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“We must reject the idea that every time a law's broken, society is guilty rather than the lawbreaker. It is time to restore the American precept that each individual is accountable for his actions.”

- Ronald Reagan

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Lex Revolution

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Quarterly Published International Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.

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

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

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MESSAGE

It is with great pleasure we announce the release of Volume IV Issue-1 (2018) of ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We owe our sincere gratitude to legal luminaries Prof. Gopal Krishna Chandani, Prof. S. K. Gaur & Sr. Advocate Mr. K. N. Chaubey for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of AdvocateKhoj who have been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

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

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

- **Editorial Board**

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THE PRESIDENT'S POWER TO PROMULGATE ORDINANCES: A COMPARATIVE STUDY OF INDIA AND USA

Animesh Kumar* & Mayuri Gupta**

Abstract

An ordinance is a law made by the President. The ordinance making power is the most important legislative power vested on the President to deal with unforeseen and urgent situations. The outstanding feature of an ordinance is its legislative character and its administrative or executive source. The power of legislation by way of the promulgation of ordinances has been vested on the President in India under Article 123 of the Constitution. It is an emergency power which enables the executive to be able to meet any unforeseen or urgent situation arising in the country when the legislature is not in session and for which there is no adequate provision under the already existing laws. The matter has again come up for discussion in India after the passing of notable judgment by the Supreme Court in the case of Krishna Kumar Singh & Anr v. State of Bihar & Ors in 2017. With the current issuance of series of executive orders by the President of United States Mr. Donald Trump, in matters related to the repeal of the Affordable Care Act, changing the rules of federal regulations and enacting the controversial ban on admission to the United States for a range of immigrants and refugees, the presence of a similar power in the United States' system of governance has surfaced. It would be interesting to see whether the United States President has power similar to the President in India. Through this paper, the authors would try to study the historical evolution of the executive's legislative power, the ordinance making power and the power to issue executive orders in India and United States respectively, the judicial control of power if any.

Keywords: President, Ordinance, executive orders, proclamation, India, United States, judicial review, Article 123, Donald Trump

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INTRODUCTION

The ordinance making power is the most important legislative power vested on the President to deal with unforeseen and urgent situations. The term ‘ordinance’ is defined by the Oxford dictionary as *an authoritative order and* by the Black’s Law Dictionary *as a rule established by authority*. Ordinance is a law promulgated by a state or national government without the consent of the legislature. For an ordinance to be enforced effectively, it must not be in conflict with any higher law such as state or national law or constitutional provisions.

An ordinance is an act of State which, in its content, partakes of the nature of a legislative act, while, in its source, it is issued by some governmental authority, usually an executive or administrative officer or organ, without the assent of the regular legislative assembly.¹ The outstanding feature of an ordinance is thus its legislative character and its administrative or executive source.²

Ordinances are laws made by the Executive and are unknown to many systems of law. The Monarch in England, for instance, has no legislative power nor for that matter can the Cabinet promulgate a law on its own without being passed by Parliament. It is the absence of the consent on the part of the legislature that is the distinct characteristic of an ordinance. Chief Justice Coke in ‘The Institutes of the Laws of England’ emphasizes this characteristic in the following words: *There is no Act of Parliament but must have the consent of the Lords, the Commons, and the royal assent of the King, and as it appeared by records and our books whatsoever passed in Parliament by this threefold consent, hath the force of an Act of Parliament. The difference between an Act of Parliament, and an ordinance in Parliament, is, for that the ordinance wanted the threefold consent, and is ordained by one or two of them.*³

The English principle of the participation of the popular assembly in the function of legislation has been extended to almost all other countries of the world. Until now it is a fundamental institution of modern Constitutional governance. Yet in all the other countries it has also been found necessary or expedient to grant at least some degree of legislative

¹ Samuel James Hart, The Ordinance making power of the President of United States, Available at: <https://archive.org/stream/ordinancemakingp00hart#page/n1/mode/1up> (Accessed: 10.04.17)

² *Ibid*

³ Ashok H Desai, ‘Government by Ordinances’ [1984], Economic and Political Weekly, Vol XIX No 49 December

discretion to the Executive acting alone. The contrast between statute and ordinance is, therefore, essentially the same in modern government of a democratic country.⁴

A statute is purely a legislative act of the Parliament whereas an Ordinance is an outcome of legislative power given to the Executive. Law making is a complex process in any democratic country. It involves several steps. This intense mechanism is bypassed in case of an Ordinance. Riding pillion, or in other words in case of urgency or the rise of an emergent situation, an Ordinance needs an Executive sanction only.

India and United States of America both adheres to the doctrine of Separation of Powers whereby Constitutionally the power to legislate, execute and judge has been entrusted in three different organs of the government. But there is a curious divergence between the theory and actual constitutional practice. The primary law making authority under the Constitution is the Legislature and not the Executive. But it is possible that when the Legislature is not in session, circumstances may arise which render it necessary to take immediate action and in such a case, in order that public interest may not suffer by reason of the inability of the Legislature to make law, the President/Governor is vested with the power to promulgate ordinances.

The standard conception of the presidency is that the office is constrained by the Separation of Powers and general weakness of the chief executive's formal powers. Yet Presidents have, throughout US history used their executive authority to make policy on their own without interference from either Congress or the Courts. President Goodnow calls it the ordinance power or the power of ordinance, Professor Willoughby names it the ordinance making power while Professor Fairlie has recently spoken of it as administrative legislation. The term was used in England in the fourteenth century to designate an enactment of the King or the King in Council without the assent of Parliament. The power of ordinance, which became more limited than the power of legislation, died out, says Anson, in the fifteenth century, only to be revived in the next as the power of proclamation.⁵

The president has been conferred with the law making power both in India and America. In India the law making power of the President flows from Article 123 of the Constitution of India which empowers the President to legislate by Ordinance in situations which demand

⁴ *Supra* note 1

⁵ James Hart, 'Ordinance Making Powers of the President' [1923] The North American Review, Vol. 218, No. 812 University of Northern Iowa, Available at: <http://www.jstor.org/stable/25113061> (Accessed: 15.04.2017)

immediate action. In United States the most significant type of executive legislation is the executive order. Although not explicitly listed in the Constitution, executive orders are generally interpreted as an implied executive power deriving from Article II, Section 3, which says that the President ‘shall take care that the Laws be faithfully executed.’⁶

Legislation by Ordinances is not extra-constitutional, but improper and undemocratic. Legislation is the supreme prerogative of Parliament. Under Article 123 of the Constitution, the President is empowered to issue Ordinances, when Parliament is not in session, if he is ‘satisfied that circumstances exist which render it necessary for him to take immediate action.’ Article 123 is based on section 42 of the Government of India Act, 1935. But the Constitution has incorporated this section from the Government of India Act with a significant difference, which makes it all the more reprehensible. While we have studied about the Ordinance making power of the President under the Indian Constitution, it would be interesting to trace the similarities and dissimilarities of the similar power exercised by the United States’ President and understand its dynamics.

HISTORICAL EVOLUTION

➤ *The incorporation of Ordinance making power in the Constitution of India*

Law making function performed by the Executive springs out of pragmatism, a need for urgent and quick law devised to deal with an immediate situation. This need was felt by the British who needed to establish a firm control over the administration in India. The Executive was thus conferred with considerable power and handed to us a unique feature to our legislative system- Ordinance making power of the Head of the State.

The British who staunchly believe in Parliamentary supremacy gave in to the exigencies of ruling a colony with a firm hand, bypassing several accepted beliefs. The word ‘ordinance’ was ‘gifted’ to India with the establishment of the East India Company with the First Royal Charter in 1600. The charter gave the company the power ‘*to make, ordain, and constitute such and so many reasonable laws, constitutions, orders and ordinances...*’ which was necessary for the efficient working of the company.⁷

⁶ Megan Covington, ‘Executive Legislation and the Expansion of Presidential Power’ [2012] Vanderbilt Undergraduate Research Journal Spring Volume 8, citing Phillip J Cooper, ‘Power tools for an effective and responsible presidency’ [1997] Administration & Society 29.5

⁷ C. L. Anand., *Constitutional Law and History of Government of India* (Universal New Delhi 2008) 476

- ***Indian Councils Act, 1861***

The Indian Councils Act, 1861 transformed the Viceroy of India's executive council into a cabinet system of six members. This had an express provision for ordinance making under *Section 23*.⁸ The language makes it abundantly clear that this decision of the Governor General was independent of his council. This provision was meant for emergent situations only, but nowhere has that emergency been defined, it has been left entirely at the satisfaction of the Governor-General, the only qualifying words being; '*for the peace and good government*'. The first ordinance was '*Export of Saltpetre Ordinance, 1861*' followed by '*Dramatic Performances*'⁹, '*Regulation of Meetings*'¹⁰ and '*Cotton Gambling*'¹¹.

- ***Government of India Act, 1915***

The Government of India Act, 1915 replaced the 1861 Act. *The Government of India Act, 1915* was an Act of the Parliament of the United Kingdom, which consolidated prior Acts of Parliament concerning British India into a single Act. *Section 72* of the Act states: "*The governor-general may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Governor-General in Legislative Council; but the power of making ordinances under this section is subject to the like restrictions as the power of the Governor-General in Legislative Council to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Governor-General in Legislative Council, and may be controlled or superseded by any such Act.*"

A total of 78 ordinances were promulgated under this Act. A few examples are, *the Gold (Import) Ordinance*¹², *the Silver (Import) Ordinance*¹³, *the Enemy Trading Ordinance*¹⁴, the

⁸ Section 23 reads: "...it shall be lawful for the Governor-General, in cases of emergency, to make and promulgate from time to time ordinances for the peace and good government of the said territories or of any part thereof, subject however to the restrictions contained in the last preceding section; and every such ordinance shall have like force of law or regulation made by the Governor-General in Council, as by this Act provided, for the space of not more than six months from its promulgation...."

⁹ The Dramatic Performances Ordinance, 1876

¹⁰ The Regulation of Meetings Ordinance, 1907

¹¹ The Bengal Cotton Gambling Ordinance, 1912

¹² 1917 (III of 1917)

¹³ 1917 (IV of 1917)

¹⁴ 1916 (V of 1916)

Treaty of Peace Ordinance¹⁵, the Martial Law Ordinance¹⁶, the Public Safety Ordinance¹⁷, the Indian Press Ordinance¹⁸, the Unlawful Association Ordinance¹⁹ etc. This was the era of awakening of nationalism and many of these ordinances had to do with suppression of anti-colonial sentiment.

- ***Government of India Act, 1919***

The Government of India Act, 1919 extended the power of executive to make laws and with the ordinance making power of Governor-General another special power of legislation²⁰ was given in situations where either chamber of the Indian Legislature refused leave to introduce a bill or failed to pass in the manner the Governor General recommended any bill which was certified by him to be essential for the safety, tranquility or interests of British India or any part thereof. If this were the case the Governor General could enact provisions of the bill despite the opposition of the chamber of legislature.²¹

- ***Government of India Act, 1935***

Under *the Government of India Act, 1935* there were two different provisions with respect to the ordinance making power of the Governor-General, *Sections 42 and 43*. By now

¹⁵ 1920 (I of 1920)

¹⁶ 1919 (I-IV of 1919)

¹⁷ 1929 (I of 1929)

¹⁸ 1930 (II of 1930)

¹⁹ 1930(IX of 1930)

²⁰ Under Section 13.--(l) *Where a governor's legislative council has refused leave to introduce, or has failed to pass in a form recommended by the governor, any Bill relating to a reserved subject, the governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject, and thereupon the Bill shall, notwithstanding that the council have not consented thereto, be deemed to have passed, and shall, on signature by the governor, become an Act of the local legislature in the form of the Bill as originally introduced or proposed to be introduced in the council or (as the case may be) in the form recommended to the council by the governor.*

(2) *Every such Act shall be expressed to be made by the governor, and the governor shall forthwith send an authentic copy thereof to the Governor- General, who shall reserve the Act for the signification of His Majesty's pleasure, and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the local legislature and duly assented to: Provided that, where in the opinion of the Governor-General a state of emergency exists which justifies such action, he may, instead of reserving such Act, signify his assent thereto, and thereupon the Act shall have such force and effect as aforesaid, subject however to disallowance by His Majesty in Council.*

(3) *An Act made under this section shall, as soon as practicable after being made, be laid before each House of Parliament, and an Act which is required to be presented for His Majesty's assent shall not be so presented until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat.*

²¹ B Shiva Rao, *The Framing of India's Constitution: A Study* (Universal Law Publishing Co. Pvt. Ltd.) 474

ordinances were not treated as exceptions to the rule but a regular feature of governance. *Section 42*²² states that Governor-General could promulgate an ordinance only if the legislature was in recess or of advice of Ministers. Consultation with the Ministers was mandatory although he could override their advice.²³ *Section 43*²⁴ gave the Governor-General the power to promulgate ordinances which he in his capacity felt necessary to discharge the functions that were imposed upon him by the Act. This power depended on his individual discretion and the legislature was excluded and ordinances could be promulgated by the

²² *Section 42 (1) If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require:*

Provided that the Governor-General-

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section if a Bill containing the same provisions would under this Act have required his previous sanction to the introduction thereof into the Legislature ; and

(b) shall not, without instructions from His Majesty, promulgate any such ordinance if he would have deemed it necessary to reserve a Bill containing the same provisions for the signification of His Majesty's pleasure thereon.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance-

(a) shall be laid before the Federal Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or, if before the expiration of that period resolutions disapproving it are passed by both Chambers, upon the passing of the second of those resolutions;

(b) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor- General; and

(c) may be withdrawn at any time by the Governor-General.

(3) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

²³ Dr. Subhash C Kashyap, *Constitutional Law of India* (Vol I, Universal Law Publishing Co. Pvt. Ltd. 2008) 1203

²⁴ *Section 43.-(1) If at any time the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise at any time thereof to act in his discretion or to exercise his individual with respect judgment, he may promulgate such ordinances as in his to certain opinion the circumstances of the case require.*

(2) An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may by a subsequent ordinance be extended for a further period not exceeding six months.

(3) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance- (a) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General; (b) may be withdrawn at any time by the Governor- General ; and (c) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(4) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.

Governor-General even while the legislature was in session. Thus he could be said to be a parallel legislative authority with hardly any bars.

Another interesting aspect of the Act was *Section 44*²⁵. It gave unprecedented powers to the Governor-General and introduced a new kind of legislation called ‘*Governor-General’s Act*.’ This power was not conditioned by the necessity of ‘*any immediate action*’ and the Governor-General could wield this power of legislation any time he deemed fit in his discretion. *Sections 42 and 43* were circumscribed by the collective satisfaction of Council of Ministers (*Section 42*) and limitation of time (*Section 43*) but *Section 44* vested in the Governor-General broadest of legislative powers in a single person.

Similar to the powers of Governor-General, the Governor had power to promulgate an ordinance under *Section 88*²⁶ of the *Government of India Act, 1935*. This becomes important

²⁵ *Section 44.-(1) If at any time it appears to the Governor-General that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to both Chambers of the Legislature explain the circumstances which in his opinion render legislation essential, and either-*

(a) enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considers necessary; or

(b) attach to his message a draft of the Bill which he considers necessary.

(2) Where the Governor-General takes such action as is mentioned in paragraph (b) of the preceding subsection, he may at any time after the expiration of one month enact, as a Governor-General's Act, the Bill proposed by him to the Chambers either in the form of the draft communicated to them or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by either Chamber with reference to the Bill or to amendments suggested to be made therein.

(3) A Governor-General's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Federal Legislature assented to by the Governor-General and, if and in so far as a Governor-General's Act makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

(4) Every Governor-General's Act shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.

²⁶ *Section 88 (1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require :*

Provided that the Governor-

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature;

(b) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance, if a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature, or if he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General.

for the *Government of India Act, 1935* was the fundamental document on which our Constitution framers relied upon.

- ***The Constituent Assembly Debates relating to Ordinance Making Power***

The members of the Constituent Assembly were apprehensive to include ordinance making power of the President in the Constitution. *Article 102 of the Draft Constitution* stated:

- 1) *If at any time, except when both Houses of Parliament are in Session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.*
- 2) *An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such Ordinance –*
 - a) *shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or if before the expiration of that period, resolutions disapproving it, are passed by both Houses, upon the passing of the second of those resolutions, and*
 - b) *may be withdrawn at any time by President.*

The Constitutional Adviser *B N Rau* included a clause in his memorandum²⁷ on the ‘main principles’ of the Union Constitution which gave the power to the President to promulgate ordinances when Parliament was not in session.. Apprehending the reluctance of the members he added a note- “The ordinance-making power has been the subject of great criticism under the present Constitution. It must however be pointed out, that circumstances may exist where

-
- (2) *An, ordinance promulgated under this, section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance-*
 - (a) *shall be laid before the Provincial Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or, if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council.;*
 - (b) *shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature assented to by the Governor ; and (c) may be withdrawn at any time by the Governor.*
 - (3) *If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void.*

²⁷ April 30, 1947 the Constituent Assembly appointed the Union Constitution Committee.

the immediate promulgation of a law is absolutely necessary and there is no time in which to summon the Federal Parliament.”²⁸

The views of other members were more or less the same. *N GopalaSwami Ayyangar* gives out the need for a provision on ordinance making powers in our Constitution. He says-“*There can be no objection to the vesting of power of this very limited description for making ordinances in the President. The ordinances can be made only during periods when the legislature is not in session in the case of matters which cannot wait till the next session of the legislature, an ordinance made has got to be placed before the Parliament so soon as possible and shall cease to operate at the expiration of six weeks from the reassembly of the Federal Parliament.*”²⁹

Both *Hriday Nath Kunzru* and *Professor K T Shah* called for restricting the power of the Executive to promulgate ordinances, through greater oversight by legislatures. They were, however, overruled by *Dr B R Ambedkar*, who stated that ordinance-making powers were necessary since existing laws might be deficient to deal with a situation.

To summarise, the amendments sought in Article 102 of the Draft Constitution were:

1. The President should not be empowered to promulgate an Ordinance when one of the two Houses of Parliament was in session.
2. No Ordinance should deprive the citizens of their personal liberty.
3. An ordinance promulgated by the President shall cease to be effective after 30 days from its promulgation.
4. Every Ordinance shall be laid before both the Houses of Parliament immediately after each House assembles and unless it is approved by either House of Parliament by a resolution, it shall cease to operate.
5. Every Ordinance shall be promulgated only after consultation with the Council of Ministers.

²⁸ Constituent Assembly Debates Vol. III, p.396 Available at <http://164.100.47.132/LssNew/constituent/debates.html> (Accessed: 12.04.17)

²⁹ *Ibid*

Ambedkar rejected the proposal for shortening the tenure of the Ordinances. He justified the extended tenure. According to him in the Draft Provision, Article 102 did not provide the Executive with any parallel or independent power of legislation. Further, the President is not entitled to issue an Ordinance when the Legislature was in Session. Also, the President “*has no special responsibility, he has no discretion and he has no individual judgment*”.³⁰ Then he said that Article 102 was analogous to *British Emergency Power Act, 1920*, wherein “*the King is entitled to issue a proclamation, and when a proclamation was issued, the executive was entitled to issue regulations to deal with any matter, and this was permitted to be done when Parliament was not in session.*” Then he explained why such a mechanism as Ordinance was needed in the scheme of the Constitution. He said, “*My submission to the house is that it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise. The executive has got a new situation arisen, which it must deal with ex hypothesi it has not got the power to deal with that in the existing code of law. The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the Power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because, again ex hypothesi, the legislature is not in session. Therefore it seems to me that fundamentally there is no objection to the provisions contained in Article 102.*”³¹

Ambedkar refuted the proposal for amendment on the ground that under Article 102(3) an Ordinance was circumscribed by the same limitations as an ordinary law. Since any ordinary law made by the Parliament is subject to violation of Fundamental Rights, so any law made under Article 102 would automatically be subject to the same provisions relating to Fundamental Rights.

He then elaborated on the mechanics of an Ordinance that it cannot be promulgated without the advice of Council of Ministers because “*the President could not act and will not act except on the advice of Ministers.*”³² It means an Ordinance can be promulgated even if only one House was in Session as for enacting laws both the Houses of the Parliament are needed. Thus, it was established in the Constituent Assembly Debates that Ordinance making power is an extraordinary measure to be used only in times of emergency. Some of the Amendments

³⁰ Ibid

³¹ Ibid

³² Ibid

sought by the Constituent Assembly members were farsighted and looking at today's situation regarding Ordinances we can safely say that had some of the Amendments been incorporated the Executive would have been stopped from delving into the territory of Legislature so frequently and so callously.

➤ ***The evolution of Executive orders and Presidential proclamation in United States of America***

Executive orders and presidential proclamations are mature phenomenon in United States. The President has employed them in some form since 1789, beginning with President George Washington.³³ In 1793, the Washington Administration was wrestling with the idea of issuing a proclamation declaring the United States neutral in the war between England and France. Given the option of calling Congress back into session or issuing a proclamation on his own accord, President Washington chose the latter.³⁴ The next major use of proclamations came during the presidency of Abraham Lincoln who at the outset of a Civil War used an executive order to manage a constitutional crisis when Congress was out of session. Through an executive order, Lincoln called for a suspension of writ of habeas corpus, something that only Congress could do in times of rebellion or invasion. Lincoln explained his actions to Congress, which later passed the Habeas Corpus Act of 1863, officially giving the president the power that Lincoln had assumed.³⁵

During the 19th century executive orders most often supplemented Acts of Congress to carry out minor details. The use and scope of executive orders and proclamations expanded with the presidency of Theodore Roosevelt. While Washington and Lincoln issued only eight and 48 executive orders respectively, Roosevelt was the first to break the 1,000 mark. His theory on presidency, the 'stewardship' theory was based on his view that the President was vested with residual powers which were neither enumerated in the Constitution nor assigned broadly to a specific branch; instead they simply resided in the concepts like national security or public good.³⁶

³³ John C. Duncan, 'A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role' [2010] Vermont Law Review Volume 35:333

³⁴ Congressional Research Service Report on Executive Orders and Proclamations 1999

³⁵ *Ibid*

³⁶ *Ibid*

With the onset of World War I, President Woodrow Wilson was able to expand the discretion of the presidency through the use of emergency powers. World War I and World War II brought dramatic increases in the use of executive orders, as did the years spanning the Great Depression. Franklin D Roosevelt issued 3,522 executive orders during his prolonged presidency. The most significant episode in the post-World War II history of executive orders came during the presidency of Harry Truman.

In 1952, President Truman was leading the nation through yet another war, this time in the Korean Peninsula. During war, the price of critical raw materials like steel is usually fixed. Because the price of steel was unnaturally low, steelworkers weren't receiving their normal wages and raises. The result was a major labor dispute in the steel industry that threatened to cut off the steel supply in a time of war. In an attempt to avoid an all-out strike, Truman brought in the Federal Mediation and Conciliation Service to strike a bargain between the steelworkers union and management. When that failed, he called in the Federal Wage Stabilization Board, but the steelworkers rejected its recommendations. On the eve of a nationwide steelworkers strike, Truman decided to invoke his presidential authority and issue an executive order for the federal government to seize control of the nation's steel mills. The mill owners immediately sued to block the seizure and the case of *Youngstown Sheet & Tube v. Sawyer*³⁷ made it all the way to the Supreme Court. The Court found that the President has acted without statutory or Constitutional authority.

