/business/india-business/Traditional-knowledge-culture-can-be-patented/articleshow/27994684.cms>

³⁴ WIPO, Protecting India's Traditional Knowledge, available at http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html

the system is a valuable deterrent to bio piracy. 0.226 million traditional medicinal formulations have been protected from misappropriation with no direct costs³⁵. India's Traditional Knowledge Digital Library is a unique tool that plays a critical role in protecting the country's traditional knowledge.

INSTANCES OF BIO PIRACY

The rich natural and cultural history of India gives her a place in the 12 mega biodiversity countries of the world. Nestled in the lush natural diversity, many indigenous communities use the environment to sustain themselves and thus, the natural diversity is a part of their cultural existence. The nature of traditional knowledge and the close nexus it shares with the natural environment make it susceptible to bio- piracy. Thus, companies often exploit traditional knowledge by gaining monopoly right over the biological resources or traditional knowledge based commercial products without the consent, recognition and adequately compensates the rightful owners of biological resources and associated knowledge³⁶. The epidemic of bio piracy is an assault on our living heritage of biodiversity and cumulative innovation embodied in the traditional knowledge of agriculture and medicine³⁷.

India has consistently opposed western countries that have tried to monopolize and exploit existing knowledge. The Challenges made by India to the Patents are very much required to maintain the sovereignty of the country and the livelihood of the citizens. When companies patent readily available knowledge, it is the people who will ultimately suffer as they would now have to pay for what was already there's.

Some of the prominent cases can be identified as:-

1. Turmeric: - A patent³⁸ was granted in 1995 to two US based Indians on the antiseptic properties of turmeric. Turmeric has been used in India for centuries and its properties of wound healing and available in the public domain as traditional knowledge. The Council for Scientific and Industrial Research opposed the patent and the patent was revoked on the basis of evidence substantiated by the Council.

³⁵ *Ibid*

³⁶ Anu Bala, Traditional Knowledge and Intellectual Property Rights: An Indian Perspective

³⁷ Vandana Shiva, Controversy over Biopiracy in India & Developing World available at http://www.organicconsumers.org/articles/article_8463.cfm

³⁸ US patent (no.5, 401,504)

2. Neem: - The European Patent office has granted a patent³⁹ in 1994 for fungicides that were derived from Neem. These properties of the Neem plant have been known to Indian farmers for centuries and are an intrinsic part of their way of life. They therefore, lack the element of novelty. And thus, the patent was challenged on this point by groups of NGOs and representatives of farmers. Finally, in 2005 the patent office revoked the patent and declared that such extraction was a prior art and there was no element of novelty involved.
3. Rice: - Another striking example in the battle against bio piracy is the case of Rice. The Rice plant is grown in abundance in India and the Basmati variety is one of the most sought after varieties of rice. This has been nurtured and grown for generations by farmers in the northern plains of India. A US based company derived a new variety of rice by cross breeding 22 traditional rice varieties and was granted a patent⁴⁰ for the same. Patent documents contain 20 claims that various varieties of traditional farmer bred rice were also used. Furthermore, the company was also monopolizing on the term Basmati and claimed exclusive ownership over new varieties based on traditional rice varieties nurtured by generations of farmers.
4. Wheat: -The Supreme Court of India urged the government to oppose a patent⁴¹ granted by the European Patent Office on a traditionally bread variety of wheat. The patented variety of wheat with specific baking characteristics of flour derived from it was originally developed in India and has been cultivated, bred and processed for bread by Indian farmers for years. In 2004 the patent was duly revoked.

Other patents that come in the way of Traditional Knowledge of the Indian People have been granted to USA based and Chinese based companies. Some of these are Mint leaves⁴², Castor⁴³, Black Pepper⁴⁴, Guggul⁴⁵ and Mustard⁴⁶.

CONCLUSION AND RECCOMENDATIONS

³⁹ Patent (No.EP436257)

⁴⁰ US Patent (no. 5663484)

⁴¹ EP 445929

⁴² Patent Application EP1849473

⁴³US Patent [5510255]

⁴⁴ US Patent 5,972,382

⁴⁵ US Patent 6,113,949

⁴⁶ US Patent [5463174]

In the course of the paper the major obstacles towards effective protection of traditional knowledge that have been identified can be summed up as: -

1. Balancing community needs and development- Science and technology have matured to an extent whereby they can create better and more efficient products by harnessing existing knowledge. However, this would lead to the indigenous populations having to pay for the products that have been known to them from generations. Intellectual property rights, when granted to scientific innovations based on traditional knowledge entitle the right holder to extract royalties. This is detrimental to the rights of the indigenous populations.
2. Novelty Requirements- Most Intellectual Property Rights demand novelty in creation. Even if changes are made to existing knowledge by narrow range that satisfies the requirements of novelty and inventiveness a right may be granted in favour of the applicant. This makes it difficult to ensure overall protection to the traditional knowledge. This can only be overcome by establishing a sui generis system which caters to the specific demands of a country and links them with community rights and international norms.
3. Issues involved in challenging patent applications- As has been seen by the cases of Turmeric, Neem, Rice and Wheat wherein India challenged the grant of patents internationally it may be observed that the process involves a lot of time and money. In the case of the patent on the Neem plant one can observe that the patent was granted in 1999 and the revocation took place in 2005. The long battles that take place in the patent offices across the globe are a major drain on capital and resources. Further, the task of urging the government to oppose patents is taken up by interest groups and NGO's lobbying for the same. Therefore, if there isn't a strong lobby against a particular patent there may not be a substantial opposition towards it.
4. Benefit Sharing- Equitable benefit sharing mechanisms have been made lucid with the Nagoya Protocol. However, the nature of benefit sharing to communities that do not require monetary compensation is uncertain.
5. Proofs of Traditional Knowledge- Indigenous communities are often opposed to outside intervention. The nature of knowledge in these communities remains uncertain if they are unwilling to share it outside of their communities.
6. Protection through legislations- this brings about the issue of duration of protection that is granted. Further, in cases where protection is sought under Copyright Laws

identification of authorship is a major concern. Authorship is the essence of Copyright Laws. This is because copyright arises out of the act of creating a work and authors have moral claims that neither corporate intermediaries nor consumer end-users can assert⁴⁷

In light of these concerns the following recommendations are suggested: -

Traditional Knowledge comprises of collective custodianship. Therefore, communal knowledge and resources, and any innovations derived, should be shared openly by all, including third parties. Specialised knowledge, for instance medicinal is held by healers and elders but must be used to address community needs. The benefit sharing of this knowledge must also be collective.

For effective identification of traditional knowledge, customary laws and practices should be analyzed like it has been done in the establishment of the Traditional Knowledge Digital Library. Efforts must also be directed towards making indigenous populations party to the policies that affect them directly. Consent in cases of appropriation must be made mandatory. Supplementary to the grant of consent communities may also enter into legal relations with parties. For example, Material Transfer Agreements have been seen as an important tool to define the obligations of parties concerned. Confidentiality Agreements may also be entered into in cases where the indigenous people may be willing to disclose knowledge without giving up their control over it. Products that are derived from Traditional Knowledge may be given a boost by the concerned governments. This institutionalization process would include remuneration of those members of the community involved in the management of biological resources. Awareness amongst the indigenous communities in relation to their rights over traditional knowledge can also help in preserving it. Therefore, educating communities must find space in the national and international agendas.

Patent applications brought before any patent office globally must go through a rigorous examination process to evaluate its novelty. The burden of proof to show that the particular patent does not infringe traditional knowledge rights of indigenous populations must be on the applicant. Most importantly, the protection and recognition should be undertaken in a manner conducive to social and economic welfare of the entire community.

⁴⁷ Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, Paper Number 03-51, Public Law and Legal Theory Research Group.

SHOULD BAL THACKERAY BE CALLED AN ‘INDIAN’ POLITICIAN OR A MARATHI ETHNOCENTRIC?

Ms. Ashita Bali *

Abstract

Keshav Thackeray, Indian journalist and politician, was the founder of Shiv Sena (Army of Shiva) political party, and advocate of a strong pro-Hindu policy in India. Under his leadership the Shiv Sena became a dominant political force in the western Indian state of Maharashtra. His father was said to have supported the use of strategic violence and the reason his father left the movement was his stance against communists. This is said to have inspired Thackeray and his foundations for his party.