A White House aide to President Bill Clinton described the lure of executive orders this way: '*Stroke of the pen, law of the land*'. President Ronald Reagan used the direct power of executive orders to peel back layers of government regulation that he and his administration believed were hampering economic growth. President George W Bush signed executive orders that approved more aggressive surveillance after 9/11 incident and limited public access to presidential documents. And President Obama has increasingly relied on executive orders to forward his agenda in the face of an intransigent Congress.³⁸

President George W Bush issued several controversial executive orders surrounding the gathering of intelligence in the war on terror. Arguably the most controversial was a secret executive order he signed in 2002, authorizing the National Security Agency (NSA) to eavesdrop without a warrant on phone calls made by US citizens and others living in the

³⁷ [1952] 343 US 579

³⁸ Available at: <http://people.howstuffworks.com/executive-order3.htm> (Accessed: 11.04.17)

United States. The Bush administration defended the secret program as necessary to root out homegrown terrorist plots.³⁹

On his very first day in office, President Obama signed three executive orders to draw a clear distinction between the policies of his administration and his predecessor's.⁴⁰ The president has received sharp criticism for flexing his executive muscle, but even his critics acknowledge that Obama is far from the first president to wield executive orders as a political weapon.⁴¹

The new President Donald Trump is all over the news because of his executive orders and proclamations. In just a few weeks in office, President Trump has made striking use of his power to issue Executive Orders, using them to pave the way for the repeal of the Affordable Care Act, change the rules about federal regulations, and enact a controversial ban on admission to the US for range of immigrants and refugees.⁴²

The use of executive orders across the entire breadth of history of the United States is extensive.⁴³ Many presidents have issued executive orders to aid in implementing administrative processes and to solidify foreign policy.⁴⁴ Additionally, the availability of the expeditious route of the executive order has historically been critical under conditions of national emergency.⁴⁵ There was no uniform name for presidential orders issued in the early years of the United States government, nor was there any numbering or publishing scheme. It was not until 1907 that the federal government adopted a system of enumerating and recording orders systematically.⁴⁶ In that year, the Department of State set up a numbering scheme to organize executive orders retroactively, beginning with those issued by President

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ *Ibid*

⁴² Time Magazine, Available at: <http://time.com/4655131/executive-orders-history/> (Accessed: 11.04.17)

⁴³ *Supra* note 33, citing, John A Sterling, Above the Law: Evolution of Executive Orders (Part One), 31 UWLA L. REV 99, 101 (2000)

⁴⁴ *Supra* note 33, citing, Todd F Gaziano, The Use and Abuse of Executive Orders and Other Presidential Directives, 5 TEX. REV. L. & POL. 273 (2001) (explaining that the Constitution gives no express authority for the President to issue executive orders per se).

⁴⁵ *Supra* note 33, ‘The most salient historical examples of the use of executive orders are to be found in times of national crisis. Abraham Lincoln, Franklin Roosevelt, and Harry Truman all faced such periods. All issued controversial and illustrative executive orders.’.

⁴⁶ *Supra* note 33, citing ARTHUR S MILLER, *PRESIDENTIAL POWER IN A NUTSHELL* [1977] 86 (Before 1907 such orders were not systematically numbered . . .).

Lincoln in 1862.⁴⁷ Actual publication of orders began in 1935, under the Federal Register Act.⁴⁸ The number of orders issued prior to the system of enumeration or otherwise outside of it is so uncertain-estimates range from 15,000 to 50,000-that it reveals a great historiographical lacuna in US governmental history.⁴⁹

ORDINANCE MAKING POWER OF THE PRESIDENT IN INDIA

India does not follow the principle of separation of powers of the three organs of state, viz executive, legislature and judiciary; in absolute rigidity because “*the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions.*”⁵⁰ The Executive in India performs varied and broad functions⁵¹ to deal with vagaries of a vast country like India. It is thus bound to exercise functions that fall broadly in the executive realm but also cast a partial shadow in the legislative and judicial sphere.

While the law making power under the Constitution of India is vested in the Parliament, Article 123⁵² empowers the President to legislate by Ordinances, to meet with any circumstances that require immediate action, when Parliament or either House thereof is not in session.⁵³ The Constitution gives power to the Executive to promulgate an Ordinance for a short period of time with a view to enable the Executive to be able to meet any unforeseen or urgent situation arising in the country when the legislature is not in session and for which there is no adequate provision under the already existing laws. The power has been conferred upon the President under Article 123 and to the Governor under Article 213 of the Constitution.

Article 123 empowers the President to promulgate such ordinances as the circumstances appear to him to require when: (a) both Houses of Parliament are not in session; and (b) he is satisfied that circumstances exist which render it necessary for him to take immediate action.

⁴⁷ *Supra* note 33, citing, Phillip J Cooper, *By Order Of The President: The Use & Abuse Of Executive Direct Action* [2002] 16

⁴⁸ *Supra* note 46

⁴⁹ *Supra* note 47

⁵⁰ Justice Y V Chandrachud, in *Indira Nehru Gandhi v. Raj Narain* AIR (1975) SC 1590

⁵¹ M P Jain, *Indian Constitution* (7th Ed 2014, Lexis Nexis New Delhi)

⁵² Article 123 Part V Chapter III of the Constitution of India

⁵³ *A K Roy v. Union of India* AIR (1982) SC 710

An ordinance cannot be promulgated when both Houses of Parliament are in session. Accordingly, an ordinance made when the two Houses are in session is void. It may, however, be made when only one House is in session, the reason being that a law can be passed by both Houses and not by one House alone, and, thus, it cannot meet a situation calling for immediate legislation and recourse to the ordinance-making power becomes necessary.

The provision confers the power formally on the President; but, as already stated, he acts in this matter, as he does in other matters, on the advice of the Council of Ministers and, therefore, the ordinance-making power is vested effectively in the Central Executive. As the Supreme Court has stated: ‘The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction.’⁵⁴ This was cleared even in the *Constituent Assembly Debates* by Hukum Singh that President is bound to act on the aid and advice of Council of Ministers.⁵⁵ Also Sir Alladi Krishnaswami Aiyer stated that the words ‘aid and advice’ is a constitutional euphemism concerning the powers of President of India and embodies the well-known British convention, where the King always acts on the advice of the ministers even though power is legally vested in him.⁵⁶ Further the same was held by the Apex Court in *A K Roy v. Union of India*⁵⁷, “the President’s satisfaction is therefore nothing but the satisfaction of his Council of Ministers in whom the real executive power resides.” Satisfaction is a state of mind and not an objective fact.⁵⁸ This statement indicates that the doors of Judicial Scrutiny are open for such Executive action. The satisfaction of the President that ‘circumstances exist which render it necessary for him to take immediate action’ is a condition precedent to the exercise of the power and is accordingly justiciable to that extent.⁵⁹ The court also held that the satisfaction of the President under Article 123 and

⁵⁴ *R C Cooper v. Union of India* AIR, (1970) SC 564, 587; Also see, *Shamsher Singh v. State of Punjab*, AIR (1974) SC 2192; *R K Garg v. Union of India*, AIR (1981) SC 2138, 2144; *A K Roy v. Union of India*, AIR (1982) SC 710; *Venkata v. State of Andhra Pradesh*, AIR (1985) SC 724; *Nagaraj v. State of Andhra Pradesh*, AIR (1985) SC 551

⁵⁵ Constituent Assembly Debates Vol. VIII, p.3126

⁵⁶ *Ibid* Vol X

⁵⁷ *Supra* note 53 at para 16

⁵⁸ H.M. Seervai, *Constitutional Law of India*, (Vol II ,4th Ed.,Universal Law Publishing Co., New Delhi) 1130

⁵⁹ *Supra* note 53

of the Governor under Article 213 while issuing ordinances is not immune from judicial review.⁶⁰

The executive's ordinance-making power is not unrestrained. An ordinance can remain in force only for a short duration and is brought under the parliamentary scrutiny at the earliest possible opportunity. The scheme of Art 123 is to place the ordinance-making power subject to the control of Parliament rather than that of the courts.⁶¹ The ordinance is to be laid before each House of Parliament when it reconvenes after the making of the ordinance [Art 123(2)(a)]. The ordinance shall cease to operate at the expiry of six weeks from the assembly of Parliament [Art 123(2)(a)]. When the two Houses of Parliament assemble on different dates, the period of six weeks is to be reckoned from the later of the two dates. It means that Parliament must pass a law to replace the ordinance within six weeks of its assembling. Thus, the maximum duration for which an ordinance may last is 7½ months as under Art. 85, six months cannot intervene between two sessions of Parliament, and the ordinance would cease to operate six weeks after the Parliament meets.⁶²

An ordinance may cease to have effect even earlier than the prescribed six weeks, if both Houses of Parliament pass resolution disapproving it [Art 123(2)(a)]. It may be withdrawn by the Executive at any time [Art. 123(2)(b)]. Parliament's control over the Central Executive's ordinance-making power is thus *ex post facto*, *i.e.* it is exercised after the ordinance has been promulgated and not before.⁶³

The requirement of laying an Ordinance before Parliament or the state legislature is a mandatory constitutional obligation cast upon the government. Laying of the ordinance before the legislature is mandatory. The failure to comply with the requirement of laying an ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process.⁶⁴

If the provisions made through the ordinance are to continue even after the ordinance comes to an end, Parliament has to enact a law incorporating the provisions made through the ordinance. Since the government enjoys majority in the Lok Sabha, there is no difficulty in

⁶⁰ *Krishna Kumar Singh & Anr v. State of Bihar & Ors* (2017) 3 SCC 1

⁶¹ *Supra* note 51

⁶² *Ibid*

⁶³ *Ibid*

⁶⁴ *Supra* note 60

the House passing the Act. But situation in Rajya Sabha may be different. If the government does not have majority in that House, passage of the Act by that House may become a problem.

The normal democratic legislative process involves the people's representatives in the two Houses openly enacting a law after a full consideration and discussion. An ordinance seeks to circumvent this process for it is drafted secretly in government chambers and is promulgated without an open discussion. The ordinance-making power should therefore be invoked not lightly but only when it is absolutely necessary to do so, and the situation cannot otherwise be met effectively. However, an ordinance partakes of legislative character; it is made in exercise of legislative power and is subject to the same limitations as an Act passed by Parliament.⁶⁵

The Supreme Court has held that the power to make ordinance is not antidemocratic even though the power is vested in the Executive and not the legislature. An ordinance is promulgated on the advice of the Council of Ministers which remains answerable to the Parliament. If the executive misuses or abuses its power, the House of Parliament may not only disapprove the ordinance but may also pass a vote of no confidence against the Council of Ministers.⁶⁶

According to Article 13(3)(a)⁶⁷ an Ordinance is 'law'. An ordinance has the same force and effect as an Act of Parliament [Art. 123(2)]. An ordinance comes to an end in the following situations: (a) Resolutions disapproving the ordinance are passed by both Houses of Parliament; (b) if the ordinance is not replaced by an Act within the stipulated period; (c) the executive lets it lapse without bringing it before the Houses of Parliament; (d) if it is withdrawn by the Government at any time.

The power of the President to issue ordinances is co-extensive with the legislative power of Parliament.⁶⁸ An ordinance cannot make a provision which Parliament is not competent to enact [Art. 123(3)]. On the contrary, an ordinance can make any provision which Parliament can enact, except that an appropriation from out of the Consolidated Fund cannot be made by an ordinance [Art 114(3)]. Thus, an ordinance may make provision with respect to a matter in

⁶⁵ *Supra* note 59

⁶⁶ *R K Garg v. Union of India*, AIR (1981) SC 2138

⁶⁷ The Constitution of India, 1950

⁶⁸ *Satpal & Co v. Lt Governor of Delhi*, AIR (1979) SC 1550

Lists I and III, but not in List II, except when proclamation of emergency is in operation. Further, like a law made by Parliament, an ordinance is also subject to Fundamental Rights.⁶⁹

The ordinance comes into effect as soon as it is promulgated. It is mandatory to place an ordinance before the each house of the parliament and the failure to comply with the requirement is a serious constitutional infraction. In case of failure to place the Ordinance before the Parliament, the Ordinance becomes *void ab initio*. It will not give rise to any legally binding consequences.⁷⁰

➤ ***Judicial review of Ordinance making power***

The power of the President or the Governor to promulgate an Ordinance was to be used sparingly to meet unforeseen and urgent situations, as conceived by our Constitution-framers. This has not been the case thus far. Although an ordinance is promulgated in the name of the President/Governor and on his *satisfaction* but in reality it is promulgated on the advice of Council of Ministers and on their satisfaction. The traditional view was that the word ‘*satisfied*’ denotes subjective satisfaction and the court cannot go into the bona fides of such satisfaction of the President or the Governor.⁷¹ This was prior to our Constitution coming into force. This barred judicial review on the reasons behind the ‘*satisfaction*’ of the Governor.

In Barium Chemicals⁷² it was held by the Supreme Court that judicial review is not completely ousted in cases where the Legislature empowered an authority to act on its ‘*subjective satisfaction*’ when the need arose. The Court held that since subjective satisfaction was a condition precedent, “*the court can go behind that recital and determine whether they did in fact exist*” for creating circumstances in forming that opinion and it was open for the Petitioner to show that such condition precedent did not exist and any of grounds could be accorded. “*No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable.*” So the authority has to establish a *prima facie* case that the circumstance did exist or “the action might be exposed to interference”.

⁶⁹ *Supra* note 51

⁷⁰ *Supra* note 60

⁷¹ Durga Das Basu, *Commentary on the Constitution of India* (Vol.4 Lexis Nexis Butterworths, Wadhwa, Nagpur, 2005)

⁷² *The Barium Chemicals Limited v. The Company Law Board*, AIR (1967) SC 295

*R C Cooper v. Union of India*⁷³ related to *Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969*. In 1969, when the Central Government decided to nationalise several private sector banks, it got the then Acting President of India, *Mr V V Giri* to promulgate an Ordinance a day before he demitted office to contest the Presidential elections. In this case the Apex Court explained the entire gamut of the exercise of power of the President under Article 123 in promulgating an Ordinance. The majority in the case however forbore to express any final opinion on this question as the Ordinance had been replaced by the Act by the time the case was taken up. *Ray, J.* dissenting felt that the Article 123 related to policy and it was to be used in cases of emergency when immediate action was considered necessary and held that the satisfaction of the President is subjective. In brief, the Court clearly held that an Ordinance could be challenged on grounds of mala fide intention or corrupt motive.

In *M/S S K G Sugar Ltd v. State Of Bihar And Ors*⁷⁴, the Bihar Sugar Factories Control Act, 1937 a pre-Constitution Act was under question. It was meant to be a temporary Act but its life was being extended by amending acts. It was asserted by the Court that an enquiry into the question of satisfaction of the President as to need for promulgating an Ordinance is not a justiciable matter.

To overcome the roadblock that the judiciary suggested in form of judicial review of Ordinance promulgated by the President in *R C Cooper* case, the Government reacted by inserting Clause(4) in Article 123 vide 38th Amendment Act, 1975.⁷⁵ This Clause expressly forbade judicial intervention on the ground of Presidential satisfaction. It was followed by the 44th Amendment which omitted Clause (4) and reinstated the position at the date of the judgment of *R C Cooper Case*. It was observed in *A K Roy's*⁷⁶ case that the effect of this deletion is to open the door of judicial review in a case under Article 123. Prior to this, the term '*satisfaction of the President*' was discussed in the case of *State of Rajasthan v. Union of India*⁷⁷ in which six separate judgments were delivered by a bench of seven judges. Each of the judges unanimously agreed on the fact that if Proclamation of emergency was issued

⁷³ AIR (1970) SC 564

⁷⁴ AIR (1974) SC 1533

⁷⁵ "Notwithstanding anything in the Constitution the satisfaction mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground"

⁷⁶ Supra note 53

⁷⁷ AIR (1977) SC 1361

on irrelevant or extraneous grounds beyond the scope of Article 356⁷⁸ then mala fides could be established.

*T Venkata Reddy v. State of Andhra Pradesh*⁷⁹ dealt with the promulgation of the *Andhra Pradesh Abolition of Posts of Part-time Village Officers Ordinance, 1984* which abolished certain village level posts, the Court reiterated that the Ordinance making power of the President and the Governor was a legislative power, comparable to the legislative power of the Parliament and state legislatures respectively. This implies that the motives behind the exercise of this power cannot be questioned, just as is the case with legislation by the Parliament and state legislatures. Further in the case of *S R Bommai v. Union of India*⁸⁰, the scope of Judicial Review was expanded as to where the court told that where the action by the President is taken without the relevant materials, the same would be falling under the category of “obviously perverse” and the action would be considered to be in bad faith. The Supreme Court held that the exercise of power by the President under the Article 356(1) to issue proclamation is justiciable and subject to Judicial Review to challenge on the ground of mala fide.

The Constitutional Bench of the Supreme Court in *Rameshwar Prasad v. Union of India*⁸¹ said that the subjective satisfaction of the Governor is not exempt from judicial review. It held “it is open to the Court, in exercise of Judicial Review, to examine the question whether the Governor’s report (recording his satisfaction) is based upon relevant material or not; whether the facts have been duly verified or not.” This case was on Executive action under Article 356 but the ratio of the case is applicable to Ordinance making power also.

Recently in the case of *Krishna Kumar Singh & Anr v. State of Bihar & Ors*⁸² seven-judge Constitution Bench of the Supreme Court in has held that re-promulgation of ordinances is a fraud on the Constitution and a subversion of democratic legislative processes. The court also held that that the satisfaction of the President under Article 123 and of the Governor under Article 213 while issuing ordinances is not immune from judicial review. The court held: *The satisfaction of the President under Article 123 and of the Governor under Article 213 is not*

⁷⁸ Article 356 (1) of Constitution of India

⁷⁹ [1985] AIR 724

⁸⁰ [1994] AIR 1918

⁸¹ AIR [2006] SC 980

⁸² *Supra* note 60

immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinise whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all.

EXECUTIVE ORDER

An executive order is a unilateral directive issued by the president to executive branch officials and agencies on how to implement the law. They are generally viewed by the courts as having the force of law, unless they clearly and explicitly violate the Constitution or an existing statute.⁸³ They can be used for a variety of purposes, such as to respond to an economic or international crisis, to implement a law, or to create and implement policy initiatives. Presidents can use executive orders to significantly impact policy. Executive orders only last until they are overturned by the Executive or Judicial branch. An executive order will stand until one of two things happens: either another president overturns it, or a court rules it unconstitutional.

The ability of the president to shape policy with executive orders comes through discretion derived specifically from some statutes or the interpretation of vague language in other statutes and the Constitution.⁸⁴ While presidents can base their authority to issue executive orders on either statutes or the Constitution, the majority appear to rely on specific statutes.⁸⁵ The President's authority to issue executive orders does not include a grant of power to implement policy decisions that are not otherwise authorized by law. Indeed, an executive order that implements a policy in direct contradiction to the law will be without legal effect

⁸³ Alexander Bolton and Sharee Thrower, 'Legislative Capacity and Executive Unilateralism' [2015] American Journal of Political Science, Vol. 00, No. 00, April, citing, Cooper, Phillip J, 'By Order of the President: The Use and Abuse of Executive Direct Action' [2002] Lawrence: University Press of Kansas

⁸⁴ *Ibid*, See also Howell, William G. 2003. Power without Persuasion: The Politics of Direct Presidential Action. Princeton, NJ: Princeton University Press. Mayer, Kenneth R, 'With the Stroke of a Pen: Executive Orders and Presidential Power' [2001] Princeton, NJ: Princeton University Press

⁸⁵ Alexander Bolton and Sharee Thrower, 'Legislative Capacity and Executive Unilateralism', [2015] American Journal of Political Science, Vol. 00, No. 00, April, citing, Rudalevige, Andrew, 'Executive Orders and Presidential Unilateralism' [2012] Presidential Studies Quarterly 42(1): 138–60

unless the order can be justified as an exercise of the President's exclusive and independent constitutional authority.⁸⁶

"Executive Orders are official documents through which the President of the United States manages the operations of the Federal Government." The directives cite the President's authority under the Constitution and statute. They are published in the Federal Register, and they may be revoked by the President at any time. Although executive orders have historically related to routine administrative matters and the internal operations of federal agencies, recent Presidents have used Executive Orders more broadly to carry out policies and programs.⁸⁷

Presidents have historically utilized various written instruments to direct the executive branch and implement policy.⁸⁸ These include executive orders, presidential memoranda, and presidential proclamations. The definitions of these instruments, including the differences between them, are not easily discernible, as the US Constitution does not contain any provision referring to these terms or the manner in which the President may communicate directives to the executive branch.⁸⁹ There is no law or even executive order which attempts to define the term 'executive order' or 'proclamations'.⁹⁰

A widely accepted description of executive orders and proclamations comes from a report issued in 1957 by the House Government Operations Committee: *Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.... In the narrower sense Executive orders and proclamations are written documents denominated as such.... Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only*

⁸⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, [1952] 343 US 579, 638 (Jackson, J. concurring) (stating that where a President "takes measures incompatible with the express or implied will of Congress" that "courts can sustain exclusive presidential control in such case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution ...").

⁸⁷ Available at: [Justice Information Sharing, Website of U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance](https://it.ojp.gov/PrivacyLiberty/authorities/executive-orders) <https://it.ojp.gov/PrivacyLiberty/authorities/executive-orders> (Accessed: 12.04.2017)

⁸⁸ Other written instruments have historically included administrative orders, homeland security presidential directives, letters on tariffs and international trade. See Congressional Research Service Report, Presidential Directives: Background and Overview by Elaine Halchin.

⁸⁹ Congressional Research Service Report, Executive Orders: Issuance, Modification, and Revocation by Vivian S. Chu & Todd Garvey

⁹⁰ Executive order 10006, October 11, 1948, governing executive order does not define the term executive order.

indirectly. Proclamations in most instances affect primarily the activities of private individuals. Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority.⁹¹

The distinction between these instruments i.e. executive orders, presidential memoranda, and proclamations seems to be more a matter of form than of substance,⁹² given that all three may be employed to direct and govern the actions of government officials and agencies. In case of both, the executive orders and proclamations, the effective action sought or directed by the document is an exercise of the Executive power under Article II of the Constitution and must be based on the authority derived from the Constitution or statute.⁹³ Essentially an executive order or proclamation is a written document issued by the President and titled as such by him or at his discretion. The subject matter of each executive order or proclamation can be ascertained from an examination of the document itself.⁹⁴

Moreover, if issued under a legitimate claim of authority and made public, a presidential directive could have the force and effect of law, 'of which all courts are bound to take notice, and to which all courts are bound to give effect.'⁹⁵ The only technical difference is that executive orders must be published in the Federal Register, while presidential memoranda and proclamations are published only when the President determines that they have 'general applicability and legal effect.'⁹⁶

⁹¹ Congressional Research Service Report, Executive Orders: Issuance, Modification, and Revocation by Vivian S. Chu & Todd Garvey, citing, Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Comm. Print 1957)

⁹² *Ibid*

⁹³ See James Hart, 'The Ordinance Making Power of the President of the United States' [1925] Baltimore, the John Hopkins Press

⁹⁴ Executive Orders and Proclamations: A study of a use of presidential powers, Committee on Government Operations [1957] United States Government Printing Office Washington, University of Michigan Libraries, Available at: <https://babel.hathitrust.org/cgi/pt?id=mdp.39015034716152;view=1up;seq=13> [Accessed: 11.04.17]

⁹⁵ *Armstrong v United States*, [1871] 80 US 154, 155-56; see also Phillip J Cooper, 'By Order of the President: Administration by Executive Order and Proclamation', 18 ADMINISTRATION & SOCIETY 233, 240 (August 1986] citing *Farkas v. Texas Instrument, Inc.*, [1967] 372 F.2d 629; *Farmer v. Philadelphia Electric Co.*, [1964] 329 F.2d; *Jenkins v. Collard*, [1893] 145 US 546, 560-61

⁹⁶ The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. Furthermore, executive orders must comply with preparation, presentation, and publication

The President's power to issue executive orders derives from three sources. First is the constitutional grant of power per se. Second, Congress may pass statutes that explicitly or implicitly include a grant of power authorizing Presidential action. Third, Article II of the US Constitution provides inherent authority for the President to issue executive orders.⁹⁷

➤ *Constitutional Authority*

Article II of the Constitution vests the executive power in the President, using a short sentence in a passive voice construction whose unstated agent is, by the nature of the document, the Constitution itself.⁹⁸ This “vesting clause” interacts with Article II, Section 3, which uses another passive voice construction to lay upon the President the specific duty of seeing to the faithful execution of the laws,⁹⁹ which forms the founding rationale upon which the power of the modern executive order depends. It refers to any means or edifice by which the President ensures the faithful execution of the laws, because it must be an apparatus over which the President exercises legitimate control. It thus implies that he may build whatever means he can, or use those means that Congress chooses to build for him. Certainly, a part of that apparatus must be regulatory in nature.