His party advocated the end of India’s constitutional status as a secular state and the adoption of Hinduism as the country’s official religion. Such was Thackeray’s power that when the Shiv Sena gained political control of Maharashtra in the 1990s, he had Bombay renamed Mumbai for the goddess Mumbadevi—the name by which the city is known in the Marathi language—and when Thackeray was satirized by novelist Salman Rushdie in *The Moor’s Last Sigh* (1995), the book was immediately banned in Maharashtra.

This Research Paper focuses as to how Bal Thackeray defied the guidelines of Indian Constitution for the crude uneducated and unintellectual Maharashtrians who did not understand ideas and ideologies and has promoted fascism to a great extent. He throughout his lifetime withheld the fundamental right of any Indian to migrate to Maharashtra, he advocated people to twist and turn the law if it suited their interest.

Bal Thackeray was not only against South Indians who were residing in Maharashtra but was also against Muslims & North Indians especially from parts of Uttar Pradesh and Bihar residing there.

Throughout his life, Balasaheb Thackeray preached hatred and incited tensions and riots in the name of religion and region. He spread a reign of terror in Mumbai and Maharashtra.

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Is it fair to have leaders like Bal Thackeray in a democratic country like India? In a country like ours, a person should be provided equal rights regardless of the religion he preaches and the region, where he comes from.

The basic question that has been raised is that, should Bal Keshav Thackeray be called an INDIAN Politician? An Indian who restricts people from obtaining their Fundamental Rights, an Indian who is against South Indians, Muslims and North Indians and only stands for Hindus and Maharashtrians.

INTRODUCTION

India, being a Democratic country has seen leaders like Bal Thackeray, who have very strongly opposed the guidelines of The Indian Constitution, which provides equal rights to all the religious communities.

Is it correct to call Bal Thackeray an Indian Politician or should he just be called a Hindu or a Maharashtrian Leader?

He advocated people to take the law into their own hands if it suited their interests and was being denied by the ruling government. In an editorial in the Hindu today, Praveen Swami says that the Shiv Sena leader is guilty of something most people chose not to highlight in their obituaries of the leader. Swami says he is guilty of giving birth to an ‘authentically Indian fascism’.¹

The political party’s main aim has been to keep people who are not from Maharashtra out of the state and stem the spread of Islam and western values. Thackeray’s Sena is among the most xenophobic of India’s Hindu right-wing political parties and held power in Mumbai from 1995 to 2000. His supporters often called him Hindu Hriday Samrat or emperor of Hindu hearts.

In the days since his passing, among other terms of adulation, Bal Thackeray has been hailed as a leader of the masses. Forming the Shiv Sena in 1966, Thackeray made the most of the fact that the industries of Mumbai offered few avenues to educated Maharashtrian youth and by projecting himself and his party as an alternative to the establishment.

¹ <http://www.firstpost.com/politics/bal-thackeray-is-india-so-comfortable-with-fascism-528767.html>

The Shiv Sena was born on the streets and thrived on mindless action. It was a textbook case of anarchy leading to fascism. Even Bal Thackeray had no idea of what was happening, neither was he equipped to comprehend the complexity. In this atmosphere of chaos people found a leader who was as clueless as them.²

The secret of his early rise lay in the Sena's trade unions, which befriended employers and destroyed a once-strong labour movement in Mumbai.³ Throughout his life, Balasaheb Thackeray preached hatred and incited tensions and riots in the name of religion and region. He spread a reign of terror in Mumbai and Maharashtra.⁴

Thackeray fought for the crude uneducated and unintellectual people who did not understand ideas and ideologies. It is this that attracted so many people, the poor, the lower middle class. He gave them the voice and an identity. He hated non-Maharashtrians including Gujarati's, South Indians, North Indians and Muslims.