When the President acts in an area in which he has no explicit grant of congressional authority to act, those actions may, depending on circumstances, acquire the force of law by acquiescence. That there is no way for this source of power to emanate from the Constitution per se has found firm ground historically. Nevertheless, Article II is indeed the espoused source of every executive order.¹⁰⁰

➤ *Statutory Authority*

An executive order will generally cite some statutory authority to give the President the power to carry out the particular law at issue. When an order has this backing, the President is communicating that his use of the order seeks to execute the directives of Congress. Since the

requirements established by an executive order issued by President Kennedy. See Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962) codified 1 C.F.R. Part 19

⁹⁷ *Supra* note 33

⁹⁸ US Constitution Article II, Section 1, cl. 1 (“*The executive Power shall be vested in a President of the United States of America*”)

⁹⁹ US Constitution Article II, Section 1, cl. 1 (stating that the President must “*take Care that the Laws be faithfully executed*”)

¹⁰⁰ *Supra* note 33

Constitution charges the President with affecting the laws,¹⁰¹ such action is well within the President's universally recognized power. Objections to this type of order may arise if the President's prescriptions actually deviate from the mandates or intent of Congress, despite the ascription. When this is the case, Congress has recourse. Congress may amend the statute referenced in the order so as to cause the order, and hence further prosecution thereof, to contradict it. The disadvantage of this remedy is that the promulgation of executive orders is swift, in contrast to the lentitude of congressional legislation.¹⁰²

Congress has several ways to approve an executive order other than by adopting a statute that specifically authorizes future presidential action. Congress can imply approval of an executive order through its power of the purse, by funding programs to purchase goods and services established by the order. In fact, the Supreme Court has even taken the fact of continued funding of particular programs, or congressional inaction when given the chance to obstruct the continuance of an executive order, as evidence of congressional ratification.¹⁰³ Alternatively, Congress can enact legislation to ratify the President's actions after their manifestation. Congress also has the power to overturn executive orders after their manifestation when it disagrees with the President's actions. However, the Supreme Court has recognized the President's independent constitutional authority under Article II to act in the absence of express delegation. Finally, courts can intervene to issue findings on the validity of presidential actions.¹⁰⁴

Congress can also give the executive branch the authority to issue policies through express delegation. The Supreme Court has only rejected an effective congressional delegation of power twice in United States history. One of those instances was the case of *ALA Schechter Poultry v. United States*, in which the Supreme Court repealed the National Industrial Recovery Act of 1933, holding that the legislation gave the President so much authority to enact laws governing trade and industry throughout the country, without meaningful restrictions, as to constitute the congressional abdication of its lawmaking role. In response, federal legislation now generally sets express conditions when the executive branch receives policy related authority delegated by the legislative branch. This is normally referred to as an

¹⁰¹ US Constitution Article II, Section 3

¹⁰² *Supra* note 33

¹⁰³ *Ibid*, citing, Alissa C Wetzel, 'Note, Beyond the Zone of Twilight: How Congress and the Court can Minimize the Dangers and Maximize the Benefits of Executive Orders' [2007] 42 VAL. U. L. REV. 385, 417

¹⁰⁴ *Supra* note 33

“intelligible principle.” The intelligible principle normally allows the delegated power to pass judicial scrutiny.¹⁰⁵

➤ ***Inherent powers of the President***

Inherent power takes as its starting point the necessity for the President to act in predictable ways to fulfill his constitutional and congressional mandates. Regardless of the specific source, the President’s authority to issue executive orders invariably originates within the outer realm of the Constitution, according to the theory that an inherent prerogative power exists within the executive office.¹⁰⁶

The President’s inherent authority is the most controversial and contested source of power, because there are no specific boundaries thereto. It is unclear whether the Framers of the Constitution intended for executive orders issued pursuant to implied authority to have the same effect as those issued pursuant to express authority. The extent of the President’s inherent authority to act depends on the interpretation of the Constitution and congressional delegation of specific powers. Opponents of the principle of inherent presidential authority claim that the scope of authority employed when the President issues an executive order pursuant to inherent or implied authority is much broader than that which framers intended.¹⁰⁷ Ultimately, there is no conclusive solution to the problem of determining the outer extent of the executive power.¹⁰⁸

➤ ***Judicial review of Executive Orders***

Executive orders, like other rules issued by the federal government, are subject to judicial review. Presidents’ broad usage of executive orders to effectuate policy goals has led some Members of Congress and various legal commentators to suggest that many such orders

¹⁰⁵ William F Funk et al, *Administrative Procedure And Practice* (4th Edn 2010) 521

¹⁰⁶ *Supra* note 101

¹⁰⁷ KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER [2001] 50–51

“Many legal scholars argue against the notion of inherent powers, concluding that it ‘is incompatible with the very purpose of a limited, written Constitution.’” quoting Bruce Ledewitz, ‘The Uncertain Power of the President to Execute the Laws’, [1979] 46 TENN. L. REV. 757, 770. Presidents have themselves asserted this inherent power as that which they possess beyond that of the Constitution. Id. For example, President Franklin Roosevelt believed that it is the President’s duty to do whatever might suit the needs of the nation unless the Constitution forbids it. Thus, the President may infer the existence of implied powers as stemming both from the enumerated powers and from those areas on which the Constitution or congressional statutes are silent.

¹⁰⁸ *Supra* note 33

constitute unilateral executive lawmaking that impacts the interests of private citizens and encroaches upon congressional power.¹⁰⁹ The Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* established the framework for analyzing whether the President's issuance of an executive order is a valid presidential action.¹¹⁰

When the President issues an executive order to implement a statute, the order serves as an ancillary act of legislation and presents a federal question when controversies arise in relation to the order.¹¹¹ In fact, executive orders commonly bypass avenues of review. The courts generally approve such action as long as it is possible to trace the order to a grant of power arising from the Constitution or congressional mandate. Strictly speaking, no executive order issued in the absence of statutory authority, which confers power on the President for implementation on the legislative model, is construable as a law of the United States. However, the courts have overturned only two executive orders since 1789. This fact illustrates the deference granted to the executive branch, and by implication the President. The first instance involved President Harry S Truman. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court overturned the President's order to seize steel mills.¹¹² The President had issued this order to prevent a work stoppage during wartime.

The second instance involved President Clinton. In *Chamber of Commerce v. Reich*, the D C Circuit Court of Appeals overturned the President's order to withhold government contracts from firms that hired strikebreakers to permanently replace striking employees.¹¹³ This case involved the Federal Property and Administrative Services Act and the National Labor Relations Act. In both of these cases, as the discussions to follow will indicate, the President had proposed to act in stark dissonance from the intent of Congress, once by virtue of prior deliberations of Congress, and the other by virtue of explicit prior statutes.

In *Dames & Moore v. Regan*¹¹⁴, the Court reviewed several executive orders issued by President Reagan which nullified holds on Iranian assets and removed claims against Iran from US courts following the resolution of the Iranian Hostage Crisis. The court took a

¹⁰⁹ Congressional Research Service Report, Executive Orders: Issuance, Modification, and Revocation by Vivian S Chu & Todd Garvey

¹¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, [1952] 343 US 579

¹¹¹ *Farmer v. Phila. Elec. Co.*, [1964] 329 F.2d 3, 7; *Moehl v. E I Du Pont de Nemours & Co*, [1947] 84 F Supp 427, 428

¹¹² 343 US at 589

¹¹³ 74 F.3d at 1324

¹¹⁴ (1981) 453 US 654

deferential approach to their review and allowed President Reagan's executive orders to stand. Judicial deference in cases concerning executive orders has largely continued, although a number of executive orders have come under review in district courts.

The federal judiciary consistently reviews executive orders, and while the vast majority of executive orders are not overturned by federal courts, some have been ruled unconstitutional by federal courts. In the near-immediate wake of attempted enforcement, District Court Judge Ann Donnell issued a stay on Trump's travel ban.

CONCLUSION

Law making is a complex process in any democratic country which involves several steps. This intense mechanism is bypassed in case of an Ordinance. In case of urgency or the rise of an emergent situation an Ordinance needs only an Executive sanction. This helps to take quick decisions in the time of crisis. The Ordinance making power in India or the power to issue executive orders and proclamations in United States are the most important and extensively used legislative powers vested in the Executive head to deal with unforeseen and urgent situations that may arise in the functioning of the world's largest and the oldest democracy, respectively.

A study into the system of both the countries suggests that similar power has been conferred on the Presidents of both the nations. Although the power has been conferred on the President of India under the Constitution in express provision under Article 123 the same is not the case in United States. The President of United States draws his power of issuing executive orders from three different sources without the express mention of the power in the Constitution. Some orders are issued under express authority conferred by Acts of Congress; others are a result of the necessity of prescribing means for carrying into effect the laws of Congress and treaties exercised under Presidents inherent powers while others are issued in pursuance of Constitutional powers which are so interpreted to give the President the power to issue executive orders.

Law making by executive is a mature phenomenon both in India and United States. A large number of ordinances and executive orders are issued for governance in both the countries. Sometimes they are driven by necessity but most of the times they have political motives. Legislation by Ordinances is not extra-constitutional, but can be improper and undemocratic. Control mechanism has been developed in both the countries to keep a check on the rampant

use of the legislative power of the executive. Approval of the Congress is necessary in case of continuation of ordinance or executive order. Executive orders last until they are overturned by the Executive or Judicial branch: either another president overturns it, or a court rules it unconstitutional. Executive orders and Ordinances like other rules issued by the government are subject to judicial review. The Court can overturn executive order as being invalid or unconstitutional.

Although there has been misuse of the power in both the countries, it cannot be denied that situations that need an urgent action are plenty in such vast countries and this power helps in taking speedy decision when the need arises. In today complex society strict separation of the function of all the organs of the government is practically not possible. Although criticized for being motivated by political goals and capricious, the power is a necessity to run vast nations with complex system.

CRIME AGAINST WOMEN: DATA ANALYSIS OF RECENT PAST

Ritu Agarwal* & Sakshi Yadav**

Abstract

In India it is said that crime against women are reported every two minutes which is a question to worry about, but generally is not even questioned. Many crimes are not even reported because of the fear of the society, people etc. Women in India are suppressed and are believed to be inferior to men always, from their birth. In our country in many places girls are killed as soon as they take birth, because people only want a boy and consider males as the only one who would take their family forward as a girl has to get married and go to a different house, but people don't realize that if there won't be female in this country how could anyone carry forward there family. This narrow-minded thinking of considering women inferior needs to stop because women are equally important as men. There are a number of dangerous crimes against women which make me question people's humanity and morality. In addition, such crimes violate a person's fundamental and human rights. One question which I always have on my mind is why women go through so much problems and difficulties? Why are crimes against women gone to such an extent that it has become unbelievable and hard to imagine. We get to hear about incidents that are so inhuman that you would question, who does that? From a three year old girl to a seventy year old women many girls and women have to face crimes like rapes, dowry, acid throwing, work place molestations, passing comments, touching her inappropriately, cruelty by husband and relatives, women trafficking, assault on women with intent to outrage her modesty, kidnapping, abduction, staking, cybercrimes, honour killing, eve teasing, chain snatching, sexual harassment etc. The list is very long and is a matter of concern for a developing country like India.

Keywords: Crime, Women, Society, Legislative Measures

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INTRODUCTION

“A society that is unable to respect, protect and nurture its women and children loses its moral moorings and runs a drift.”¹

Centuries have come, and centuries have gone, but the plight of women is not likely to change. The time has helplessly watched women suffering in the form of discrimination, oppression, exploitation, degradation, aggression, humiliation. In Indian society, woman occupies a vital position and venerable place. The Vedas glorified women as the mother, the creator, and one who gives life and worshipped her as a ‘Devi’ or ‘Goddess’. But their glorification was rather mythical for at the same time, in India women found her totally suppressed and subjugated in a patriarchal society. Indian women through the centuries remained subjugated and oppressed because society believed in clinging on to orthodox beliefs for the brunt of violence, domestic as well as public, physical, emotional and mental. Male violence against women is worldwide phenomenon. Fear of violence is an important factor in the lives of most women. Fear of violence is the cause of lack of participation in every sphere of life. There are various forms of crime against women. Sometimes it is even before birth, some times in the adulthood and other phases of life. In the Indian society, position of women is always perceived in relation to the man. This perception has given birth to various customs and practices. Violence against women both inside and outside of their home has been a crucial issue in the contemporary Indian society. Women in India constitute nearly about half of its population and most of them are grinding under the patriarchal system of socio-cultural and religious structures. One gender has been controlling the space of the India’s social economic, political and religious fabric since time immemorial. In the era of globalization and modernization the present trends of crimes against women is on increase. Recently the brutal gang rape against 23 year student in Delhi again sparked the debate on Indian mental set up and existing law and order in the Country.²

TYPES OF CRIMES AGAINST WOMEN

Kidnapping

The term kidnapping refers to either kidnapping from India or kidnapping from lawful guardianship. Sec 360 of the IPC states that whoever conveys any person beyond India

¹ *The Hindu – September 15 2002 , Opinion*

² Available at: <http://www.countercurrents.org/ranjan300113.html>

without his consent is said to kidnap that person from India and whoever takes away a minor (16years in case of male and 18years in case of female) without his consent or the guardian's consent is said to kidnap that person from lawful guardianship (Sec 361). The punishment for this purpose is up to 7 years and fine. Sec 366 of IPC defines kidnapping, abducting or inducing woman to compel her marriage and forceful sexual relations for which the offender can be punished with imprisonment up to 10 years and fine.

Eve Teasing

Eve Teasing is a euphemism used for public sexual harassment or molestation of women by men. It is a problem in the current youth. It is a form of sexual aggression that ranges in severity from sexual remarks, brushing and catcalls to groping. Sec 509 of the IPC states that whoever intending to insult the modesty of any women, utters any word, makes any sound or gesture or exhibits any object which intrudes upon the privacy of such woman shall be punished with imprisonment up to 3 years and fine.

Chain Snatching

This is a common problem of modern society. The women of all ages are suffering from this problem. The victim not only loses the valuables but also is hurt and traumatized because of such incidents. The offenders sometimes even disguise themselves as police officials and ask women to give their valuables for the purpose of safety and later on run away with that. This type of crime is subjected to Sec 378 of IPC.

Rape

Rape is a much broader term to be defined and its scope is of wider perspective. It is the most common crime against women and the Indian society and system has failed to end this heinous crime. The numbers of rape cases have increased tremendously. The legal system has failed drastically to end this problem. The offence of rape can be categorized in various aspects -as a rape of a minor girl, rape of a woman (Sec 376), rape with murder (Sec 376A), rape in families, rape by public servants (Sec 376C) , gang-rape (Sec 376 D), marital rapes (Sec 376B). The punishments for these offences range from imprisonment up to 7 years to 20 years or life imprisonment and also fine.

Sexual Harassment

Sexual harassment can be defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical harassment of sexual nature. It includes a range of actions from mild transgressions to sexual abuse or sexual assault, showing pornography to women against her will etc. According to Sec 354A of IPC if any person commits an act of sexual harassment, he shall be rigorously imprisoned up to three years and fine.

Domestic Violence

Domestic Violence is yet another term which is common in our country as women were and are considered to be the inferior strata of human society. The psychology was that the man earned and worked outside so he had the right to do anything with his wife. But with time, the trend has changed and now women have the right to work equally. These acts of violence include beating, rape, forced sex etc. Sec 498A of Domestic Violence Act, 2005 defines 1yr punishment and fine.

Honor Killing

A spate of murders and dishonorable crimes in the name of ‘honor’ whether of a family or caste or community are continuing to be reported from various states? A crime in the name of ‘honor’ is one in the range of violent or abusive acts including emotional, physical, and sexual abuse and other coercive acts. The Khap Panchayats through various kinds of coercive and punitive actions want to create terror and stop marriages and associations on the basis of choice from taking place. These actions are also violative of certain fundamental rights in the Constitution of India, including the right to life and liberty which includes the right to bodily integrity, and the right to choose whom to associate with.

Cyber Crimes

In the world of technology, India too had advanced itself in technology and the women are an equal part of it. But the diseased minds have not left any chance to offend women in the cyber world too. There are several cybercrimes such as bullying, abusing, pornography etc which are happening each day against women. These crimes have several punishments under the Information Technology Act, 2000 which ranges from imprisonment up to 3yr to life imprisonment and fine.

Dowry Deaths

The evil practice of taking dowry in marriage is still common in the rural areas of India which if opposed results to deaths of women gradually. Despite of Anti Dowry laws, the number of such deaths has increased in the recent years.

Acid Attacks

However sale of acids without proper information have been banned by the government of India, acid attacks are still in trend to threaten women and hurt them. Sec 326A and 326B of IPC states that whoever voluntarily throws acid for grievous hurt or an assault shall be punished with imprisonment up to 7 years to life imprisonment and fine.

Stalking

Stalking is a new crime in trend against women. Stalking means breaching the privacy of women by following or regular contacts or monitoring on internet or any other electronic communication. Whoever does so shall be punished with imprisonment up to 3 years to 5 years and fine.

Assault to outrage modesty

Whoever assaults or uses criminal force intending to outrage her modesty (1 year- 5 years imprisonment) or disrobing her or compelling her to be naked (3 years-7 years imprisonment) are liable under Sec 354 and Sec 354B respectively.

Women trafficking

The concept of women trafficking started in the late 20th century in India and is still in existence. Sec 370 describes various modes of trafficking which includes trafficking of minor girls, trafficking for the purpose of exploitation etc. Sec 372 and 373 states it as crime in the buying and selling minor for the purposes of prostitution. The imprisonment term varies in each offence and ranges from 3 years to life imprisonment and also fine.³ These were several offences and their punishments under Indian Penal Code related to women. The government of India have made efforts in favor of women by bringing several acts like Sexual harassment of women at workplace Act, 2013; Protection of children against sexual offences Act, 2013 etc. recently. It has also amended the IPC and the Code of Criminal Procedure. The government is keen to bring laws for dowry related offences and for Honor Killing.

³ Available at: <https://www.indianbarassociation.org/crimes-against-women-a-legal-perspective/>

Cybercrimes would be tackled sooner or later. In the recent years due to changes in society, women are now, ready to fight for themselves and they are getting a huge support. We wish to change our society but first we have to change our thinking. Hypothesis that violence against women is a manifestation of unequal gender relations and harmful manifestations of hegemonic masculinity governed by patriarchal beliefs, institutions and systems is true. Yet, it is a fact that not all men perpetrate violence against women. The study shows the increase in number of rape cases from 2001 to 2010.

RAPE CASES FROM 2001 TO 2010

Crime Head	2001	2006	2007	2008	2009	2010
Rape (Section 376 IPC)	16075 (1.6%)	19348 (1.7%)	20737 (1.8%)	21467 (1.9%)	21397 (1.8%)	22172 (1.9%)

In 2010 there were 22,193 victims of Rape out of 22,172 reported cases in the country. 8.9% (1,975) of the total victims of Rape were girls under 14 years of age, while 16.1% (3,570) were teenage girls (14-18 years). 57.4% (12,749) were women in the age-group 18-30 years. 3,763 victims (17.0%) were in the age-group of 30-50 years while 0.6% (136) was over 50 years of age'. ⁴

Years	Total no. crime	Cases against women	%
2006	18,78,293	1,54,158	8.2
2007	19,89,673	1,74,921	8.8
2008	20,93,379	1,86,617	8.9
2009	21,21,345	2,03,804	9.2
2010	22,24,831	2,13,585	9.6

⁴ Source: Crimes In India , National Crime record Bureau, Govt. of India, 2011, 2

As per the above data⁵ crime rate trend analysis against women in India shows clearly the sharp increased crime rate from (8.2%) in 2006 to (9.6 %) in 2010 in the last five years. which is a serious matter from the safety and security point of Indian women.

REPORT OF NCRB OF CRIME AGAINST WOMEN FOR THE YEAR 2016

Promises to address gender gap are far from reality. In India, women do not seem to enjoy all the rights to freedom provided under the Constitution of India. According to the National Crime Records Bureau (NCRB), India, a crime against women is recorded every 1.6 minutes in India. Every 4.8 minutes a girl is subjected to domestic violence in this country and every 13.5 minutes a rape case is recorded.

According to the report of NCRB for the year 2016, cases under “Crime Against Women” increased by 2.9% in 2016 over 2015. Majority of cases were under the head “Cruelty by Husband or His Relatives” (32.6%) followed by ‘Assault on Women with Intent to Outrage her Modesty’ (25.0%), ‘Kidnapping & Abduction of Women’ (19.0%) and ‘Rape’ (11.5%).

Uttar Pradesh reported the highest number of total cases of crimes against women (14.5% share of all India total - 49,262 cases) followed by West Bengal (9.6% share - 32,513 cases) during 2016. Delhi UT reported the highest crime rate (160.4 cases per lakh of female population) compared to the national average rate of 55.2.

A more appropriate measure of extent of safety enjoyed by women is the number of violence per unit population (referred to as rate of crime). According to this measure, Delhi emerges as the most unsafe place with 160.4 incidents of violence per lakh of female population (15,310 incidents and a share of 4.5% of all India total incidents of violence against women. Assam (131.3 incidents per lakh of female population, 2.58% share of population and 6.2% share of total incidents), Odisha (84.5 incidents per lakh of female population, 3.43% share of population and 5.3% share of total incidents), Telengana (83.7 incidents per lakh of female population, 2.99% share of population and 4.5% share of total incidents) and Rajasthan (78.3 incidents per lakh of female population, 5.7% share of population and 8.1% share of total incidents) occupy the next four positions in that order.

Considering both the parameters the top five most unsafe areas are Assam (6th in percentage share and 2nd in rate of crime), Rajasthan (4th in percentage share and 5th in rate of crime),

⁵ Source- Crimes in India, 2011, National Crime Record Bureau

West Bengal (2nd in percentage share and 7th in rate of crime), Odisha (7th in percentage share and 3rd in rate of crime) and Delhi (10th in percentage share and 1st in rate of crime).

Acid attacks - also known as vitriolage is a violent attack especially on women. Every year around 1500 people are attacked in this way across the world. Reports indicate that out of them, 80% are women and 40% to 70% are below 18 years of age.

During the year 2016 number of victims subjected to acid attacks went up by 23.3% from 249 (in 2015) to 307. Among the states and UT-s, West Bengal registered a jump of 102.4% from 41 (in 2015) to 86 which is the highest among all. Number of incidents recorded in Uttar Pradesh (second largest number of victims during the year) remained static at 61 while Delhi recorded marginal rise from 21 (in 2015) to 23 and has recorded the 3rd largest number of victims. Punjab recorded the 4th highest number of victims at 18 (compared to 7 in 2015 – 157.1 % rise) and Haryana has registered the 5th largest number at 17 which is 41.7% higher than last year (12 victims in 2015). As many as 5 victims each were affected in the cities of Ahmedabad and Kolkata during the year.

Rape cases have increased by 12.4% from 34,651 cases in 2015 to 38,947 in 2016. Madhya Pradesh (4,882 cases - 12.5% share) and Uttar Pradesh (4,816 cases - 12.4% share) reported the highest incidents of Rape during 2016 followed by Maharashtra (4,189 cases - 10.7% share).

Cases of Kidnapping and abduction increased by 9.71% from 60,652 cases in 2015 to 66,544 cases in 2016. The highest numbers were recorded in the states of Uttar Pradesh, Maharashtra, Bihar, Assam and West Bengal in that order.

During 2016 West Bengal recorded the largest number of Trafficking of Women during the year at 222 cases followed by Kerala (189 cases), Jharkhand (171 cases) and Odisha (132 cases).

Although the largest number of incidents of crime against women have been recorded under the head “Cruelty by Husband or His Relatives” the number of incidents recorded under this head during 2016 (110,434 cases) represents marginal decline of 2.74% over the number recorded during the previous year (113,548 cases in 2015). The highest number was recorded in the state of West Bengal (19,305 cases 17.48% share) followed by Rajasthan (13,814 cases

12.51% share), Uttar Pradesh (11,166 cases 10.11% share), Assam (9,321 cases 8.44% share) and Maharashtra (7,215 cases 6.53% share).

However, the number of incidents recorded under the head ‘Assault on Women with Intent to Outrage her Modesty’ showed an increase of 3.06% during 2016 (85,332 cases) over 2015 (82,800 cases). The highest number was recorded in the state of Maharashtra (11,454 cases 13.42% share) followed by Uttar Pradesh (11,338 cases 13.29% share), Madhya Pradesh (8,720 cases 10.22% share), Odisha (8,269 cases 9.69% share) and Karnataka (5,313 cases 6.23% share).

Among the 19 metropolitan cities for which data has been made available, Delhi (14108 cases) has accounted for 32.93 percent of total crime against women in these cities followed by Mumbai (5261 cases; 12.28 percent), Bengaluru (3531 cases; 8.24 percent), Hyderabad (2451 cases; 5.72 percent) and Lucknow (2205 cases; 5.15 percent).

The rate of cognizable crimes against women was significantly higher in Delhi, Lucknow, Jaipur, Patna and Nagpur at 182.1, 159.8, 144.1, 133.8, and 113.0 per lakh of female population respectively as compared to average of metropolitan cities at 77.2 per lakh of female population.

National capital Delhi has reported 40.47 percent (2006 out of 4957 cases) of rape cases reported from these 19 metropolitan cities, 37.04 percent (3601 out of 9,722 cases) of kidnapping and abduction cases, 29.82 percent (3645 out of 12,222) of cases under “Cruelty by Husband or His Relatives”, 35.71 percent (3645 out of 12,222) of cases under ‘Assault on Women with Intent to Outrage her Modesty’ and 37.5 percent (42 out of 127 cases) of Trafficking of women among 19 metropolitan cities, the NCRB report said. However the highest number of Trafficking of women from amongst these 19 metropolitan cities was reported from Kochi at 48 (37.8 percent). The three cities of Kochi, Delhi and Kolkata together accounted for 88.2 percent of all cases of Trafficking of women from amongst these 19 metropolitan cities.