Balasaheb was associated with a magazine whose management was South Indian, and hence his first attack, when he started Marmik, a sort of Marathi Punch, was against the South Indians. The basic thinking behind all these attacks was always that the non Maharashtrians (non-Marathi-speaking) were the haves of Bombay, and the Maharashtrians, to whom the city geographically belonged, were the have-nots. It was a way of thinking guaranteed to make Mr. Thackeray popular.⁵

The first victims of his poisonous ideology were the South Indians working in Mumbai, who were attacked by Thackeray's men. In his acts, he was supported by many industrialists, who wanted to weaken the strength of the trade unions that had South Indians in substantive numbers. That gave him popularity in and around Mumbai.

Thackeray's next victims were the poor economic migrants from Bihar and eastern Uttar Pradesh to Mumbai and Maharashtra. On his call, the Shiv Sena cadres publicly beat those helpless migrants; their properties were attacked, homes were ransacked and a few even died. Many of them were forced to return to their native places, leaving behind their jobs and all

² <http://forbesindia.com/article/special/bal-thackerays-fractured-legacy/34151/1>

³ <http://www.thehindu.com/news/national/leader-who-brought-ethnic-politics-to-mumbai-melting-pot/article4105715.ece>

⁴ http://www.dailytimes.com.pk/default.asp?page=2012%5C11%5C27%5Cstory_27-11-2012_pg3_6

⁵ Bal Thackeray & The Rise Of The Shiv Sena, Vaibhav Purandare, Roli Books, 2012

their belongings. For his brutalities, he gained support from the locals through his slogans like “Jai Maharashtra”, “Marathi Manus”, and “Mumbai for Maharashtrians.”⁶

Then came the Muslims against whom he said "When I come into my element ('josh'), I will not allow a single fanatic Muslim to live in Maharashtra, and wherever we have party branches, right up to Jammu & Kashmir.". Thackeray and the Shiv Sena were blamed for inciting violence against Muslims during the 1992–1993 Mumbai riots in an inquiry ordered by the government of India - the Srikrishna Commission Report. Following the riots, Thackeray took stances viewed as anti-Muslim. In 2002, Thackeray issued a call to form Hindu suicide bomber squads in response to Islamist suicide bombers and other violence. His supporters had destroyed the 16th-century Babri Masjid in Ayodhya, Uttar Pradesh, in 1992, and in 2000 he was arrested on charges of having incited the deadly 1992–93 riots in Mumbai.

The Press Council of India(PCI) head said, “It is a fundamental right of a Gujarati, South Indian, Bihari, U.P.ite, or person from any other part of India to migrate to Maharashtra and settle down there, just as it is of Maharashtrians to settle down in any part of India”.⁷

It is indeed strange, that a man who prided himself for being Marathi, fought for the Marathi identity, invoked Marathi culture and embraced Maratha history, never really took any interest in promoting historical research or going beyond simple references to Shivaji Maharaj. He never bothered to promote the Marathi language. For him, only politics mattered, not as a theme but as a rabblerousing technique.

CONCLUSION

This research paper shows how Balasaheb Keshav Thackeray, also known as, The Tiger was only in favor of the Marathis in a Democratic country like India and dominated over the other minorities present in Maharashtra. He was an enemy of minorities & a person who divided nation in the name of Marathis, Biharis, Muslims, South and North Indians. The language of hate and, when needed, violence were deployed to generate fear and insecurity, pride and solidarity. The founder-leader of the Shiv Sena first invoked Maratha pride against the State's linguistic minorities and then the divisive agenda of Hindutva against religious minorities.

⁶ http://www.dailytimes.com.pk/default.asp?page=2012%5C11%5C27%5Cstory_27-11-2012_pg3_6

⁷ <http://www.ibtimes.co.in/articles/406273/20121119/bal-thackeray-press-council-markandey-katju-tribute.htm>

One can say that, the Shiv Sena's success came at a great price for not only Mumbai and Maharashtra, but India as well. Bal Thackeray in his reign created a rift between the Maharashtrians and Other Indians and created an unsaid partition of Maharashtra from India. Taking into consideration the difference in outlook of Mr. Thackeray towards Maharashtra and the rest of India it will not be very wrong in saying that Bal Thackeray should rather be called a Marathi Ethnocentric instead of an Indian politician.