SUGGESTIONS AND REVIEW

- ***Know your rights-*** When it comes to reporting a crime several women hesitate in filing a report, fearing social backlash, family dishonor, or insensitive law officials. This naturally awards a sense of impunity to sexual offenders, who are tempted to go even

further next time. Wherever possible, therefore, it's important to arm ourselves with the laws and rights at our disposal. For instance, the Zero FIR ruling by the Supreme Court states that a rape victim can register her complaint from any police station (and not necessarily the one closest to where the incident occurred). She can also file this report online or through registered post. In fact, the police are bound to record a rape FIR whenever the victim chooses to come forward, even weeks or months after the incident has taken place. It is only once we have a clear idea of our rights, that we can encourage others to step forward, report crime, and gradually break the vicious circle of shame, impunity, and repeated offences.

- ***Denounce victim blaming-*** Blame, shame, and backlash are the main reasons why most women hesitate to press assault charges. Shaming the woman for her clothes, her lifestyle, or simply the place she happened to be at the time of the crime is a knee-jerk reaction with damaging repercussions. 'She deserves it because she's a sex worker,' or 'She was hanging out with boys and wearing shorts' are convenient narratives spun by a patriarchal society, which aim to shift blame from the perpetrator to the victim. This lies at heart of rape culture, and is by far the biggest way we fail those brave enough to report a crime. It goes without saying that we must end this toxic and dangerous practice of victim blaming if we're to make this a safer, saner, and more respectful society for women.
- ***Proper communication with family-***This is particularly crucial when you consider that over 90% of rapes reported in India are committed by people familiar to the victim, including relatives, neighbors, and employers. To create an equal as well as a safer space for women, it's important to drive change right from an early age. Children, after all, follow by example. When a boy finds that the rules meant for his sister do not apply to him, it conditions him to believe that there's a lot he can get away with that girls cannot. Similarly, we instruct our daughters to watch out for dangers on the road, but often forget to teach our sons something as basic as consent and accountability. As a consequence, we raise girls who lack confidence and boys who think they can get away with anything – a recipe for disaster if there was ever one. The next time you find yourself saying 'boys will be boys', take a moment to reconsider; you may be part of the problem.
- ***Demand actual solutions-*** From cowmen and cell phones to dressing of girls, politicians over the past several years have found many innovative things to blame for

the high incidence of crimes against women. While we may laugh over them, these statements ultimately reflect that authorities have neither learnt to take these crimes seriously nor handle them sensitively. To make things worse, these ridiculous notions often distract us from the larger picture – from outraging over a rape, we merely move on to outraging over stupidity. Rather than shaking our heads and carrying on, next time we should point out how all this nonsense prevents us from rectifying the sorry state of women's safety in India. Retaliate with demands instead: Ask for safer public transport, well-lit community spaces, faster processing of cases, higher conviction rates, and sensitive handling of victims by concerned authorities.

- ***Don't forward that rape joke-*** We often let issues like gender inequality take a backseat because the problem seems too large and complex for any one individual to tackle. However, there is one thing you can personally do to make sure that things don't get worse and that is to stop forwarding, creating, or share insensitive content among others. Repeat after us: Rape jokes are not funny. Do not forward them even for a laugh, and definitely reprimand those who do. The same logic holds for sexist jokes and forwards passed around on family groups, as well as Bollywood chartbusters that celebrate harassment as love. Point out how such jokes, songs, and ideas create a culture of misogyny and objectification, ultimately creating a world where men presume that 'no' only means they must try their luck again.

Reacting after a crime is only natural, whether you post your opinions online or take to the streets in protest. However, with crimes against women being as rampant as they are, perhaps it's time to concede that reactions alone cannot change the status quo. Instead, what might work are smaller, practical steps that are less exciting than a candlelight march but infinitely more useful in the long run.⁶

⁶ Available at: <http://www.hindustantimes.com/brandstories/tataajeagore/crimes-against-women-are-rising.html>

DEVELOPMENT OF FEMINIST JURISPRUDENCE IN INDIA VIA HADIYA CASE

Aparajita Singh*

Abstract

In the history of humankind ‘equality’ and ‘freedom’ evaded women in comparison to men. Women always suffered subordinate status and were assigned a purely functional role in every society or civilization of the world. Over the period, this unequal status of women being offensive to human dignity and human rights steered to develop feminist jurisprudence. This research paper reflects the perspective of feminist jurisprudence with reference to individual freedom of women, its expansion under various issues and state’s duty to protect women individual freedom and to empower them. This paper deals with individual freedom, feminist jurisprudence as developed through Hadiya case.

Keywords: Equality, Freedom, Feminist jurisprudence, Human dignity, Human rights

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Hon'ble Chief Justice of India Dipak Misra in Hadiya case remarked, that in their collective experience spanning many years, they had not come across a case like the Hadiya one. Justice Misra said they would have dealt with more than a 100 habeas corpus petitions in the various High Courts they had presided over, but the Hadiya case was unique.

The court was balancing its concerns for Ms. Hadiya's autonomy as an individual to make her own choice and the court's power to explore further, how she made the choice based on the National Investigation Agency's material claiming she was indoctrinated by a well-oiled network in Kerala, which was into radicalisation. We are concerned about the cherished value of liberty of an individual," Justice D.Y. Chandrachud observed about the court's initial doubts about the parameters it should follow in a case like this where an adult's choice was under question before a court.”¹

“When the liberty of a person is illegally smothered and strangulated and the State or a private person throttles his/her choice, the signature of life melts and living becomes a bare subsistence. That is fundamentally an expression of acrimony, which gives indecent burial to the individuality of a person and refuses to recognize the other's identity. That is reflection of cruelty, which the law does not countenance.”²

The narrative of Hadiya case is a bit different; state being the facilitator of enjoyment of fundamental rights helped the cause of father who endeavored immensely in not allowing his daughter to make her own choice in respect of faith and marrying a person of his own choice. The whole idea revolves around the patriarchal autocracy. The high court annulled the marriage, which was set aside by the Supreme Court holding the individual liberty. The initial judgement passed by the Kerala High court stating that a girl of 24 years is weak and vulnerable, capable of being exploited. The court exercised its parens patriae jurisdiction in order to take care of welfare of the girl of her age. The basic duty that the court presumed in this case was to see the safety of the girl whether she is in safe hands. Further court ordered that the marriage between Hadiya and Shafin Jahan is null and void. Hadiya continued to remain against her will in the compulsive confinement at the home of her father in pursuance of the directions of the Kerala High Court. There are two serious concerns that emerge from the judgment of the Kerala high court .The first is that high court transgressed the limits of its

¹ Available at: <http://www.thehindu.com/news/national/hadiya-case-is-a-unique-challenge-sc/article21011529.ece> (Accessed on 09.04.2018)

² *Shafin Jahan v. Asokan K.M. & Ors.* MANU/SC/0340/2018

jurisdiction in issuing a declaration annulling the marriage of Shafin Jahan and Hadiya in course of hearing a habeas corpus petition.

In a free democratic country once a person becomes major, he/she can marry whomsoever he/she likes. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/he is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of *parens patriae*. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father.³

The schism between Hadiya and her father may be unfortunate. However, it was no part of the jurisdiction of the High Court to decide what it considered to be a 'just' way of life or 'correct' course of living for Hadiya. She has absolute autonomy over her person. Hadiya and Shafin Jahan are adults. Under Muslim law, marriage or Nikah is a contract. Muslim law recognizes the right of adults to marry by their own free will.

The conditions for a valid Muslim marriage are:

- (i) Both the individuals must profess Islam;
- (ii) Both should be of the age of puberty;
- (iii) There has to be an offer and acceptance and two witnesses must be present;
- (iv) Dower and Mehar; and Absence of a prohibited degree of relationship.

A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its jurisdiction Under Article 226 ought not to have embarked on the course of annulling the marriage. The Constitution recognizes the liberty and autonomy, which inheres in each individual. This includes the ability to take decisions on aspects, which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to

³ *Soni Gerry v. Gerry Douglas* MANU/SC/0166/2018:(2018) 2 SCC 197

choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences.

Article 16 of the Universal Declaration of Human Rights underscores the fundamental importance of marriage as an incident of human liberty:

Article 16 (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right to marry a person of one's choice is integral to Article 21 of the Constitution.

The Constitution guarantees the right to life. This right cannot be taken away except through a law, which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.

In *Justice K.S. Puttaswamy v. Union of India*⁴, this Court in a decision of nine judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality:

"The autonomy of the individual is the ability to make decisions on vital matters of concern to life... The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."

The High Court, in the present case, has treading on an area, which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude. The High Court was of the view that at twenty-four, Hadiya "*is weak and vulnerable, capable of being exploited in many ways*". The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases. The concern of this Court in intervening in this matter is as much about the miscarriage of justice that has resulted in the High Court as much as about the paternalism, which underlies the approach to constitutional interpretation reflected in the judgment in appeal. The superior courts, when they exercise their jurisdiction *parens patriae* do so in the case of persons who are incapable of asserting a free will such as minors or persons of unsound mind. The exercise of that jurisdiction should not transgress into the area of determining the suitability of partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices, which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty bound not to swerve from the path of upholding our pluralism and diversity as a nation.

Feminist jurisprudence is a philosophy of law based on the political, economic and social equality of sexes. Feminist jurisprudence a term coined as recently as 1978 has completely

⁴ MANU/SC/1044/2017:2017 (10) SCC 1

disrupted the conventional model of jurisprudence.⁵ It now holds a significant place in law and legal thought and influences many debates on sexual and domestic violence, inequality at the workplace and gender based discrimination around the world. Voice has been raised in India also, to demand individual's recognition as independent human beings by women associations. The constitution of India ensures every person to have Right to 'life and personal liberty' (under Article 21) free from all encroachments unsustainable in law. Justice P. N. Bhagvati, in Maneka Gandhi case (1978) observed expression Right to 'life and personal of liberty' encompasses within it all those variety of rights of a person which go to constitute personal liberty of a person and some additional protection under Article 19 of the constitution of India. Personal Liberty .The constitution of India in principle is giving a special status to women and having model of gender justice.

"Hadiya's life has been naarativised by her father, judiciary, and the Sangh Parivar. Each of them has conspired to denude her autonomy and individuality. In common perception, Hadiya is perceived through the many narratives that have been constructed about her. She is denied the freedom to represent herself. Even common individuals have been complicit in this misrepresentation and misrecognition that Hadiya is going through.

Social media has seen many speculations about both Hadiya and Shafin. The basic premise of Hadiya's conversion has incited immense secular anxiety. Why should any woman choose to convert to any religion, since all religions encourage patriarchy? Why did Hadiya have to convert before getting married, isn't this a loss of autonomy?

All these speculations come in the way of giving solidarity to Hadiya. Owing to secular idiosyncrasies, we are unable to comprehend Hadiya's act of conversion and the consequent cruelty being meted out to Hadiya by her father and even the Indian state. We are unable to fathom why a woman would choose to convert to another religion"⁶

⁵ McClain, LC.1992

⁶ Available at: <https://feminisminindia.com/2017/11/09/hadiya-representation-many-lives/> (Accessed on 09.04.2018)

THE ADVENT OF CRYPTOCURRENCY IN INDIA (BITCOIN)

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Abstract

Currency can be defined as tokens used as money in any country which includes metal coins, paper bank notes, cheques and also digital cash or electronic currency and many more. Digital cash or electronic currency are payment methods which are not tangible and exists only in electronic form hence the name ‘electronic currency’. This digital currency can be said to have two types – (a) Virtual currency and (b) Cryptocurrency, where digital currencies are centralized while virtual currencies are unregulated and decentralised. In this article we are going to discuss about the penetration of cryptocurrency in the traditional currency system of Indian economy.

Keywords: Bitcoin, India, Decentralized Cryptocurrency, Reserve Bank of India, Virtual Currency

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INTRODUCTION

A crypto currency is a medium of exchange that uses cryptography to manage the creation of new units as well as secure the transactions. Bitcoin originated with the white paper that was published in 2008 under the pseudonym ‘Satoshi Nakamoto’. It was published via a mailing list for cryptography and has a similar appearance to an academic paper. The creators’ original motive behind Bitcoin was to develop a cash-like payment system that permitted electronic transactions but that also included many of the advantageous characteristics of physical cash.¹ One of the most striking features of crypto currency is that it weeds out the need for a trusted third party such as a governmental agency, bank etc. The crypto currency system collectively creates the units. The rate at which such units are created is defined beforehand and is publicly known unlike the traditional currencies where the government or the authorized banks control the supply.² At present most of the currencies in the world including reserve currencies are fiat currencies. The fiat currencies are issued by a government and if needed, the government promises to pay the holder of such currencies an equivalent amount in gold. Therefore, these currencies usually have a central regulatory body which issues them, and thus called ‘centralized’.³ Bitcoin is a virtual monetary unit and therefore has no physical representation. A Bitcoin unit is divisible and can be divided into 100 million “Satoshis,” the smallest fraction of a Bitcoin. The Bitcoin Blockchain is a data file that carries the records of all past Bitcoin transactions, including the creation of new Bitcoin units. It is often referred to as the ledger of the Bitcoin system.⁴ Bitcoin is a decentralized crypto currency, a form of payment that uses cryptography to control its creation and management, without need of any central authorities such as bank. It is open source software based online payment system introduced in 2009 by Satoshi Nakamoto. It is also known as electronic cash system based on peer-to-peer virtual data. It is world’s first decentralized currency. Each Bitcoin is subdivided down to eight decimal places, forming 100,000,000 smaller units called satoshis. Bitcoins can be transferred through a computer or smart phone without an intermediate financial institution. The processing of Bitcoin transactions is secured by servers called Bitcoin “miners”. These servers communicate over

¹ Aleksander Berentsen, Fabian Schar, *A Short Introduction To The World Of Cryptocurrency*, Available at: <https://files.stlouisfed.org/files/htdocs/publications/review/2018/01/10/a-short-introduction-to-the-world-of-cryptocurrencies.pdf>

² Akshaya Tamradaman & Sangeeta Nagpure, *Bitcoin In India*, Available at: <http://ijcsit.com/docs/Volume%208/vol8issue3/ijcsit2017080324.pdf>

³ *Ibid*

⁴ *Supra* note 1

an internet-based network and confirm transactions by adding them to a ledger which is updated and archived periodically using peer-to-peer file sharing technology, also known as the “blockchain.”⁵

COUNTRIES THAT HAVE LEGALISED BITCOINS

- Japan: In the process of legally recognizing as money.
- Australia: Proposed in budget speech 2017-18 to treat bitcoins as money.
- European Union: Convertible decentralized virtual currency.
- Canada: Digital currency/intangible.
- Indonesia: Digital currency.
- United States: “funds” under 18 U.S. Code § 1960 (virtual currency in general).
- Russia: Virtual currency (monetary surrogate).
- China: Virtual commodity.⁶

INDIAN BITCOIN REGULATIONS & ITS STATUS

Bitcoin demand is growing day by day in India. People in India now understand the power and advantages that these virtual currencies can offer. If we consider Bitcoin in India then all the rules and regulations which are presently applicable to Indian currency will become applicable to Bitcoin also. These rules and regulations for Indian currencies are controlled by RBI. As per Indian constitution, article 246 gives the list of all activities that are legislated by central and state government. Entry 36 and 46 of List I of the Seventh Schedule of the Constitution states that the Central Government is allowed to legislate in respect of currency, coinage, legal tender, foreign exchange and bills of exchange, cheques, promissory notes and other like instruments respectively. If Bitcoin falls any of this categories the central government would have exclusive power to legislate.⁷

The principal laws concerning Indian currency are:

- The Constitution of India, 1950;
- The Foreign Exchange Management Act, 1999 (FEMA);

⁵ *Supra* note 2

⁶ Vallari Dubey & Team, *Bitcoins India Report*, Available at: <http://vinodkothari.com/wp-content/uploads/2017/08/Bitcoins-India-Report.pdf>

⁷ *Supra* note 2

- The Reserve Bank of India Act, 1934 (RBI Act);
- The Coinage Act, 1906 (Coinage Act);
- The Securities Contracts (Regulation) Act, 1956 (SCRA);
- The Sale of Goods Act, 1930 (Sale of Goods Act);
- The Payment and Settlement Systems Act, 2007 (Payment Act);
- Indian Contract Act, 1872 (Contract Act).

These laws will become applicable to Bitcoin if RBI wants to treat it as a currency. The Reserve Bank of India has neither declared bitcoins as illegal in India nor has it accepted bitcoins as a currency. The RBI has only stated the risks that are associated with virtual currencies and cautioned that people dealing in it should do so at their own risk.⁸ As Bitcoin is decentralized digital currency, the creation, trading or usage of Bitcoin as a medium for payment is not controlled by RBI or any other trusted authority unlike fiat currency.

CURRENCY

Currency is generally defined as tokens used as money in a country. In addition to metal coins and paper bank notes, money orders, traveller's checks, it also includes electronic money or digital cash. To fit in this definition, which is not exhaustive?

- Either bitcoin has to be physical and movable, and fungible. It is movable and fungible but not physical.
- Electronic money or digital cash may include bitcoin but then it needs a legal backing from an authorized entity, which is not the case in India as of now.⁹

“Currency” includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank, as per Section 2(h) of Foreign Exchange Management Act, 1999

- As is evident from the above definition, bitcoin doesn't fit in any of the illustrative names, however if RBI wants, it can certainly notify it to be included in the above definition.

⁸ *Supra* note 6

⁹ *Ibid*

- RBI hasn't notified bitcoin as legal tender in India and therefore it couldn't be termed as real currency for the time being.¹⁰

COINS

Coins in India are governed by the Coinage Act, 2011. *Section 2(a)*: ‘coin’ means any coin which is made of any metal or any other material stamped by the Government or any other authority empowered by the Government in this behalf and which is a legal tender including commemorative coin and Government of India one rupee note.¹¹

For the removal of doubts, it is hereby clarified that a ‘coin’ does not include the credit card, debit card, postal order and e-money issued by any bank, post office or financial institution; (b) ‘commemorative coin’ means any coin stamped by the Government or any other authority empowered by the Government in this behalf to commemorate any specific occasion or event and expressed in Indian currency;¹²

On study of above, bitcoin is certainly not metal or even any other material for that matter. Moreover, it's not legal tender. If it was to become e-money in the near future, still it could not be coin as per the Coinage Act, since e-money is specifically excluded from the above definition. Consequently, bitcoins cannot be considered as coins now or in the days to come.

DIGITAL CURRENCY

Digital currency is a payment method which exists only in electronic form and is not tangible. Digital currency can be transferred between entities or users with the help of technology like computers, smartphones and the internet. Although it is similar to physical currencies, digital money allows borderless transfer of ownership as well as instantaneous transactions. Digital currencies can be used to purchase goods and services but can also be restricted to certain online communities such as a gaming or social networks.¹³ There are two forms of digital currency: a) *Virtual currency* b) *Crypto currency*

VIRTUAL CURRENCY *versus* CRYPTOCURRENCY

¹⁰ *Ibid*

¹¹ *Ibid*

¹² *Ibid*

¹³ Available at: <https://www.techopedia.com/definition/6702/digital-currency>

Digital currency is largely backed and regulated by the Central Bank, more like electronic money. Virtual currency, on the other hand is unregulated and decentralized. Financial Crimes Enforcement Network's ruling on 'Application of FinCen's regulations to virtual currency mining operations' clarifies that virtual currency is a medium of exchange that operates like a currency in some environments but does not have all the attributes of a real currency. It does not hold any legal tender status anywhere. Similar view was expressed in European Central Bank's (ECB) publication, 'Virtual Currency Schemes'.¹⁴ Bitcoins could be termed as virtual currency- they have been categorized as such by ECB. They are decentralized, unregulated and have few attributes of a real currency. Then there are cryptocurrencies and non-crypto currencies. Since, bitcoin is purely based on crypto-graphical system, where you have a private and a public key, and each transaction gets recorded on the ledger, it is said to come under the definition of crypto-currency.¹⁵

DECENTRALIZED CURRENCY

Currency is further classified into centralized and decentralized. Those which are governed by a central repository or a designated entity for sake of trust over transactions taking place are termed as centralized currency. Bitcoin doesn't work like that. Transactions in bitcoin happen on a decentralized P2P system, where all entities operate independently, and hold the entire risk of dealing in the same.¹⁶

FOREIGN EXCHANGE MANAGEMENT ACT, 1999 ('FEMA')

Given its attributes, the closest we could define bitcoin as is 'virtual currency' or more particularly 'crypto currency'. As far as FEMA is considered, there can be two possible scenarios:

- *When there is no regulatory framework:* Section 2(h) of the Act defines 'currency'. RBI hasn't declared bitcoins to fall under that definition. Then there's 'foreign currency'. Section 2(m) defines, "foreign currency" means any currency other than Indian currency". Now what is Indian currency? FEMA (Section 2(q) also defines Indian currency. Accordingly, "Indian currency" means currency which is expressed

¹⁴ *Supra* note 6

¹⁵ *Ibid*

¹⁶ *Ibid*

or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under *section 28A* of the *Reserve Bank of India Act, 1934*.

- *When there is a regulatory framework:* As mentioned before, the RBI can explicitly declare bitcoins to be currency; in this case it would fall under the definition of foreign currency and be dealt with accordingly.

However, the present situation is such where bitcoin doesn't fall in any of the above definitions. So, it does not cleanly fall into the category of foreign currency as per FEMA as it does not qualify to be currency as per the same Act the RBI would have to explicitly notify it to be such in the first place.¹⁷

SEBI

Bitcoin is treated as 'commodity' in few foreign jurisdictions. However, to understand the intricacies revolving bitcoins as 'commodity derivative' in India, one shall have to refer the *Securities Contracts Regulation Act, 1956 Section 2 clause (bc)* of the Act defines the expression as¹⁸:

'Commodity derivative' means a contract —

- i. *for the delivery of such goods, as may be notified by the Central Government in the Official Gazette, and which is not a ready delivery contract; or*
- ii. *for differences, which derives its value from prices or indices of prices of such underlying goods or activities, services, rights, interests and events, as may be notified by the Central Government, in consultation with the Board, but does not include securities as referred to in sub-clauses (A) and (B) of clause (ac);*

To be able to be covered by the above definition, the essential element is a contract. While the definition of contract is dealt by the *Indian Contract Act, 1872*, either of the above two purposes is a pre-requisite for a contract to be a commodity derivative contract. Essentially, bitcoin is not goods as already explained in the preceding sections, additionally it is also not something that has its value derived from an underlying good or something else. In fact value of bitcoins fluctuates on demand-supply phenomenon rather than anything persistent. Conclusively, bitcoins cannot be treated as commodity; also it cannot be treated as

¹⁷ *Ibid*

¹⁸ *Ibid*

commodity derivative. Therefore, **SEBI** cannot be seen as the authority overseeing bitcoin exchanges.¹⁹

COLLECTIVE INVESTMENT SCHEME ('CIS')

Collective Investment Scheme has been defined under *Section 11AA (1)* of the *Securities and Exchange Board of India Act, 1992* ('*SEBI Act*'). Accordingly, *sub-section 2 or 2A* has to be referred to, which specifies a list of conditions that have to fulfill in order to fall under the definition of CIS. Interestingly, Sections cited above focus on words or expressions such as 'collective', 'pooling of interest', 'contribution'. Looking at the concept of bitcoin, it cannot be held that at any time the investor is collecting funds and then investing the money.

Till date, there is no trace of any such activity in the market where a service such as pooling of funds of investors and then investing in bitcoins was done. Thus, trading in bitcoins for investment purposes has not grown enough to be regarded as CIS. If at all there is a prospective change resulting in inclusion of bitcoin trading services under the regulation of SEBI by virtue of being treated a CIS.²⁰

INDIAN COMPANIES USING BITCOIN

November 8, 2016, the Reserve Bank of India (RBI) removed 500 and 1000 Rupee notes from circulation, stripping the nation of 86% of its currency. India aimed to quell its shadow economy and to defeat its never-ending illicit activities. At the same time, this economic crisis indirectly taught its 1.3 billion people that cash was unreliable - one day there, the next day gone - and there was a nationwide frenzy with the stock market falling by 7 per cent, cash shortages and several deaths from people queuing to exchange their worthless money. A significant disruption to the economy occurred with more of India's largely younger population turning to Bitcoin. At the time, a large number of industries were already using Bitcoin and shortly, thereafter, the number of investor grew to the point where mid-2017, 2,500 Indians invested in Bitcoin daily, according to The Economic Times. The digital coin attracted people in India, since it offered a safer system for their money, a haven from inflation, refuge from government regulation and interference, and a system that avoids

¹⁹ *Ibid*

²⁰ *Ibid*

political and economic turmoil.²¹

India is now the 6th largest economy in the world with its GDP of \$2.6 trillion, displacing France, according to the database of the International Monetary Fund's World Economic Outlook (WEO) for April 2018. A 2016 study by PricewaterhouseCoopers found that 233 million people in India, or 40% of its population, still have no bank account. To put this in perspective, 65 million people live in Britain. This means that there are 3.5 times more unbanked people in India than people who live in the U.K. The fact that so many Indians are unbanked is because you need a form of identification and a fixed address, among other information, which for many homeless Indians is impossible. These individuals, then, rely on cash which hinders their spending abilities. Along comes Bitcoin which allows you to make deals all over the world quickly, cheaply and securely - without needing a bank account. No wonder, then, that to date more than 600,000 Indians use Bitcoin, according to several bitcoin outlets. In 2015, more than 500 merchants in India and five of India's largest companies, including Dell, accepted the crypto currency as payment, according to GBminers co-founder Amit Bhardwaj. The number grows by day. True, that Bitcoin is far from popular, and most Indians prefer fiat money, but a recent Forbes article reports Bitcoin's craze is catching on and that, to date, there are more than 600,000 users in the country. Although India's RBI has long warned crypto currency users and traders of its perils, Indian Prime Minister, Narendra Modi, indirectly promoted Bitcoin, on July, 2, 2015, with his ambitious Digital India Plans included digitizing government data, improving India's digital infrastructure, and optimizing its online connectivity. Then, the government formed an inter-disciplinary committee to examine the framework on virtual currencies and set up a forum MyGov for public opinion on virtual currencies.²²

FUTURE OF BITCOIN IN INDIA

Observers predict that India's government will regulate Bitcoin in stages. India's Bitcoin industry welcomes these changes knowing that government acceptance will give the crypto currency the backing it needs. In fact, India's Bitcoin industry has long tried to popularize Bitcoin with strategies that include conducting security checks, requesting identification from users, such as government-verified address documents, Permanent Account Numbers (PAN)

²¹ *The Future of Cryptocurrency In India*, Available at: <https://www.compareremit.com/money-transfer-guide/the-future-of-cryptocurrencies-in-india/>

²² *Ibid*

or Aadhaar IDs, and sometimes even checking bank details. Private Bitcoin companies have also launched an association, called the Digital Assets and Blockchain Foundation of India, to educate lay people on Bitcoin benefits and usage. Government intervention credits their efforts.²³

RISKS ASSOCIATED WITH BITCOINS

- RBI through its press release dated 24th December, 2013 has warned the public about the negative attributes of bitcoins and its usage. It specifically pointed out, that since they are stored digitally, they are exposed to risks such as hacking, attacks, compromises etc.
- Bitcoins are not backed and/or regulated by a centralized agency till date, making them less reliable.
- There is no forum, where a user can possibly reach out for any help or grievance, as a result of which Indian consumers are being exposed to transactional and informative risks.
- Another issue pertains to awareness. Lot of consumers has little or no information regarding risks associated with bitcoins lending them into unwanted trouble under regulations such as anti-money laundering.
- One of the very important attributes of bitcoins is its volatility. Steep changes every second are expected, making investors prone to zero-worth risks.
- Several incidences have occurred stating that bitcoins have been used for illicit and illegal activities around the globe. Reportedly, a recent ransom ware attack called WannaCry spread on a large scale basis; the hackers had demanded payment in respect to ransom money in bitcoins. The incidence among others has raised questions on the viability of the crypto currency. Bitcoins have also been used in Ponzi schemes, resulting in huge loss of money for several investors.²⁴

CONCLUSION

The Bitcoin creators' intention was to develop a decentralized cash-like electronic payment system. It has already gained wide acceptance around the world- hence banning them would not be an option in India. Instead, this industry would need to be regulated. The sooner this is done, the better.

²³ *Ibid*

²⁴ *Supra* note 6

WOMEN EMPOWERMENT IN LOCAL GOVERNANCE AND CHALLENGES: INDIAN SCENARIO

Preeti Singh*

Abstract

“You can tell the condition of a nation by looking at the status of women”

- Jawaharlal Nehru

Women empowerment in local governance is one of the imperative issues of development. Both men and women must act decisively for the growth of any nation. In India, despite many international agreements affirming human rights, women are still much more likely than men to be poor and illiterate. They usually have less access than men to medical care, property ownership, credit, employment etc. They are far less likely than men to be political leaders. But, history is a witness that women in the past like Razia Sultana, Rani of Jhansi, Sarojini Naidu and Indira Gandhi have demonstrated unique leadership capabilities. God has gifted women with compassion, tender-heartedness, caring nature, concern for others. These are very positive signs which imply that women can be leaders. But in Indian society man has always acted as the master of the scene and the decision regarding the issue of empowering women has always been taken by him. In India, the 73rd and 74th Constitutional Amendment provides 33.33% reservation for women in the rural and urban Local Self Governing Bodies. However, some practical difficulties have been experienced at the field level such as no attendance, proxy members, sarpanch pati and even lack of political education and training of women for the role of leadership.

Thus, this paper aims to bring women out of confines in which centuries of traditions had kept them. In order to help women to be in limelight, they need to be empowered. Therefore, empowerment of women is the prerequisite to transform a developing country into a developed country and is vital to sustainable development and realization of human rights for all.

Keywords: Women empowerment, Political Education, Development, Local Governance, Human Rights

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INTRODUCTION

“Only if unequal social and institutional discrimination is eliminated, and women and men can participate in the development process, can human development goals be attained.”¹

India is considered to be a male-dominated society; the ideology toward women is to confine them to the private sphere of life and restricts women's existence within domestic roles as wives and mothers. This male hegemony prevails in the decision-making processes both in private as well as public domains. But, politics should be a democratic, participatory, accountable and transparent means to bring about a just, humane and equitable society. Political system should incorporate the interests of all and be accessible to all sections of society of which women constitute half of the population. High cost of electioneering, improper and illegal practices, violence and corruption are some reasons that prevent women from participating in politics. Therefore, it is high time to seek and work towards transformation of politics that would establish a decisive role for women at all levels of governance and politics.

The 73rd and 74th Constitutional Amendments² have constitutionalized the elected grassroots level local governing bodies, i.e., Panchayats and Municipalities as the third strata of the Government structure. These are self-governing institutions that stand for a “*decentralized, participatory, accountable, transparent, relevant polity administration*”. The decentralisation of powers is a pre-requisite of a democratic society. Local Self-Government implies the decentralisation of powers so that the elected bodies may function independently with authority and resources to bring about economic development and social justice.³

The Constitutional Acts have also set into motion a process that has made women's representation in local level decision-making a reality. Women's leadership and effective participation is increasingly on the development agenda of governments, bilateral and multilateral agencies and non-governmental organisations, including women's rights groups.⁴

¹ The United Nation's Fourth World Conference on Women (Beijing, 1995)

² The Constitution (Seventy-Third Amendment) Act, 1992 introducing ‘The Panchayats in Part-IX, Articles 243-243-O’; The Constitution (Seventy-Fourth Amendment) Act, 1992 introducing ‘The Municipalities in Part IX-A, Articles 243-P-243ZG’

³ Biswajit Mohapatra, “*Local Self-Governance and People's Empowerment: Challenges and perspectives*”, 59 IJPA, 804-811 (2013)

⁴ International Centre for Research on Women (ICRW) and UN Women: United Nation Entity for Gender Equality and Empowerment of Women, *Opportunities and Challenges of Women's Political Participation in India- A Synthesis of Research Findings from Select Districts in India*, (2012)

Especially, the 73rd and 74th Constitutional Amendment Acts provide for an opportunity for women's entry into political spheres. These Amendment Acts provide for a 33.33% reservation of seats for women in the governance of local bodies both in rural and urban with aspiration of good governance and fair representation in the development process at grassroots level.

The National Panchayati Raj Day (*National Local Self-Government Day*) is the national day of India celebrated by Ministry of Panchayati Raj on 24th April annually. The then Prime Minister of India Manmohan Singh inaugurated 1st National Panchayati Raj Day in 2010. He mentioned that if PRIs functioned properly and locals participated in the development process, the Maoist threat could be countered. The present Prime Minister Narendra Modi on 24th April 2015 called for an end to the practice of "husbands of women sarpanches" or "sarpanch pati" exercising undue influence on the work of their wives elected to power. He hailed the contribution of women to the functioning of panchayats. He urged panchayat members to work with a five-year vision with concrete plans to bring about positive changes in their villages.

HISTORICAL BACKGROUND

The 73rd and 74th Constitutional Amendment Acts of 1992 are an important landmark in the history of Indian women's participation in the formation of democratic institutions at grassroots level. The '*System of Self-Governance- Panchayat Raj*' was introduced in 1959 following the submission of Balwant Rai Mehta Committee Report of 1957. It recommended that besides 20 members of the Panchayat Samiti, there should be two women as co-opted members. This may be said to be the first official declaration for women to enter active politics at the grassroots. In many parts of India, women were recruited to the PRI by co-option rather than through election.

The 64th Constitutional Amendment Bill was introduced in Parliament in 1989, which provided for "as nearly as may be" up to 30% reservation for women. But it could not be passed. The Bill was defeated by a narrow margin in the Upper House. The Bill was reintroduced in September 1991, as the 73rd and 74th Constitutional Amendment Bills with an additional provision such as 1/3rd representation for women member representatives. It also contained provision for women reservation to the seat of chairpersons. The Bills were finally passed on December, 1992 and ratified by half the states by April, 1993. They came into

operation as 73rd and 74th amendments to the Constitution of India on 24th April 1993.

The provisions of the 73rd and 74th Amendment had far reaching consequences. It provided for direct elections to all the seats for the Panchayat from the village level to the intermediary block committee (Panchayat Samiti) to the district level (Zila Parishad) for a period of 5 years.⁵ The act is most significant for the reservation for women and Scheduled Caste and Scheduled Tribes (SC/ST). There are certain general features, which could be taken advantage of by women. Such as direct elections for membership and Sarpanch, village head or chairperson post at the local as well as the block level. This amendment can be considered as a landmark in the empowerment of women's by providing an opportunity to women's to perform very well in public life. The most significant aspect is that the gender representation in the decision-making has been taken into account.

LEGAL FRAMEWORK: AT INTERNATIONAL LEVEL

India has also ratified various international conventions and human rights instruments committing to secure equal rights of women like Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1993. The one of the significant goals set out in World Conference on Women, 1995, Beijing was adequate representation of women in all decision-making bodies.⁶

The lesson learned from the MDG (2000- 2015) is that the global development agenda needs to be rooted in the local development agenda and MDGs “best achieved” when local governments are engaged and inter-governmental (national-local) relationships are effective.⁷

The Post-2015 Development Agenda: Sustainable Development Goals (SDGs) also talks about that women's participation at the local level needs to be measured for at least two of the proposed SDGs:-

- ***Goal 5:*** Achieve gender equality and empower all women and girls

⁵ Article 243-E: Duration of Panchayats etc.; Article 243-U: Duration of Municipalities, etc.

⁶ FWCW 1995, Beijing, under UN

⁷ MDG 3: Promote gender equality and empower women. See *MDG India Country Report 2015*, Government of India, Ministry of Statistics and Programme Implementation, Social Statistics Division, Available at:

http://mospi.nic.in/sites/default/files/publication_reports/mdg_2july15_1.pdf (Accessed on: 29/09/2017 at 10:04AM)

- **Goal 16:** Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

LEGAL FRAMEWORK: AT NATIONAL LEVEL

The principle of gender equality is enshrined in the Indian Constitution in its Preamble (EQUALITY of status and of opportunity), Fundamental Rights (Part-III), Fundamental Duties (Part-IV) and Directive Principles of State Policy (DPSP-Part-IV).

The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women under Article 15(3).⁸ The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.⁹

The Constitution (Seventy-Third Amendment) Act, 1992 introduced ‘Panchayats’ in Part-IX, Articles 243-243-O and the Constitution (Seventy-Fourth Amendment) Act, 1992 introduced ‘Municipalities’ in Part IX-A, Articles 243-P-243ZG. These are the basic provisions and had to be supplemented by the respective state laws because ‘local government’ is an exclusive state subject under Entry 5 of List II of VII Schedule of the Constitution. The Union has only outlined the scheme. The Article 243-D and 243-T especially talks about the reservation of 1/3rd seats to women (including the number of seats reserved for women belonging to SC/ST) in the Panchayats and municipalities respectively. The Constitution (73rd Amendment) Act, 1992 introducing Panchayats in Part-IX is a major step in the direction of implementing the directive principle under Article 40.¹⁰

The Government of India has addressed the issue of empowerment by consolidating all programmes for women under the National Mission of Empowerment of Women (NMEW). The NMEW was passed in 2001 and its mission is to enhance economic empowerment of girls and women through skill development, micro credit, vocational training and entrepreneurship. The policy focuses on “*the advancement, development, and empowerment of women.*” Specifically, the policy focuses on ending gender inequality and violence against women. The “*Results-Framework Document (RFD) for Ministry of Panchayati Raj-(2014-*

⁸ Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

⁹ Article 40: Organisation of Village Panchayats

¹⁰ Mahendra P. Singh, *V.N. Shukla's Constitution of India* 350 (11th Ed. 2011)

2015)" of Government of India provides for strengthening of democracy at grassroot level to attain decentralized and participatory local self-governance through Panchayati Raj Institutions by increasing participation of women/other disadvantaged groups in decision making through Gram Sabha and various Panchayat Committees.¹¹

WOMEN AND LOCAL GOVERNANCE: THE PANCHAYAT RAJ

"If by strength is meant brute strength, then, indeed, is woman less brute than man. If by strength is meant moral power, then woman is immeasurably man's superior. Has she not greater intuition, is she not more self-sacrificing, has she not greater powers of endurance, has she not greater courage? Without her, man could not be." - Mahatma Gandhi

Local governing bodies in India are called "Panchayat Raj Institutions (PRIs)" and 1/3rd of seats and leadership positions must be reserved for women. States such as Andhra Pradesh, Bihar, Chattisgarh, Jharkhand, Kerala, Maharashtra, Orissa, Rajasthan, Tripura and Uttarakhand have increased reservations to 50%.¹² The term "Local Government" literally means management of the local affairs by the people of the locality. It is based on the principle that the local problems and needs can be looked by the people of the locality better than by central or state governments. The term "Local Government" or "Local self-government" means the government by freely elected local bodies which are endowed with power, discretion and responsibility to be exercised and discharged by them, without control over their decisions by any other higher authority. Their actions are, however, subjected to the supremacy of the national government. The common desire was to ensure self-government by the local bodies, that is, "*the third tier*".

IMPACT OF EMERGING LEADERSHIP AMONG WOMEN IN LOCAL SELF-GOVERNMENT

The effect of reservation for women has been increase in the number of public goods. They have used their elected authority to address critical issues and significantly make more investments in education, drinking water facilities, road construction, hygiene and health, public toilets, village development etc. Women and men have different policy priorities.

¹¹ Results-Framework Document (RFD) for Ministry of Panchayati Raj-(2014-2015), Available at: <http://www.panchayat.gov.in/documents/10198/0/RFD%20201415.pdf> (Accessed on: 30/09/2017 at 11:52AM)

¹² Press Information Bureau, Government of India, Available at: <http://www.pib.nic.in/newsite/erelase.aspx?relid=74501> (Accessed on: 20/09/2017 at 10:08AM)

Women are also likely to bring welfare issues such as violence against women, childcare, and maternal health to consideration onto the agendas of political campaigns. Women representatives devote more energy to women-specific issues than men do and are more successful in passing legislation on women's issues when they propose them. In these and other ways, the issues that women have chosen differ from conventional political platforms, which are usually caste, ethnic and religion based. The some of them were as following:

- 40 teams of women in Sonabhadra (Uttar Pradesh) area carried out systematic campaigns covering ten villages each, to explain the salient features of the 73rd Amendment and the place given in to women. Women, who took part in these campaigns, were very clear about their cattle and for their families. They were equally determined to prevent the inflow of liquor into their area.¹³
- A study of the all-women panchayats of Maharashtra concluded that such panchayats gave expression and importance to local needs, by addressing issues like water scarcity, or schoolrooms. In general, data reveals a high level of awareness about reservations, but low levels of awareness about the powers and responsibilities of panchayats. Decentralisation can be regarded as an important means for addressing gender inequality and empowerment of women.¹⁴

Therefore, women's experience of being involved with the PRI has transformed many of them. They have gained a sense of empowerment by asserting control over resources, officials and most of all by challenging men. They have become articulate and conscious of their power. Despite their low- literacy level, they have been able to tackle the political and bureaucratic system successfully. Thus, the positive discrimination of PRIs has initiated a momentum of change. Therefore, involving women in politics has a positive impact on incorporating gender equal perspective in policies and social programs.

POSITIVE DISCRIMINATION OF PRIs: FROM REPRESENTATION TO PARTICIPATION

¹³ Devaki Jain, UNDP, *Panchayat Raj: Women Changing Governance*, September, 1996, Available at: http://www.devakijain.com/pdf/jain_panchayat.pdf (Accessed on: 06/10/2017 at 03:15PM)

¹⁴ UNDP, *Decentralisation in India: Challenges & Opportunities*, Available at: http://www.in.undp.org/content/dam/india/docs/decentralisation_india_challenges_opportunities.pdf (Accessed on: 04/10/2017 at 03:25PM)

While participation is obviously contingent upon representation, it would be a mistake to see representation as an end in itself. Effective participation cannot be legislated. It involves the creation of a political, social and cultural environment in which women acquire the awareness, information base and confidence to articulate their concerns, and an institutional environment that is receptive and responsive to such articulations. This arguably requires more committed and sustained initiatives by political parties and civil society organisations. As such, while laws and institutions can indeed create the conditions for representation, political parties and civil society and especially women's organizations and the women's have an important role to play in creating the conditions for effective participation.¹⁵

What reservation has basically done is to give the other half of the state, i.e. women a say in the political system in a country, albeit at the grassroots. If we see it in another way, once these women taste power at the local level and understand its intricacies, they could very well enter national politics, with or without reservation, provided the political parties give party tickets to the women participants.

Women participation in local level politics brings viewpoints which are essential for a holistic development of the society. The presence of women in local governments serves as an encouragement for other women to enter diverse professions and leads to breaking stereotypes of women's roles in society and public space. People had gained confidence in women as good public administrators and local government representatives after seeing women making a positive difference in other people's life. The society acknowledges the sincerity and commitment of women to their duties and their resistance to criminalization of politics.¹⁶

WOMEN RESERVATION IN LOCAL GOVERNMENT - GOOD OR BAD?

Arguments in support

¹⁵ Niraja Gopal Jayal, *From Representation to Participation: Women in Local Government*, Available at: http://www.un.org/womenwatch/daw/egm/eql-men/docs/EP.3_Jayal.pdf (Accessed on: 05/10/2017 at 01:33 PM)

¹⁶ Richa Shanker (Director, Central Statistics Office, India), Ministry of Statistics and Programme Implementation, India, *Measurement of Women's Political Participation at the Local Level: India Experience*, Fifth Global Forum on Gender Statistics, Aguascalientes, Mexico, 3-4 November 2014, Available at: http://unstats.un.org/unsd/gender/Mexico_Nov2014/Session%206%20India%20ppt.pdf (Accessed on: 17/09/2017 at 12:25 AM).

- Reservation for women does not discriminate, but compensate for actual barriers that prevent women from their fair share of political seats.
- Reservation implies that there are several women together in a committee or assembly, thus minimizing the stress often experienced by the token women.
- Women have the right as citizens to equal representation.
- Women's experiences are needed in political life.
- Election is about representation, not qualifications.
- Women are just as qualified as men, but women's qualifications are downgraded and minimized in a male dominated system.
- It is in fact the political parties that control the nominations, not primarily the voters who decide who gets elected.
- Introducing reservation may cause conflicts, but only temporarily.

Arguments against

- Reservation is against the principle of equal opportunity for all, since women are given preference.
- Reservation is undemocratic, because voters should be able to decide who is elected.
- Quotas imply that politicians get elected because of their gender, not because of their qualifications and that more qualified candidates are pushed aside.
- Many women, who do not want to get elected, get elected just because they are women.
- Introducing quotas creates significant conflicts within the party system.

PROBLEMS AND CHALLENGES FACED BY WOMEN REPRESENTATIVES

- No attendance/ Proxy members
- Sarpanch Pati
- Sexual violence
- Discrimination
- Political Education and training
- Role of family
- Socio-Economic Conditions
- Self-Confidence

- Inadequate support mechanism by Government agencies
- Dalit women participation as representatives in village panchayat

50% RESERVATION FOR WOMEN IS THE URGENT NEED OF THE HOUR

The reform in Bihar (in 2005) is the first of its kind in India and according to the information made available by the Institute for Democracy and Electoral Assistance (IDEA) there is no other countries where the local governance has adopted a reservation of 50%. This is a significant increase in women representation and it is believed that such a reservation policy will have a positive effect on women's empowerment.¹⁷ In India, the 73rd and 74th Constitutional Amendment provides 33.33% reservation for women in the rural and urban Local Self Governing Bodies.

However, some practical difficulties have been experienced at the field level. For example: A particular Gram panchayat has 9-member body. According to 33.33% reservation for women, there will be 6 men and 3 women in this body. Therefore while taking decisions or passing a resolution, the men have the majority. This amounts to disregard and rejection of most of the resolutions tabled by the women members. Women are forced to maintain silence since the men have numerical majority in most of the Gram panchayats. Gradually women start withdrawing from the Gram panchayat proceedings. Same is the scenario at different levels in the government, where women officials are less in numbers. Dominating attitude of the male officials often obstruct the smooth functioning of the women officials.

The Ministry of Panchayati Raj in document titled "*Roadmap for the Panchayati Raj (2011-16): An All India Perspective*", while discussing about women and panchayats provides that the President of India in her Address to the Parliament on 4.6.09 had mentioned the intent to provide 50% reservation for women in Panchayats as women suffer multiple deprivations of class, caste and gender.¹⁸ Women have succeeded in many cases because of the power of unity. Therefore we all should fight against injustice unitedly, at the micro and macro levels. So, the Government is to approve the proposal for enhancing reservation of women in

¹⁷ Institute for Democracy and Electoral Assistance (IDEA), 2006

¹⁸ Roadmap for the Panchayati Raj (2011-16): An All India Perspective, 2011, Available at:

<http://www.indiaenvironmentportal.org.in/files/panchayat%20Roadmap.pdf> (Accessed on: 18/09/2017 at 05:55 PM)

Panchayats from the present 1/3rd to 50%.¹⁹

CONCLUSION AND SUGGESTIONS

"It's empowerment that leads to entitlement and entitlement leads to enrichment." - Prof. Amartya Sen

The essence of good governance lies, on one hand, the inclusion of local level planning in the national government and on the other hand, the success of a local government depends on peoples' participation. It is the grassroots level people who could contribute significantly to the governance of their communities. However, unequal participation of women and men in the government planning works as a barrier to ensure good governance In India, reservation for women in political bodies became necessary, considering the social conditions in which women of the country lived even after the constitutional guarantee of their rights to equality and political participation it became necessary for the state to remind the political institutions at different levels, particularly the Panchayat level (district, block, village) to give adequate representation to women. The 73rd and 74th Constitutional Amendment envisaged a significant structural change by decentralizing power and redressing the gender imbalance in the institutions of self-governance.

So, we have to encourage and elicit everybody's participation for ensuring the success of democracy and well-being of a just society. Every person has unique skills. We should give each individual the scope to realize her or his potentials and utilize them for the betterment of our society. Especially women, she is mother of creation. She is capable of ensuring a healthy society. It is believed that if a woman is educated, the entire family reaps the benefit. Therefore participation of this indispensable component of our society in political and decision-making process is must. The need of the hour is to bring women out of confines in which centuries of traditions had kept them. In order to help women to be in limelight, they need to be empowered. Therefore, empowerment of women is the prerequisite to transform a developing country into a developed country. Women's empowerment is vital to sustainable development and the realization of human rights for all.

Therefore, the key strategy is to provide support to PRIs, women's movements and community representatives for strengthening of local bodies' 360 degree approach on media

¹⁹ Women Reservation in Panchayats, Press information Bureau, Government of India, Available at: <http://www.pib.nic.in/newsite/erelease.aspx?relid=74501> (Accessed on: 20/09/2017 at 11:08AM)

and communication for behaviour change and social mobilization for gender equality.

Ultimately, there is a *need for democratization from within*, i.e., if women are to come even without reservation, the foremost responsibility should be that of the political parties who should recognize the capability and success of women and give party tickets to those who are interested to stand for the said post.

The present system of reserved seats is a necessary evil that may continue until greater representation of women is achieved.

ROLE OF COLLECTIVE BARGAINING IN INDUSTRIAL DEMOCRACY IN INDIA: ISSUES AND CHALLENGES

Dr. Meena Ketan Sahu*

INTRODUCTION

The prime objective of the Industrial relations is to regulate the powers of management and organised labour and to provide a mechanism to reconcile there too. It presupposes equal status before law of labour and management and acts as a countervailing force to reduce the inherent inequality in the collective power of the two parties.

Collective bargaining has developed to some extent in India since independence. This inspiration for peaceful settlement of differences between management and labour came from Gandhiji. In the past, collective bargaining was not necessary because the production methods before Industrial revolution differed so much from those of Modern Industry. But, now men are working towards new techniques by which agreement, rather than coercion, can become the core of the needed regulation.

Today, a distinct feature of the modern industrial era is collective bargaining. It is the technique for voluntary regulation of industrial relations.

Settlement of industrial disputes is very necessary to improve the industrial relations in the organization. Rise and growth of the trade unions evolved a device of collective bargaining to resolve their disputes by negations between the two parties without the help of any arbitrator. It has now become the central point of industrial relations.

Theoretically, collective bargaining is based on the principle of balance of power. Managements and unions representing the workers are considered as two separate powers that jointly negotiate with each other various terms of employment. In actual practice both the parties bargain to get maximum advantage out of the other by using, if necessary, threats and counter threats like strikes, lockouts and other direct actions. Information about the company, industry and other relevant statistical data are pressed into service in the process of bargaining. Collective bargaining therefore has been used as an important method of

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influencing managerial decisions over past years. The element of power does play a part in arriving at an agreement. The method of horse trading also is not uncommon.

CONCEPTUAL ANALYSIS OF COLLECTIVE BARGAINING

The expression “collective bargaining” has acquired a technical meaning in industrial law. The term Collective Bargaining originated in the end of the nineteenth century. The word “Collective Bargaining” is made up of two words “Collective” which implies group action through its representatives, and “bargaining” which suggests negotiating.

It provides a system of industrial jurisprudence establishing and administering the conditions under which wage earners render their services. It is an industrial peace treaty.

The meaning of the expression “Collective Bargaining” has been the subject-matter of controversy. It has been defined in the encyclopaedia of social sciences as “a process of discussion and negotiation between two parties, one or both of whom is a group of persons acting in concert.

According to Dale Yoder, “it is essentially a process in which employees act as a group in seeking to shape conditions and relationships in their employment.” Thus, collectively bargaining is a method by which problems of wages and conditions of employment are resolved amicably (although after reluctantly) peacefully and voluntarily between labour and management. In brief, it can be described as continuous, dynamic process for solving problems arising directly out of employer-employee relationship.

Collective bargaining represents a situation in which the essential conditions of employment are determined by bargaining process undertaken by representatives of a group of workers on the one hand of Employers on the other. The prerequisites for its success are first unions which are neither controlled nor seriously influenced by the Employers and second some rough equivalence of bargaining power on the two sides of the table. As such, unorganised workers are usually helpless and they have little or no power to bargain against their employer.

The conclusion of the collective bargaining is the collective agreement or ‘labour contract’. It is the written statement of the terms and provisions arrived at by collective bargaining. It is either a mimeographed document or a small printed booklet.

OBJECTS OF COLLECTIVE BARGAINING

It enumerated the following objects:

- (1) To establish and built up union recognition as an authority in the work place,
- (2) To raise workers' standard of living and win a better share in company's profits
- (3) To express in practical terms the workers' desire to be treated with due respect and to achieve democratic participation in decision affecting their working conditions
- (4) To establish orderly practices for sharing in these decisions and to settle disputes which may arise in day to day life of the company and lastly
- (5) To achieve broad general objectives such as defending and promoting the workers' interests.

COLLECTIVE BARGAINING IS DEMOCRATIC

Collective bargaining is an institution that allows individual freedom of association and discussion both for management and organised workers. It is a process of decision making and rule making for the governance of industrial life. It is self-government in operation and promotes the democratic virtues of independence and responsibility. Collective bargaining has come to stay as the main plank of industrial democracy.

FORMS OF COLLECTIVE BARGAINING

Collective bargaining may be broadly classified under two heads, such as 'single-employer bargaining' and 'Association or Multi-employer bargaining'. Again, for bargaining purposes the union representatives are generally at two levels-local and national.

IMPORTANCE OF COLLECTIVE BARGAINING

The necessity of collective bargaining is keen felt for solving the problems arising at the plant or industry level. It restricts management's freedom or action, for even where management security is intact. Again, it opens up a channel of communication between the top and bottom of an undertaking which is difficult otherwise.

DURATION OF COLLECTIVE BARGAINING

The duration of collective bargaining agreements vary from agreement to agreement. There is a general tendency on the part of union to have the contract or short duration, but management on the other hand prefers agreement of long duration.

MAJOR CLAUSES IN COLLECTIVE BARGAINING

The most frequently included subjects of collective bargaining are given below:

- (i) Wage clauses
- (ii) Recognition or union security clauses
- (iii) Hours of work clause
- (iv) Seniority clause and lastly
- (v) Other miscellaneous clauses like leave of absence, welfare funds, disciplinary action or grievance procedure.

ESSENTIAL CONDITIONS FOR THE SUCCESS OF COLLECTIVE BARGAINING

In order to achieve collective bargaining, it is essential to ensure that the workers and employers must have freedom to form unions or association. The denial of such freedom negates collective bargaining. Apart from that a strong and stable trade unions, recognition of trade unions and willingness to give and take are some of the important prerequisites for success of collective bargaining.

STAGES OF COLLECTIVE BARGAINING

Broadly speaking, collective bargaining is a composite process consulting of certain stages. They are:

1. Negotiation- It is the first step in the process. Here, only the parties to the dispute are involved without any intervention from the third party.
2. Conciliation- It involves a third party whose responsibility is limited to keeping the disputing parties together around the conference table. In industrial jurisprudence, conciliation and mediation are used inter-changeably meaning thereby the presence of a third party whose function is that of peace-maker persuading and helping the parties to continue their bargaining efforts to reach an amicable settlement.

Conciliation is a process by which discussion between employers and employees is kept going on through the activities of a third party (conciliator). The Industrial Disputes Act, 1947 and other state enactment authorise the Government to appoint conciliators charged with the duty of mediating in and promoting the settlement of industries in a specified area or one or more industries either permanently or for a limited period. The appropriate Govt. may also constitute a Board of conciliation for promoting the settlement of industrial disputes. Such board consists of an independent chairman and two or four other members, representing the parties to this dispute. The conciliation machinery can take note of the existing as well as apprehended disputes either on its own or on being approached by any party to the dispute. While conciliation is compulsory in all public utility services, it is optional in non-public utility services. In conciliation, the ultimate decision rests with the parties themselves but the conciliator may after a solution to the dispute acceptable to both the parties and serve as a channel of communication. The parties may accept his recommendation for settlement of any dispute or reject it altogether.

3. Arbitration- It goes further than conciliation or mediation. While conciliation is to aid and promote the settlement by persuasion and suggestions, the arbitration has the responsibility for deciding the nature of the final settlement, acceptance of which may or may not be compulsorily required by the disputants. Apart from that there is also the method of enquiry or investigation by third parties, which again may and may not result in a compulsory settlement.

The term “collective bargaining” has been defined as under:

Michael J. Jucius defines “Collective bargaining refers to a process by which employers on the one hand and representatives of employees on the other, attempt to arrive at agreements covering the conditions under which employees will contribute and be compensated for their services.”

According to Encyclopaedia of Social Sciences, collective bargaining is a process of discussion and negotiation between two parties one or both of whom is a group of persons acting in concert. The resulting bargain is an undertaking as to terms and conditions under a continuing service are to be performed.”

Edwin B. Flippo defines, "Collective bargaining is a process in which the representatives of labour organization and the representatives of business organization meet and attempt to negotiate a contract or agreement which specifies the nature of the employee-employer union relationship."

It is the method where trade unions and the representations of management sit together and resolve their disputes or negotiate an agreement with the management for better working conditions, terms of employment, bonus, participation in management and other benefits. This method has generally been used by the trade unions all over the world.

In other words, collective bargaining is a process, a technique, or device to protect the interests of the employees and employees, to determine the employment conditions, to fix the wage and salary and achieve the objectives of the organization.

IMPORTANCE OR ROLE OF COLLECTIVE BARGAINING IN PERSONNEL MANAGEMENT

The role of collective bargaining may be evaluated from the following points of view:

- (1) From management point of view: The main object of the organization is to get the work done by the employees at work at minimum cost and thus earn a high rate of profits. Maximum utilization of workers is a must for the effective management. For this purpose co-operation is required from the side of the employees and collective bargaining is a device to get and promote co-operation. The labour disputes are mostly attributable to certain direct or indirect causes and based on rumours and misconceptions. Collective bargaining is the best remedial measure for maintaining the cordial relations. Strikes, go-slow tactics are avoided which result in increasing the production. It promotes industrial democracy.¹
- (2) From labour point of view: Labour has poor bargaining power. Individually a worker has no existence because labour is perishable and therefore, the employers succeed in exploiting the labourers. The working class in united form becomes a power to protect its interests against the exploitation of the employers through the process of collective bargaining. The collective bargaining imposes certain restrictions upon the employer. Unilateral action is prevented. All employers are treated on equal footings. The

¹ Dr. Varma & Agarwal, *Personnel Management and Industrial Relations*, Revised Edition, 1991, Forward Book Depot, Nai Sarak, Delhi, p. 338.

conditions of employment and rates of wages can be changed only through the negotiations with labour. Employer is not free to make and enforce decisions at his will.

- (3) From trade union point of view: Collective bargaining can be made only through the trade unions. Trade unions are the bargaining agents for the workers. The main function of the trade unions is to protect the interests of workers through constructive programmes and collective bargaining is one of the devices to attain that objective through negotiations with the employers. Trade unions may negotiate with the employer for better employment opportunities and job security through collective bargaining. It also satisfies the ego of the workers.
- (4) From Government point of view: Government is also concerned with the process of collective bargaining. Government passes and implements several labour legislations and desires it to be implemented in its true sense. If any person violates the rules and laws, it enforces it by force. Collective bargaining prevents the Government from using the force because an amicable agreement can be reached between employer and employees for implementing the legislative provisions. Labour problems shall be minimised through collective bargaining and industrial peace shall be promoted in the country without any force.

ESSENTIAL PREREQUISITES FOR COLLECTIVE BARGAINING

Effective collective bargaining requires the following pre-requisites:

- (1) Existence of a strong representative trade union in the industry that believes in constitution means for settling the disputes.
- (2) Existence of strong and enlightened management which can integrate the different parties, i.e employees, owners, consumers and society or Government.
- (3) Agreement on basic objectives of the organization between the employer and the employees and on mutual rights and liabilities.
- (4) Existence of a fact-finding approach and willingness to use new methods and tools for the solution of industrial problems. The negotiation should be based on facts and figures and both the parties should adopt constructive approach.
- (5) Proper records for the problems should be maintained.

- (6) Collective bargaining should be best conducted at plant level. It means if there are more than one plant of the firm, the local management should be delegated proper authority to negotiate with the local trade union.
- (7) In order that collective bargaining functions properly, unfair labour practices must be avoided by both the parties.

It may be emphasised here that the institution of collective bargaining represents a fair and democratic attempt at resolving mutual disputes. Wherever it becomes the normal mode of setting outstanding issues, industrial unrest with all its unpleasant consequences is minimised. The contract must include arbitration clause in case there is a dispute.

CONTENTS OF COLLECTIVE BARGAINING AGREEMENT

Collective bargaining is a form of collective contract. Every matter defining the relationship between the management and the workers may form a part of the contract. Usually, two types of provisions are included in a collective bargaining agreement:

- (i) Economic provisions and
- (ii) Political provisions.

Economic provisions involve provisions which affect the economic and working conditions of workers. The political provisions include the provisions relating to the general administration such as divisions of authority and responsibility between the management and the employees or workers participation in decision making bodies or powers to challenge the decisions taken by management etc.

Generally, the following items may be included in a comprehensive contract:

- (i) Wage rates, including shift and overtime wage rates, the method and the period of payment of wages and incentive wages.
- (ii) Allowances, holiday pay, leave with pay etc.
- (iii) Hours of work, holidays, vacations, leave rules etc.
- (iv) Lay-off of workers, rationalisation, demotion, discharge, promotion or transfers, covering particularly the nature and effect of security.
- (v) Grievance procedures including steps, time limitations and provisions for arbitrations.

- (vi) Safety and health facilities.
- (vii) Setting up of standards for production, methods and procedures.
- (viii) Workers representation in management, profit sharing and co-partnership.
- (ix) Recognition of trade union and its authority.
- (x) Maintaining discipline, penal provisions for indiscipline.
- (xi) Provision for retirement benefits such as pension, gratuity, provident fund etc.
- (xii) Performance appraisal, job analysis and job evaluation.
- (xiii) Bonus.
- (xiv) Labour welfare and social security measures. Etc.
- (xv) Arbitration clause.

The above items are not all. Many others may be included in an agreement but certain items have specifically been excluded from the purview of collective bargaining such as managerial policies and decisions which cannot be negotiated in any way.²

ROLE OF COLLECTIVE BARGAINING IN SETTLEMENT OF INDUSTRIAL DISPUTES

The methods of settling industrial disputes are not very much difficult from the methods of settling any other disputes. The concern of the state in labour matters emanates as much from its obligations to safeguard the interest of workers and employees as to ensure to the community the availability of their joint product/service at a reasonable price. The extent of its involvement in the process is determined by the level of social and economic development, while the mode of intervention gets patterned in conformity with the political system obtaining in the country and the social and cultural traditions of its people. The degree of state intervention is also determined by the state of economic development. In a developed economy, work stoppages to settle claims may not have as serious consequences as in a developing economy.

An important feature in the field of industrial relations in India is the role played by the State. State intervention in India has assumed a more direct form. The state has enacted procedural and substantive laws to regulate industrial relations.

² *Ibid* at p. 340

The industrial disputes legislation in India provides for two types of machinery. One is for prevention of disputes and includes works committees and welfare officers; the other is for settlement of industrial disputes and consists of conciliation officers and boards, courts of inquiry and tribunal.

In the case of settlement of industrial disputes without state intervention there are two ways in which the basic parties to an industrial dispute i.e the employer and the employees can settle their disputes. These are as follows:

- (a) Collective bargaining and
- (b) Voluntary arbitration.

But, where there is state intervention takes place are the followings:

- (a) Compulsory establishment of bipartite committees;
- (b) Establishment of compulsory collective bargaining;
- (c) Compulsory investigation;
- (d) Conciliation and mediation (voluntary and compulsory) and
- (e) Compulsory arbitration or adjudication.

The internal settlement by mutual agreement is the best method of solving differences between the employers and the workers. However, state interferences in industrial disputes in India under the present circumstances seem to be desirable and essential.

Collective bargaining is very dynamic, vital, growing, expanding and changing in its area, scope, style, coverage and levels. Previously it was distributive bargaining; now it is productive bargaining. Now it has become more scientific, factual and systematic. From plant level it has moved to industry and national level. It has almost encompassed the whole gamut of industrial life.

FACTORS FOR MAKING COLLECTIVE BARGAINING SUCCESSFUL

On the basis of discussion and information's obtained from 800 respondents (125 managers, 125 union leaders, 550 workers), the following points have emerged for making collective bargaining more successful and effective :

- i. Criteria for recognition of union.

- ii. Commitment and determination to reach an agreement.
- iii. Unfair practices must be declared illegal.
- iv. Full implementation of agreement.
- v. Based on factual data.
- vi. Well laid down grievance procedure
- vii. Mutual recognition of rights and responsibilities.
- viii. Existence of an efficient bargaining machinery.
- ix. Presence of a supportive legislative frame work.

CHALLENGES

1. Weak Bargaining Process

Collective bargaining process is an essential to protect and safeguard the workers interest. On the other hand, collective bargaining is happening separately based on the union objectives which may differ from union to union. As a result, collective bargaining process gets weakening from industries to industries due to non-cooperation among the trade unions. As it is happening in this region, identified weak collective bargaining process as a dependent variable and politicization of trade union kept as an independent variable. The following hypothesis is framed to find the association between politicization and weak collective bargaining process.

2. Chameleonic Attitude of Trade Union Leaders

Attitude of trade union leader is an important factor for better relationship among the parties of industrial relations. Consistent attitude is better which should be adopted by various parties in the industrial relations. On the other hand, chameleonic attitude from trade union leaders will definitely damage the trust between management and trade union leaders which has got direct effect on cordial industrial relations.³

CONCLUSION & SUGGESTIONS

Indian constitution considers formation of association as a fundamental right. Indian Trade Union Act allows any seven workers to join together and form a Trade union. Both give rise

³ S. Rajesh, Dr. Manoj P., *Politicization of Trade Unions and Challenges to Industrial Relations in India: A Study With A Focus On Northern Kerala*, International Journal of Business and Administration Research Review. Vol.I, Issue No.2, Nov-Jan 2014

these file to formation of multiple trade unions which goes against the very concept of unionism-the unity workers. No central legislation now exists which makes it compulsory for management to recognize more than one union or not to recognize anyone? This has further weakened the trade union and their bargaining power. The Indian Trade Union Act further allows 50 per cent of officer-bearers from outside the organization and 10 per cent of leadership from outside. This provision resulted politicization, and remote control of union activities from outside the organisations. Even the “code of discipline” only recommend recognition of trade union as a voluntary action. Recognition of trade union causes rivalry from others who are not recognized. This problem can be tackled by bringing out comprehensive central legislation covering all aspects such as Recognition, Multiplicity, outside leadership, etc.⁴

Individual worker is too weak in bargaining. Trade union, through collective bargaining, protects the interest of the workers. Thus, collective bargaining is the main object of the trade unions.

The analysis of the development of trade union movement in India shows that lack of proper leadership, and political influences presented several obstacles in the way of its development. Unions are still being dominated by the professional men and political leaders which have no identical interest with that of the workers and make use of the working force for their own interest and in their own way by organising the strikes, gherao etc. for no reasons. Because the most of the workers are uneducated and are not in a position to understand the complexity of laws. Trade unions are weak because they have lack of funds to manage the affairs of the unions, workers do not take active part in the activities because of their migratory character and low-saving capacity. Therefore, it is necessary that the strong trade unions must be created so that they may have good bargaining power to safeguard the interests of their members and help achieving the production targets. As V.V.Giri states,

“If the trade union movement is not united and strong enough to achieve these objectives the industrial structure to be built in India on the basis of full-fledged specialist democracy would not have firm foundation.”

A few following suggestions have been offered to the ills of the trade union movement:-

⁴ Abhishek Gupta, Neetu Gupta, *The 21st Century Trade Union Challenges in India*, Journal of Accounting & Marketing, 2013

(1) One union, one industry

The multiplicity of unions in the same industry establishment leads to inter-union rivalries which ultimately weakens the powers of collective bargaining and reduces the effectiveness of workers in securing their legitimate rights. To end the multiplicity of unions, ‘one union in one industry’ should be fully implemented and adheres to in practice. It will promote the mutual understanding between employers and workers and ultimately reduces the conflicts and promote labour relations better. For this purpose, political influences should be kept out of the field.

(2) Removal of inter-union rivalries

Inter-union rivalries harm the interests of the worker. It comes in the way of settlement of dispute, disunity among the ranks of workers etc. which are mainly responsible for lack of strength and poor bargaining power. All must join hands to form a single central organization on the basis of common goal and programmes covering methods and procedure. Unity of strength have two basic factors promoting interests of workers and maintaining real industrial peace.

(3) Working class leadership

Outside leadership is the main weakness of the Indian trade union movement. They are generally professional agitators and were often interested in using the workers as a ‘pawn in their political game’. It is, therefore, essential to have their own leader from within the members themselves who know the real hardships of the working class. He should be given proper education in the art of how to tackle the problems of workers.

(4) Responsibility of workers

At present, trade unions confine their attention to the workers’ demands only. It is high time they inculcate in the workers a sense of discipline and responsibility to do a full day’s work for a full fair day’s wages. They should first make every worker understand their duties and responsibilities and then their rights and privileges.

(5) Framing own policy

The trade union movement must keep itself away from the conflicting ideologies of different parties and follow an independent policy, which is best suited to the interests of the workers. Disruptive political activities should be avoided but it does not mean that the trade union movement should completely be divorced from politics and labourers should not take part in politics but it should be in their individual capacity. The political parties must not be allowed to utilise trade unions for their selfish political objectives.

(6) Varied trade union activities

Trade unions should enlarge their operations in the sphere of education, health, recreation, housing and other welfare activities. They should have contacts with their members in normal times as they contact them in the time of disputes. They must make their members educate in the sense of discipline and responsibilities by organising frequent meetings, discussions etc. they should not function only as strike committees.

(7) Strengthening of trade unions

Indian trade unions are weak in their strength and finance. The following steps may be recommended to strengthen their position:

- (i) Small trade unions must be amalgamated into one big trade union who can organise the labour welfare activities well. They should pour their resources in the interest of stability and strength.
- (ii) Improvement in the finances of trade unions should be made from their internal resources. Membership fee may be enhanced and defaulters should not be allowed to continue their membership.
- (iii) Attitude of employees needs change. They should realise that strong trade union is essential for the better development of industry.

(8) Responsible trade union leadership

Trade union leadership should be fully responsible for the acts of the union. Leaders should acquire full understanding of the constitutional and legal rights available to unions. They should make use of such rights to secure and promote workers interests.

(9) Need for comprehensive legislation

The Trade Union Act was passed as early as in 1926 which is in force since then without any major change. There should be a comprehensive legislation on the subject which should provide not only for registration and recognition of trade unions but also for protection and development of worker's interest.

The development of sound trade union organisation is a sine-qua-non for the success of industrial democracy. The success of our planning, progress and development of the world depends greatly upon the workers-their zeal, enthusiasm and solidarity. A healthy growth of genuine trade unionism is therefore imperative throughout the world. They have to modify the traditional role and adopt a new one for the economic development of an underdeveloped economy of the world.

ROLE OF COPYRIGHT & PIRACY OF REGISTERED DESIGN UNDER INTELLECTUAL PROPERTY RIGHTS

Karabi Dihingia*

INTRODUCTION

Design of an article is an intellectual property of a person who creates it as a person may not have invented an article but may have thought of a good design for it. A design of an article has a commercial value in the world of business and trade. Besides the practical utility and efficiency, a buyer is also influenced by the design of an article. Design of an article is judged solely by the eyes. An eye catching design may enhance the sale of an article. The person who creates a design has exclusive right over his design which is his intellectual property. No one can apply his design to any article without his consent, as any unauthorized application of his design to any article amounts to piracy of his design. The protection of design is important as it encourages the creativity in the industrial and manufacturing sectors and helps in the economic development of a nation. The manufacturers, therefore, pay adequate attention to the designs of the articles they produce. Legal protection, therefore, becomes necessary for the creation of new designs and their application to articles, as it ensures a fair return on investment. An effective system of protection promotes fair competition and honest trade practices, encourages creativity and promotes more aesthetically attractive products.¹ The registration of a design confers upon the registered proprietor 'Copyright' in the design for the period of registration. Copyright means the exclusive right to apply a design to any article in any class in which the design is registered. Piracy of registered design means unauthorized application of designs to the articles with respect to which the design is registered during the existence of their copyright. According to Section 22 of the Designs Act, 2000, during the existence of copyright of registered design, no one can fraudulently imitate or apply the registered design without the written consent of the registered proprietor of that design. Section 22 also provides remedies in case of piracy of registered design to the registered proprietor.²

COPYRIGHT IN REGISTERED DESIGNS

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¹ V.K. Ahuja, Law relating to Intellectual Property Rights. 2nd Edition (Haryana: Lexis Nexis 2013) at p. 217

² Meenu Paul, Intellectual Property Law.4th Edition (Haryana: Allahabad Law Agency 2012) at pp. 525 & 530

According to Section 2(c) of the Designs Act, 2000 Copyright means the exclusive right to apply a design to any article in any class in which the design is registered. This means that if a design is registered in respect of several articles in one class, the proprietor of such design shall have the exclusive right to apply the design to all of them. The term “copyright” as defined under the Designs Act, 2000 is to be contrasted with “copyright” which is conferred on the author of an original literary, dramatic, musical or artistic work under the Copyright Act, 1957. The copyright in the aforesaid works protects the works from being copied or reproduced, whereas the registration of design confers on the registered proprietor not mere an exclusive right to copy or reproduce the design, but a monopoly to produce articles of the class in which the design is registered with that design applied.³

DURATION OF COPYRIGHT IN DESIGN

According to Section 11 of the Designs Act, 2000 when a design is registered, the registered proprietor of the design shall have copyright in the design during ten years from the date of registration. Sub-section (2) of Section 11 provides that if, before the expiration of the said ten years, application for the extension of the period of copyright is made to the Controller in the prescribed manner, the Controller shall, on payment of the prescribed fee, extend the period of copyright for a second period of five years from the expiration of the original period of ten years. The total duration of copyright in design shall not exceed 15 years. After 15 years, the design will fall in public domain and will become public property.⁴

EFFECT OF DISCLOSURE ON COPYRIGHT

According to Section 16 of the Designs Act, 2000 provides that the disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and the disclosure of a design in breach of good faith by any person, other than the proprietor of the design, and the acceptance of a first and confidential order for articles bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.⁵

³ *Supra* note 1 at p. 235

⁴ *Supra* note 2 at p. 525

⁵ *Ibid* at p. 526

RESTORATION OF LAPSED DESIGNS

According to Section 12 of the Designs Act, 2000 where a design has ceased to have effect by reason of failure to pay the fee for the extension of copyright, the proprietor of such design or his legal representative may make an application for the restoration of the design in the prescribed manner on payment of prescribed fee within one year from the date on which the design ceased to have effect. The application shall contain a statement which is to be verified in the prescribed manner and fully setting out the circumstances which led to the failure to pay the prescribed fee. The Controller may require from the applicant such further evidence as he may think necessary.⁶

PROCEDURE FOR DISPOSAL OF APPLICATION FOR RESTORATION OF LAPSED DESIGNS

According to Section 13 of the Designs Act, 2000 provides that if after hearing the applicant in cases where the applicant so desires or the Controller thinks fit, the Controller is satisfied that the failure to pay the fee for extension of the period of copyright was unintentional and that there has been no undue delay in the making of the application, the Controller shall upon payment of any unpaid fee restore the registration of design. Sub-section (2) of Section 13 provides that the Controller may, if he thinks fit, as a condition of restoring the design, require that any entry shall be made in the register of any document or matter which under the provisions of this Act, has to be entered in the register which has not been so entered.⁷

RESTORATION OF LAPSED DESIGN- RIGHTS OF PROPRIETOR

According to Section 14 of the Designs Act, 2000 the rights of a proprietor of a lapsed design which has been restored shall be subject to such provisions as may be prescribed and to such other provisions as the Controller thinks fit to impose for the protection or compensation of persons who may have begun to avail themselves of, or have taken definite steps by contract or otherwise to avail themselves of, the benefit of applying the design between the date when the registration of the design ceased to have effect and the date of restoration of the registration of the design. In addition, no suit or other proceeding shall be commenced in

⁶ *Supra* note 1 at p. 236

⁷ *Supra* note 2 at p. 526

respect of piracy of a registered design or infringement of the copyright in such design committed between such dates.⁸

REQUIREMENTS BEFORE DELIVERY ON SALES

According to Section 15 of the Designs Act, 2000 the proprietor shall fulfill the following requirements before delivery on sale of any articles to which a registered design has been applied:

- a) He shall furnish to the Controller the prescribed number of exact representations or specimens of the design. If he fails to do so, the Controller may after giving notice thereof to proprietor, erase his name from the register and thereupon the copyright in the design shall cease.
- b) He shall cause each such article to be marked with the prescribed mark, or with the prescribed words or figures denoting that the design is registered. If he fails to do so, he shall not be entitled to recover any penalty or damages in respect of any infringement of his copyright in the design unless he shows that he took all proper steps to ensure the marking of the article, or that the infringement took place after the person guilty thereof knew or had received notice of the existence of the copyright in the design.⁹

INSPECTION OF REGISTERED DESIGN

According to Section 17 of the Designs Act, 2000 provides that during the existence of copyright in a design, any person on furnishing such information as may enable the Controller to identify the design and on payment of the prescribed fee may inspect the design in the prescribed manner. Sub-section (2) of Section 17 provides that any person may, on an application to the Controller and on payment of such fee as may be prescribed, obtain a certified copy of any registered design.¹⁰

INFORMATION AS TO EXISTENCE OF COPYRIGHT

According to Section 18 of the Designs Act, 2000 provides that on the request of any person furnishing such information as may enable the Controller to identify the design, and on

⁸ *Supra* note 1 at p. 237

⁹ *Ibid* at pp. 237-238

¹⁰ *Supra* note 2 at p. 528

payment of the prescribed fee, the Controller shall inform such person whether the registration still exists in respect of the design, and, if so, in respect of what classes of articles, and shall state the date of registration, and the name and address of the registered proprietor.¹¹

PIRACY OF REGISTERED DESIGNS

Piracy of registered design means unauthorized application of designs to the articles with respect to which the design is registered during the existence of their copyright. Section 22 of the Designs Act, 2000 gives the detailed provisions relating to piracy of registered design. Section 22(1) provides that during the existence of copyright in any design, it shall not be lawful for any person- (a) for the purpose of sale to apply or cause to be applied to any article in any class of articles in which the design is registered, the design or any fraudulent or obvious limitation thereof, except with the licence or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or (b) to import for the purposes of sale, without the consent of the registered proprietor, any article belonging to the class in which the design has been registered, and having applied to it the design or any fraudulent or obvious imitation thereof; or (c) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article in any class of articles in which the design is registered without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.¹²

REMEDIES AGAINST PIRACY OF REGISTERED DESIGN

The Designs Act, 2000 provides two alternative remedies to the proprietor of registered design under Section 22(2). Section 22(2) provides that if any person acts in contravention of Section 22, he shall be liable for every contravention:

- (i) to pay to the registered proprietor of the design a sum not exceeding twenty-five thousand rupees recoverable as a contract debt, or
- (ii) if the proprietor elects to bring a suit for the recovery of damages for any such contravention, and for an injunction against the repetition thereof, to pay such damages as may be awarded and to be restrained by injunction accordingly. Provided that the total sum recoverable in respect of any one design under clause (a) shall not

¹¹ *Ibid* at p. 529

¹² *Ibid* at pp. 530-531

exceed fifty thousand rupees .Provided further that no suit or any other proceeding for relief under this sub-section shall be instituted in any court below the court of District Judge.¹³

CONCLUDING OBSERVATION

In a world where simultaneous copying rages and piracy has become a business model, legislation addressing innovators' rights is a necessary addition to intellectual property law and a fair complement to anti-counterfeiting measures. Design denotes those which are protected by the Designs Act, 2000. But Designs Act prohibits registration of those which lack novelty or originality and also those designs which have been disclosed to the public domain in a tangible form or in any other way prior to the filing date. This Act has been enacted, taking into consideration the international standard that has been kept for design protection. It also states that the design must have an eye appeal, which means that it should attract people towards the article. A rationale basis for the protection of designs is to reward the designer's creativity and to provide incentives for future contributions. The registration of a design confers upon the registered proprietor Copyright in the design for the period of registration. Unauthorized application of designs to the articles with respect to which the design is registered amounts to piracy. Section 22 of the Designs Act gives the detailed provisions relating to piracy of registered design. It also provides remedies to the registered proprietor. Designs which appeal to the eye can be of a tremendous commercial value. So there is a real need to register the design as a registered design. It is the only way to prevent piracy of designs and to encourage the origin of new and original ones. The Designs Act, 2000 to a great extent serves as an umbrella protection for Designs.

¹³ *Supra* note 1 at p. 252

RE – VISITING THE LABOUR LAWS FOR THE UNORGANISED SECTOR

Ankit Srivastava* & Divyansha Kumar**

Abstract

One of the major features of the Indian economy is the impact of a vast majority of labours employed in the unorganised sector. Now the distinguishing feature of the unorganised sector is the non-applicability of labour laws and other regulations which provide basic working conditions, social security and job security. This continues to be a major problem in this sector which has resulted in extreme exploitations of the employees of the unorganised sectors in terms of wages/salaries, work-hours, job-guarantees. The families of such employees have to regularly move from one place to another in search of work as a result of which there are more number of children who drop-out from schools. The legislations providing for social securities for old-age, health-care and assistance in the event of death, marriage and accidents etc. also do not apply to majority of these employees as all the categories of jobs of the unorganized sector are still not identified by the existing laws.

This paper discusses whether the categories of the unorganised sector where the existing labour laws are applicable are being enforced at all? If not, then how is it affecting the employees and their families? The authors have also tried to find how easily legal aid is being provided to any category of workers which fall under labour law. With the help of empirical research the authors have also been able to compare, the current condition of implementation of existing laws and the legal aid provisions, for all the employees of the unorganised sector. Authors feel that there is a need to strengthen the existing laws for the unorganised sector and some stringent steps need to be taken before the adverse effects become irreparable. Furthermore a proper mechanism needs to be imposed for Legal aid assistance and labour law literacy for all those who are in need.

Keywords: Unorganised sector, Legal aid, Labour Laws, exploitations, non-applicability

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INTRODUCTION

Almost 90 per cent workforce in India is part of the unorganised sector. “The unorganised sector consists of all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary or partnership basis with less than ten total workers”.¹

‘Unorganised Sector’ means an venture owned by individuals engaged in production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.²

The benefits of various schemes or laws started for the welfare of the labours of the unorganised sector are proving ineffective due to poor implementation by the respective government authorities. All the Authorities are there, all the laws are there for them, but what is not is the proper implementation of the schemes or the laws.

Justice Thakur, the former CJI, also executive chairman of the National Legal Services Authority, said during a speech that “most of the workforce in unorganised sector gets wages lower than the fixed minimum wages. Though there is a construction workers’ protection Act but the authorities responsible for its implementation have shown little sensitivity.”³ In a similar way there are a lot of laws whose implementation, knowledge; awareness is not reaching to the targeted sector.

The Report for the national commission of labours says that the laws that the government proposes for the unorganised sector cannot be effective unless they themselves are aware of the laws, and fight to ensure that laws are brought into force; till the time there are effective means to execute, check and offer quick redress; unless breaches of the law are punished with deterrent penalties, and unless the organs of public opinion and movements and organisations mount vigil, and intercede to ensure that the provisions of the laws and welfare systems are

¹ National Commission for Enterprises in the Unorganised Sector, Report on Condition of Work and Promotion of Livelihoods in the Unorganised Sector, 2007, p.4.

² Section 2(l) of the Unorganised Workers’ Social Security Act, 2008

³ Speech in Two-day colloquium on ‘Workers in Unorganised Sector-Challenges and Way forward’, Chandigarh, April, 2015; The Indian Express; Available at: <http://indianexpress.com/article/cities/chandigarh/90-indian-workforce-in-unorganised-sector-deprived-of-welfare-schemes-says-justice-t-s-thakur/>

acted upon.⁴ The government is talking about the self-awareness, that it is important for the labours but the government forgot that the workers in the unorganised sectors are from everywhere, from the tribal areas to the household workers who don't have any idea about the laws which the government has framed as many of the labours in the unorganised sectors are illiterate and do not have access to the proper technology to get information about the laws which were enacted in favour of them. First of all, the government needs to realise that before making the law, they should be ready that how will they implement the law for everyone. Mere framing of the law won't help but its proper implementation is the real challenge for the government for a sector which doesn't know about their right and other laws.

The fact can't be ignored that the unorganised sector does not get enough protection through labour legislation. Although, with the existence of labour laws, for different reasons, the workers in this sector do not get social security and other benefits, as do the workers in the formal sector. Here, workers are highly oppressed by entrepreneurs. They are employed on a casual basis. With the exception of very few cases, there is hardly any institutional machinery to fight for the workers. As of now, collective bargaining has not been able make a way in the unorganised sector. As the workers in the unorganised sector, particularly women do not have protection or adequate bargaining power.

Categories Which Fall Under Unorganized Sector

Everything which doesn't fall under the organised sector comes under the unorganised sector. Saying this would be wrong. As we have already discussed that the unorganised sector on one hand covers tribal area as well as on the other hand also covers the household workers. So this means that the unorganised sector is vastly stretched and cannot be defined in a particular definite sector or group. There are different kinds of areas, works, organisation etc, and all are covered in this sector. It has often been brought up, and perhaps commonly accepted, that there are areas in the unorganised sector where it is difficult to identify an 'employer', and hence, an employer - employee relationship, which the law can attempt to channelize or influence by defining rights and responsibilities, and building up a system of social security on a contributory basis. But still let's discuss the different categories

⁴ Report of the national commission of labours; Chapter 7, 'Unorganized Sector'; Available at: http://www.prsindia.org/uploads/media/Unorganised%20Sector/bill150_20071205150_National_Commission_on_Labour_2_Chapter_7_unorganised_sector_Part_A.pdf

which fall under the unorganised sector as categorised by the Ministry of Labour, Indian Government:⁵

In terms of Occupation: Small and marginal farmers, landless agricultural labourers, share croppers, fishermen, those engaged in animal husbandry, beady rolling, labelling and packing, building and construction workers, leather workers, weavers, artisans, salt workers, workers in brick kilns and stone quarries, workers in saw mills, oil mills etc. come under this category.

In terms of Nature of Employment: Attached agricultural labourers, bonded labourers, migrant workers, contract and casual labourers come under this.

In terms of especially distressed categories: Toddy tappers, Scavengers, Carriers of head loads, Drivers of animal driven vehicles, Loaders and un-loaders come under this category.

In terms of Service categories: Midwives, Domestic workers, Fishermen and women, Barbers, Vegetable and fruit vendors, Newspaper vendors etc. belong to this category. In addition to these four categories, there also exists a large portion of unorganized labour force such as Cobblers, Hamals, Handicraft artisans, Handloom weavers, Lady tailors, Physically handicapped self-employed persons, Rikshaw-pullers, Auto drivers, Sericulture workers, Carpenters, Tannery workers, Power loom workers and Urban poor. By this we can find out and it clearly inferred that the unorganised sector is one of the most important sectors of the Indian market and it plays a very important role as far as the Indian economy is concerned. Thus, the sector needs security and for that it is necessary to have proper implementation of labour laws.

The Indian Economy is considered by the existence of a huge majority of informal or unorganized labour employment, contributing immensely to the GDP whilst employing millions of people year on year. The Unorganised sector in India is highly diverse in terms of the extent of the enterprises, variety of products and services produced and the levels of technology employed. Most of the Micro Small Medium Enterprises are also established in the informal or unorganized sector and they deploy a large number of work-force on an informal basis because of tedious and stringent labour laws. Large of the workforce is deployed on the basis of contractual and daily wage labourers wherein large number of labour

⁵ Key Labour Issues in the Unorganised sector; Available at: <http://www.visva-bharati.ac.in/InstitutionsCentresSchools/Contents/cjmc-report-080413.pdf>

force is unskilled or semi-skilled. Even the government realises that the unorganised sector is one of the most important sectors for the Indian economy and thus they frame every possible law to protect such labourers and their interests, although there are some lacuna in the implementation of the laws framed by the government. We shall discuss the different laws framed for the labourers by the government and then to analyse the data collected to check whether there is proper implementation of the laws which are framed.

Research Problem

We wanted to explore the existing status of the legal aid in India and knowledge the workers of the unorganised sector have regarding the existing laws. For this we did there was a need to conduct an empirical research.

RESEARCH QUESTIONS

- Why do we need to re-visit the labour laws?
- In a country where there are already some labour laws existing for the category, is there a need to add more laws?
- Is the implementation of the laws the problem or the lack of knowledge?
- Is demography of the employees related to legal literacy?

SCOPE OF THE STUDY

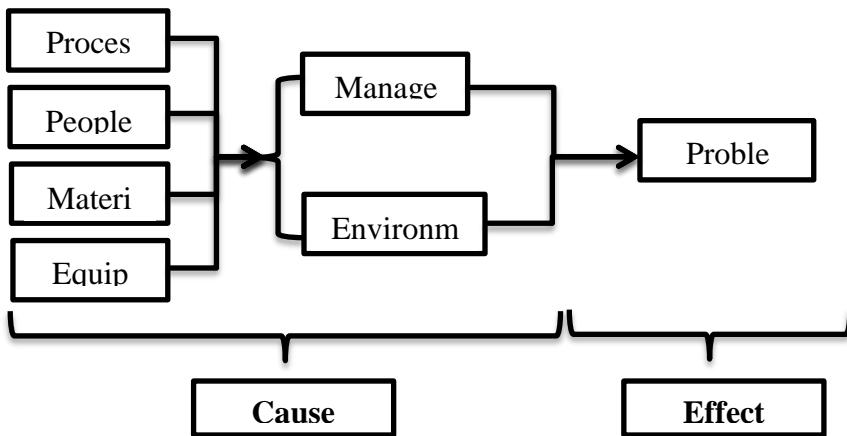
This study intends to provide insights on whether our justice system has been able to ensure that the Government will secure to all low income workers belonging to the unorganized sector; work, a living wage, suitable condition of working thereby ensuring a decent standard of life and full enjoyment of social and cultural opportunities.

METHODOLOGY

Conceptual Back Ground Using Theories

Theory applied to our model is Fishbone model theory which uses Ishikawa diagrams (also called fishbone diagrams, herringbone diagrams, cause-and-effect diagrams, or Fishikawa) that were created by Kaoru Ishikawa (1968) that show the causes of some specific event.

Common uses of the Ishikawa diagram are product design and quality defect prevention to identify potential factors causing an overall effect. Each cause or reason for imperfection is a source of variation. Causes are usually grouped into major categories to identify these sources of variation.



- People involved with the process are the ones who think that Legal Literacy will be helpful to them. The process is performed by using different online and offline media such as social media sites, Television media, print media, school education, workshops etc.
- Machines involved the use are; computers, internet, televisions, tablets, laptops and mobile phones, classrooms, teachers, lawyers.
- Raw materials were the human efforts to search for information for the research by using printed survey questionnaires.
- Data generated were the results and information gathered after information search by using analytical tools like SPSS.
- Environment includes any of the places be it home, work place, streets where the information was accessed.

RESEARCH DESIGN & DATA COLLECTION METHOD

This research is classified as Empirical Research Design and conducted according to quantitative approach which has been carried out to describe the *Need to Re-visit the Labour Laws in India* by using Judgement Sampling technique. The data was collected using printed questionnaires and total of 150 respondents were approached.

The existing knowledge of the labour laws and the perception of implementations of existing laws in India were judged using five point Likert Scale on the level of agreement of (1) “strongly disagree” to (5) “strongly agree”. The demographic profiles of the respondents were measured on nominal scale.

Sampling Design & Size

In this research Judgement Sampling Technique is used to represent the population of capital cities of North India by conducting the research in Lucknow city. The population of the sample belongs to labour/employee/self-employed that belongs to the income group of less than 3lakh per year and work in the unorganized sector in urban cities of India and are of more than 14 years of age. The sample size taken was 152 samples but the final data entered was of 130 after elimination of incomplete questionnaires and miss-placed one. The method used for survey was through a mall-intercept method only.

Variables Considered and Hypothesis

This research is aimed to collect information on the perception and knowledge the people working in the unorganized sector have and how to they seek to improve on it.

Belief:

- India needs better enforcement of labour laws
- Legal Literacy will be helpful

Perception:

- Legal aid is easily accessible to all
- Strict enforcement of law will make the work conditions complex
- The current working conditions are good.

Measurement of Variables⁶

The variables in questions 3 to 8 in part B of the questionnaire pertaining to the knowledge of the existing labour laws and implementation of the same are measured using a five point

⁶ Refer to appendices for the questionnaire which was used for the data collection

Likert Scale on the level of agreement of (1) “strongly disagree” to (5) “strongly agree”. The questions of Part A and Question (2 and 3) of Part B of the questionnaire are being measured on a nominal scale where the demographic profiles of the respondents are asked.

Also, the variables are chosen keeping in mind the key principle of analytical design that the design has to evolve as you collect more data. This means that the variables would need to be changed or evolved as we collect more and more data.

Analytical Design

Linear Regression Analysis: It estimates the relationship between two or more variables.

There are multiple benefits of using regression analysis. They are as follows:

1. It indicates the **significant relationships** between dependent variable and independent variable.
2. It indicates the **strength of impact** of multiple independent variables on a dependent variable.

Regression analysis also allows us to compare the effects of variables measured on different scales, such as the different information sources which will be more helpful for attaining more knowledge on the existing laws. Hence this benefit helps market researchers / data analysts / data scientists to eliminate and evaluate the best set of variables to be used for building predictive models.

EXISTING LABOUR LAWS IN INDIA

It is true that while the independent India's constitution was drafted, social security was a main provision included in List III to Schedule VII of the constitution and it was the joint responsibility of the Central as well as the state government. Many of the directive principles of state policy in relation to the aspects of social security were included in the Indian constitution.

Article 246 (4) of Constitution of India empowers both Centre and State to frame any law related to the interest of the labour. Most of the Labour Laws are enacted by the Parliament of India but they are implemented by State Governments through their administrative machinery. In Labour Laws the word “LAWS” denotes that it is not a single act but a bunch

of different Acts, Rules and Regulations enacted by the Parliament of India and different States Legislatures.

In the Indian scenario, the labour laws cover almost all types of industries. There are different laws for the labourers enacted by the government for different type of industries, taking into account the conditions under which the labourers of that industry are working (as for Dock Workers, Coal Mines Workers, Plantation Workers etc. There are different laws to regulate their employment and conditions of service). Not only industry but the laws are made for different subjects also (as for Wages-Minimum Wages Act and Payment of Wages Act, for compensation – Workman Compensation Act, for maternity benefit to women's – Maternity Benefit Act etc.)⁷ Following are discussed the major laws in relation to the unorganised sector:⁸

- ***Employees State Insurance Act, 1948:*** The ESI Act provides the benefits to workers in the cases relating to sickness, maternity and employment. The ESI Act applies to Factories and other classes of establishments (industrial, commercial agricultural).
- ***The Payment of Gratuity Act, 1961:*** The Act provides for payment of gratuity to employees employed in factories, shops and establishments having served a continuous service for 5 years, in the event of their superannuation, retirement, resignation, death or disablement.
- ***The Maternity Benefits Act, 1961:*** The Act regulates the employment of women in different workplaces for periods before and after the birth of the child, and to provide for maternity benefit and other benefits. It shall apply to every work place having more than 10 employees.
- ***The Industrial Disputes Act, 1947:*** Contains provisions regarding lockouts, retrenchment, investigation and settlement of industrial disputes and unfair labour practices and it applies to all the commercial and industrial workplaces.

⁷ Fundamentals of Labour Laws; Available at: <http://www.lawsindia.com/Industrial%20Law/labour/MAIN.html>

⁸ Summary of Key Labour Law Legislation; Available at: <https://www.tralaw.in/summary-of-key-labour-law-legislations/>

- ***Factories Act, 1948:*** Factories Act has provisions for ensuring the welfare of the workers employed in factories in terms of health, safety, working hours, benefits, leave, overtime pay, etc.
- ***Child Labour (Prohibition and Regulation) Act, 1986:*** Prohibits the appointment of children in few occupations and to forbid their engagement in hazardous occupations.
- ***The Minimum Wages Act, 1948:*** Under the Act, the State and Central Governments are empowered to give notice regarding the minimum wages payable to employees on factors including the industry, location and nature of work done and it should not be less than what is prescribed.
- ***The Payment of Wages Act, 1936:*** To regulate the payment of wages in a proper form at regular intervals without unlawful deductions and to make sure a speedy and effective remedy to employees suffering against unlawful deductions and/or baseless hindrance caused in paying wages.
- ***The Equal Remuneration Act, 1976:*** The Act provides for the payment of equal salary to both men and women workers for similar nature of work and prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto.
- ***Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal Act, 2013:*** The SE Act prescribes a mechanism for prevention and prohibition of workplace sexual harassment and for redressal of grievances pertaining to workplace sexual harassment.

These all are some of the important acts or laws forming the part of labour laws for the unorganised sector. But the main issue here is that even after having these laws there is no knowledge amongst the labourers regarding their rights and benefits from such acts. During our survey when we were talking to the labourers of the unorganised sector we found out that they're having a lot of problems regarding their wages working hours etc. They did not even know their minimum wage for a day of skilled or unskilled labour. Most of the labourers were not even aware of the basic rights which they possess and were suffering because of that for a long time now. The Authors feel that only the organised sector is taking some benefits

out of these laws and the unorganised sector has no clue of what is there for their benefits. Few of the problems of the labourers which we came across are listed below:

- **Lack of employment:** The schemes by the government giving employment such as NREGA etc. are flop as the worker is only getting work for 100 days and after that the same old condition persists.
- **Work Place:** A lot of times house-maids, sweepers are given inhumane conditions and treatment which shall not be there.
- **Caste and Class Difference:** the labourers are often harassed for the caste they belong to, although, it is a crime to degrade anyone on the basis of caste, colour, creed or sex.
- **Lack of Political Support:** No one comes up for support apart from few NGO's who have often told them about their rights.
- **Migration:** They have to migrate every now and then because of the lack of employment.
- **Unequal distribution of money:** Many female workers said that they were given less amount of money for the same work as the men did. When they asked, they were not entertained or asked for sexual favours.
- **Social security and measure:** they felt that there was no job security, as for taking even a day off because of illness etc., they were removed from the jobs.

In the next segment the Authors have tried to empirically research that does the Labourers has any knowledge about the laws and if not, what is the way they would prefer to get the knowledge of the same. Also, what can be the better implementation methods and ways to enhance the awareness about the existing laws for the unorganised sector.

DATA ANALYSIS AND INTERPRETATION

The statistical computer program used for the questionnaires data analysis was SPSS 14.0 version for windows. Linear Regression Analysis was used to determine whether the respondents think information sources will help them gain more knowledge of the existing laws in India. Descriptive statistics was used explore the effect of demographic background

of respondents on the belief and perception with respect to implementation of labour laws and current practice.

Data Analysis

Comparing Means

We have used gender as the grouping variable and question 3 to 9 as dependent variables. The test used is Independent T-Test. The Independent Samples T-Test compares the means of two independent groups in order to determine whether there is statistical evidence that the associated population means are significantly different. The results are as follows:

Group Statistics					
	education qualification	N	Mean	Std. Deviation	Std. Error Mean
Industrial Employment (Standing Orders) Act 1946	>= 2.00	122	.2787	.45020	.04076
	< 2.00	8	.0000	.00000	.00000
Contract Labour (Regulation and Abolition) Act 1970	>= 2.00	122	.3770	.48665	.04406
	< 2.00	8	.0000	.00000	.00000
Inter-State Migrant Workmen Act, 1979	>= 2.00	122	.0000	.00000 ^a	.00000
	< 2.00	8	.0000	.00000 ^a	.00000
Workmen's Compensation Act 1923	>= 2.00	122	.0410	.19907	.01802
	< 2.00	8	.0000	.00000	.00000
Prohibition of Employment as Manual	>= 2.00	122	.0000	.00000 ^a	.00000
	< 2.00	8	.0000	.00000 ^a	.00000
Payment of Wages Act 1936	>= 2.00	122	.0492	.21714	.01966
	< 2.00	8	.0000	.00000	.00000
Minimum Wages Act 1948	>= 2.00	122	.0656	.24856	.02250
	< 2.00	8	.0000	.00000	.00000
The Maternity Benefit Act, 1961	>= 2.00	122	.1148	.32004	.02897
	< 2.00	8	.0000	.00000	.00000
None	>= 2.00	122	.4672	.50098	.04536
	< 2.00	8	1.0000	.00000	.00000

a. t cannot be computed because the standard deviations of both groups are 0.

We had taken the cut off value as '2' where 1= uneducated, 2=class1 to 8 education and 3 was 9 and above. Since group means are not equal as N for ≥ 2 is 122 and for < 2 is 8 hence we see the significant values of Levene's Test for equality of variance in the table given below.

H0= variances of the 2 groups are equal

We can observe from the table 'Independent Sample Test' that there are 3 variables having significant value equal to 0.000 which are:

- None (which means that they are not familiar with any existing laws) as sig=0.000

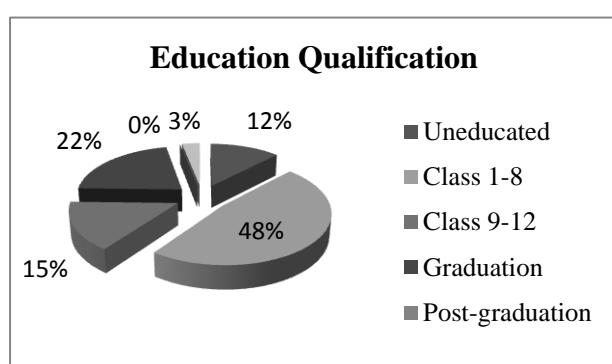
- Contract Labour Act 1970, as sig=0.000
- Industrial Employment Act 1946, as sig=0.000

As per the table given below the p-value (sig =.000) is less than 0.05 so we reject H0 that is the variances of the 2 groups are not equal hence there a difference in answers for the 3 variables given above. So those respondents belonging to group 1 (uneducated or education till standard 8th) will be having less knowledge about the laws as compared to those who belong to group 2 (education of standard 9th and above).

		Independent Samples Test								
		Levene's Test for Equality of Variances		t-test for Equality of Means						
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
Industrial Employment (Standing Orders) Act 1946	Equal variances assumed	32.329	.000	1.745	128	.083	.27869	.15975	-.03741	.59478
	Equal variances not assumed			6.837	121.000	.000	.27869	.04076	.19799	.35938
Contract Labour (Regulation and Abolition) Act 1970	Equal variances assumed	122.390	.000	2.183	128	.031	.37705	.17268	.03537	.71873
	Equal variances not assumed			8.558	121.000	.000	.37705	.04406	.28982	.46428
Workmen's Compensation Act 1923	Equal variances assumed	1.469	.228	.580	128	.563	.04098	.07064	-.09879	.18075
	Equal variances not assumed			2.274	121.000	.025	.04098	.01802	.00530	.07666
Payment of Wages Act 1936	Equal variances assumed	1.812	.181	.638	128	.524	.04918	.07705	-.10327	.20163
	Equal variances not assumed			2.502	121.000	.014	.04918	.01966	.01026	.08810
Minimum Wages Act 1948	Equal variances assumed	2.557	.112	.743	128	.459	.06557	.08820	-.10894	.24009
	Equal variances not assumed			2.914	121.000	.004	.06557	.02250	.02102	.11012
The Maternity Benefit Act, 1961	Equal variances assumed	5.392	.022	1.010	128	.314	.11475	.11356	-.10995	.33946
	Equal variances not assumed			3.960	121.000	.000	.11475	.02897	.05739	.17212
None	Equal variances assumed	1824.000	.000	-2.997	128	.003	-.53279	.17777	-.88453	-.18104
	Equal variances not assumed			-11.747	121.000	.000	-.53279	.04536	-.62258	-.44299

On further exploring we found that since maximum people are having no knowledge of law.

Hence we will try to find the education background of the respondents.



questionnaire.

From the pie chart we can see 60% of the respondents belonged to Group 1 and were those who marked the option 'none' in their response in the Question 2, Part B of the

Regression Analysis

The table below shows a brief summary of the central tendency of belief the different information sources will helpful towards legal literacy. Also we can see that there are no missing values hence all the observations are complete.

Descriptive Statistics

	Mean	Std. Deviation	N
Legal literacy will be helpful to me	2.0538	.69674	130
Internet Apps, Social media campaigns	3.3231	1.24025	130
Awareness campaigns	2.1077	.63790	130
Worshops for Legal Literacy	2.4231	.66897	130
Print Media	2.7077	1.10282	130
Television	2.3923	1.08189	130
School education	2.2769	.72620	130

We use Linear Regression Analysis where Question3 is dependent variable (DV) and Question8 (a to f) are independent variables (IV). Here both the DV and IV are metric in nature measured on scale of 1 to 5.

ANOVA^{a,b}

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	21.220	6	3.537	10.507	.000 ^a
	Residual	41.403	123	.337		
	Total	62.623	129			

a. Predictors: (Constant), School education, Print Media, Worshops for Legal Literacy, Television, Awareness campaigns, Internet Apps, Social media campaigns

b. Dependent Variable: Legal literacy will be helpful to me

As per ANOVA table the p-value (sig =.000) is less than 0.05 so we reject H0 that is the considered Regression Model is significant. So the belief of respondents towards the helpfulness of legal literacy will be affected by the sources of information given in Question 8 on the overall purchase decision. Contribution of explained variation is 3.537. Contribution of unexplained variable is 0.337

Examining the significance of predictors from the table given below:

Model	Coefficients ^a						
	Unstandardized Coefficients		Standardized Coefficients	t	Sig.	95% Confidence Interval for B	
	B	Std. Error	Beta			Lower Bound	Upper Bound
1	.592 (Constant)	.404		1.465	.146	-.208	1.392
	Internet Apps, Social media campaigns	.076	.092	.136	.828	.409	-.106 .259
	Awareness campaigns	.034	.147	.031	.230	.819	-.257 .324
	Workshops for Legal Literacy	.239	.198	.230	1.208	.229	-.153 .631
	Print Media	-.069	.071	-.109	-.964	.337	-.210 .073
	Television	-.068	.064	-.106	-1.060	.291	-.195 .059
	School education	.398	.113	.415	3.522	.001	.174 .622

a. Dependent Variable: Legal literacy will be helpful to me

Hence the significant predictors for the model are as per their hierarchy:

1. School Education (.451)
2. Workshops for Legal Literacy (.230)

Therefore it can be interpreted that the respondents believe that these two sources will be most helpful in gaining legal literacy for understanding the laws and benefitting from the same.

ROLE OF THE JUDICIARY

The supreme court has summarised the situation aptly saying that “Neither law-makers nor those entrusted with the duty of implementing laws enacted for welfare of unorganised workers have put in place appropriate mechanism for the protection of persons employed by or through contractors to whom services meant to benefit public at large are outsourced by State and/or its Agencies/Instrumentalities for doing workers, which are inherently hazardous and dangerous to life nor have they made provision for payment or reasonable, compensation in the event of death”.⁹

While dealing with the matter of child labour in *MC Mehta v. State of Tamil Nadu*¹⁰ the Supreme Court gave instruction to the Government to keep an eye on and prevent child labour in the ‘Sivakasi cracker manufacturing establishment’. In another case of the Minimum Wages Act, the Supreme Court directed that minimum wages to the labourers

⁹ *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers* (2011) 8 SCC 568

¹⁰ (1996) 6 SCC 756

employed by contractors must be waged directly and the provisions of Section 21 of Contract Labour (Regulation and Abolition) Act, 1970 should be observed.¹¹

In **P.M.Patel v. Union of India and others**,¹² the Supreme Court answered the question of whether the home workers are entitled to the benefits of Employees' Provident Funds and Miscellaneous Provisions Act, 1952. By explaining the definition clause in 2(f)¹³ of the act, the Court said that home workers are employees.

In the case of maternity benefit, the Supreme Court gave the decision that “*even female workers engaged on casual basis or on muster roll on daily wages are also entitled to benefit under the Maternity Benefit Act, 1961 as nothing in the Act confers the benefit only on regular women employees.*”¹⁴ The concern of Judiciary for safeguarding labourers rights and to enforce the socio-economic justice is well expressed in different cases relating to unorganised sector, few of which has been discussed above.

CONCLUSION AND SUGGESTIONS

The Authors feel that the problem lies in the awareness about the laws from the research which we conducted. Labourers/ workers/ employees, as found in the results, were not aware of the fact that such laws are there for their benefit and they were quite amused to know them. The matter in hand right now is to provide social security and revive dignity for the workers of the unorganised sector. The labourers/ workers are exploited in many ways because of the seasonal irregular work, irregular patters of earning and employment, absence of employer-employee relationship and weak administrative structure.

Practical experience gives us a picture that mostly people have no knowledge of their rights. The Labour Courts which are formed to provide speedy disposal of matters have failed to give speedy justice. It takes a lot of time to decide a case. If a case is decided in favour of labour, the execution of that decision is also very lengthy and time consuming which again

¹¹ *Salel Hydro Project v. State of Jammu & Kashmir*, 1983 LLJ 494

¹² (1986) 1 LLJ 88 (SC)

¹³ Section 2(f) of the Act are wide enough to include persons employed directly by the employer and also through a contractor and they also include persons employed in the factory and persons employed in connection with the work of the factory. The fact that the home workers deliver the beedis to the manufacturer who has a right of rejecting those that do not confirm to the standards clearly shows the degree of control and supervision for establishing the relationship of master and servant between the home workers and manufacturers. (part of the judgement)

¹⁴ *Municipal Corporation of Delhi v. Female Workers (Muster Roll)* 2000 (2) SC Almanac 269

takes a lot of time to implement Labour Court decision. Practically, the laws created for the purpose of labour have been unsuccessful in discharging most of the hopes for which they are created. They need a drastic change for fulfilment of hopes of Labourers. They should become the reason for the development of all sectors of society.

So to conclude it can be said that if the labour laws are properly implemented it shall make the labourers more secure towards their jobs and shall give strength to the unorganised sector. As per the survey conducted we can see that how the labourers wanted to be more educated about the laws which govern their daily work. The labourers wanted to be more educated about the laws and for that different public organisations, NGOs with the help of judiciary should come forward and support the unorganised sector in learning and implementing and taking support of the different laws which are there for their benefit. If different NGOs, advocates come forward to increase the awareness of such laws by conducting legal aid camps, Street plays etc., it can play a vital role to uplift this sector. With this hope, the author believes that the government won't any more just frame the law but also 'shape' the law for the benefit of the society.

JUVENILE DELINQUENCY: A BRIEF STUDY

Jyoti Yadav*

INTRODUCTION

Every child is special child and it needs proper care and attention so that he grows in proper manner. Growing in proper manner makes them independent in every way social economically it makes them to grow in positive way. Juvenile delinquency also known as juvenile offending it means habitual committing of criminal acts or offence by young people, especially one below the age of prescribe by the statutory provisions.

Every child is born with innocence but due to circumstances and not proper guidance they become delinquent. This is the first step towards the adult crime. It is antisocial activity of the child age of 16 for boys and 18 for girl in India know as juvenile. This is the very important topic for discussion because in the progress of every country depends upon the youth if youth will misguided or involve in unlawful activity during the teenage the future of the country is in the stake.

The word juvenile has been derived from the Latin term juvenis, which means young and etymologically, and the word delinquency has been derived from the Latin word delinquer which means to omit. In the year 1484, William Coxton used the word delinquent to describe a person who was found guilty. Juvenile delinquency refers to the involvement by the teenagers in an unlawful behavior who is usually under the age of 18 and commits an act which would be considered as a crime. A child is known as a delinquent when he/she commits a mistake which is against the law and which is not accepted by the society. Thus a “juvenile” or “child” means a person who has not completed eighteenth years of age and violates the law and commits an offence under the legal age of maturity.

The term delinquency is a form of misbehavior or deviation from the accepted norms of the society the term delinquency is come from Latin word delinquency which means to omit it is was apparently used in Roman times to refer to the failure to the person to perform assigned task of duty.

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The term ‘juvenile’ has been defined in clause (h) of Section 2 of the Juvenile Justice Act, 1986. The term ‘delinquency’ has been defined in clause (e) of section 2 of the Juvenile Justice Act, 1986.

THE JUVENILE AGE

Despite the universal acceptance of the principle of maturity in relation to crime there is no unanimity among the nations regarding level of maturity in terms of age for absolute immunity from penal implications conditional immunity from penal liability and different treatment to the target group known as juvenile delinquency. In the area of criminal law though the countries differ from one another regarding cut-off age in chronological order for determining adult juvenile conduct one thing is agreed upon almost universally that the period of danger and opportunity. The society must both protect the young and discourage them from committing crimes because a criminal act by young people is not without danger so far as its physical consequences are concerned.

In view of the wide variation from country to country, the working paper prepared by the secretariat of the united nation while commenting upon youth crime expressed its inability to evolve and universally accepted definition of youth and youth crime. Age based definition of a child, juvenile, youth or adult vary from country to country and culture to culture. It further observes the youth is not merely a term to identify an age group but one that refer to period between childhood and adulthood and relates primarily to a process of personal development and self-realization. For operational purposes and accordance with the proposed rules a juvenile an child or a young is a person who under the respective legal system may be dealt with for an offence but is not yet criminally responsible as an adult.

In the midst of diver’s approaches and absence of universalization regarding the concept of juvenile delinquency comparative study of magnitude of delinquency problem appear unrealistic and unproductive. It became imperative to examine the problem and its various aspects as far as the treatment and rehabilitation within the legal frame work within the juvenile justice system concerned with in the social boundaries of specific country or state. For that purpose legal definition of the concept of the delinquency is most essential and infact a starting point.

S. No.	Country	Age of Absolute Immunity from criminal liability	Age for differential treatment As juvenile delinquents
1	Russia	Below 16 years	(a) 14-16 years for serious offence only
			(b) 16-18 years for other cases
2	Poland	Below 16 years	(a) Juvenile below 18 years
			(b) Young offenders below 21 years
3	Germany	Below 14 years	(a) Juvenile 14-18 years
			(b) Adolescent 18-21 years
4	Japan	Below 14 years	Juvenile under 20 years
5	England	10 years upto 14 years conditional	(a) Under 17 years and 15-21 years for some offences
6	Canada	Under 7 years ; 7-14 years	(a) Under 16 years (b) 6-18 years varying from province to province
7	USA	7years to 12 years (different in different states)	16-18 years; varies from State to State but mostly 18 years
8	China	16 years	(a) Child 9-13 years
			(b) Juvenile 14-25 years
9	Korea	14 years	(a) 14-18 years
			(b) Under 20 years
10	India,	7 years	18 years for both male and female
	Mayanmar,	(conditional	
	Srilanka,	immunity	
	(Pakistan and	from 7 years	
	Bangladesh	to 12 years)	
	similar to India)		
11	Malasiya	10 years	(a) Child 14 years
			(b) Juvenile 10-18 years
12	Indonesia	10 years	10-18 years
13	Philippines	9 years	9-18 years

JUVENILE DELINQUENT BEHAVIOR

In developing a definitive concept of juvenile delinquency, Gibbens and Ahrenfeldt cite three stages of culture change. The first stage is the tribal culture which had little delinquency. In this setting crime was defined in terms of adult behavior. The norms of the community-based social control agencies dealt with most of delinquency cases.

The second stage of culture change relates to the rapidly developing countries where urbanization and development have been disrupting the stability of the family the most important basic control unit. This also took place in US and England when rapid industrialization precipitated the growth of large urban centers. It is during this stage the separate juvenile laws usually originate and reinforce. In the third stage a preventive approach become more prevalent and the definition of delinquency become ambiguous.

In addition to juvenile law great emphases is placed on determining the psychological and sociological factor that contribute to crime causation.

The country of Western Europe and United States could be considered being in the midst of the third stage of cultural development in the contest of delinquency problem. In view of the uncertain and shifting ground on which the concept of juvenile delinquency based cultural interpretation do influence every stage of the process by which the fact of delinquency is established.

JUVENILE JUSTICE STANDARDS

Article 37 and 40 Of the Childers convention specifically refer to juvenile justice children who come into conflict with the law must be treated in a manner consistent with the promotion of the Childs sense of dignity and worth which reinforces the Childs respect for human rights of others and which takes into accounts the Childs age and the desirability of promoting reintegration and assuming constructive role in society there are three other instrument developed by the crime commission that are relevant to juvenile justice. The united nation slandered minimum rule on the administration of juvenile justice (The Beijing rule): the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guideline): and the United Nation rules for the protection of juvenile Deprived of their Liberty.

The Guidelines for Action on Childers Criminal Justice System summaries these instruments in setting out specific targets for states to meets States should establish juvenile courts with special procedure designed to take into account to specific needs of children.

Diversion as well as broad range of alternative and educative measures should be develop for all stages of the criminal process in order to prevent recidivism and promote the social rehabilitation of child offenders.

These alternative measures are to comply with UN standards ensuring for respect for due process and for the principal of minimum intervention the placement of children in closed institution should be reduced, should take place as a matter of last resort and be for the shortest period of time possible

CURRENT LEGISLATION

The Juvenile Justice (Care and Protection) Act, 2000 lays down that juvenile in conflict with law or juvenile offenders may be kept in an ‘Observation Home’ while children in need of care and protection need to be kept in a ‘Children Home’ during the pendency of proceedings before the competent authority.

A juvenile can be detained only for a maximum period of 3 years irrespective of the gravity of offence committed by him and he will be remanded to ‘Special Home’. The Juvenile Justice (Care and Protection) Act, 2000 provides immunity to the child who is less than 18 Years of age at the time of the commission of the alleged offence from trial through Criminal Court or any punishment under Criminal Law in view of Section 17 of the Act.

The purpose of this new Act was to rehabilitate the child and assimilate him/her in mainstream society. The rationale is that a child still has the possibility of getting reformed due to his/her tender age and lack of maturity and it is the responsibility of the State to protect and reform the child.

AMENDMENT IN JUVENILE JUSTICE ACT, 2000

Recently due to major hue and cry in public against the increasing number of crimes being committed by the juveniles, the Government has decided to present the proposed amendment in law in the current Parliament itself. This amendment would have far reaching effects on our criminal justice system.

In brief major changes are as follows:

- The proposed legislation would be replacing the existing Juvenile Justice (Care and Protection) Act 2000.
- It has clearly defined and classified offences as petty, serious and heinous.
- It has been noticed that the increasing number of serious offences being committed by juveniles in the age group of 16-18 years. Thus, in recognition of the rights of the victims alongside the rights of juveniles, it is proposed that such heinous offences should be dealt with in special manner.
- Therefore, it has been proposed that if a heinous crime is committed by a person in the age group of 16 to 18 years, the Juvenile Justice Board will first assess if the said crime was committed by that person as a ‘child’ or as an ‘adult’.
- The *Juvenile Justice Board* will have psychologists and social experts in it which would make sure that the rights of the juvenile are duly protected if the crime was committed as a child.
- The trial of the case shall proceed on the basis of Board’s assessment report that whether the concerned juvenile has committed the crime as a child or as an adult.

VIEWS ‘FOR’ AND ‘AGAINST’

The Government of India has already given approval to the new amendments in the Juvenile Justice Act. Experts and common public both are having strong views regarding the same. At present there are large numbers of people in the society who are demanding that juveniles and specially juveniles in the age group of 16 to 18 years should be treated as adult as far as their conviction in heinous crimes such as rape, gang rape, murder, dacoity etc. is concerned. The reason is that in several of the recent incidents as described above, it has been found that the juveniles of 16-18 age group are involved in serious crimes and they are doing such criminal acts with full knowledge and maturity.

The maturity level of children has not remained the same as 10-20 years ago, a child gets mental maturity early in present socio-cultural environment due to the influence of Internet and Social Media.

Therefore, to have a deterrent effect it is important that such offenders in the age group of 16 to 18 should be punished as adults so that victims' could also get their justice.

Views in Opposition

The people and experts who don't subscribe to this view that juveniles in the age group of 16 to 18 should be treated as adults as far as their sentencing in heinous crimes are concerned are of the opinion that any law should not be amended or enacted by getting influenced from few incidents, because a law is for all and for all time.

So it should be carefully drafted after taking into consideration all dimensions. For instance, in case of juvenile crimes, it should be considered that whether by punishing 16, 17 year olds we are following a punitive form of justice system or reformatory system; whether there are no possibilities that the child would be reformed; and whether it is not true that after spending 10 years in regular adult jails with hardened criminals, the child would come out as a more toughened criminal.

Also, this view says that it is not only the responsibility of the child that he/she has committed such heinous crimes but it is also the responsibility of the society that why society has not been able to provide a proper and healthy childhood to the child and why such types of discriminations and deprivations, both social and economic, were there that the child was forced to commit crimes; also, why the State failed to provide care and protection to its children and let them drift towards criminal activities.

Thus, it can be seen that there are strong views in both favor and opposition of the change or amendment in Juvenile Justice Act.

CONCLUSION

In conclusion it can be said that whatever changes be made in the Act, it should be the interest of justice which must prevail. A law must not be made or amended due to single act of barbarism; because a law is for all and for all time to come. Though it is true that children in the age group of 16 to 18 are increasingly being found in commission of heinous crimes but it is still only a little percentage of all the crimes committed every year in India. As per National Crime Records Bureau, in the year 2013, juveniles were charged with only 3.4 per cent of total number of rapes registered in India. Also, there is nothing to prove that harsher laws will lead to fewer crimes.

Therefore while debating the amendment in Parliament it must be discussed that whether we as a society want to have a justice system based on retribution and punishment or a system which is reformative and assimilative for the juvenile offenders.

The State as well as the society has a responsibility towards our children in the sense that they would not become wayward and remain in the social mainstream; hence, ‘care and protection’ must be the main motto while amending the Juvenile Justice (Care and Protection) Act and not punishment. In India legislative efforts have been directed towards limiting the scope of juvenile courts jurisdiction from time to time. The first major efforts in this direction was made when non offender delinquent was excluded from the jurisdiction of juvenile court and Juvenile Justice Board and were require to treated by Child Welfare Committee. The consensus has emerged towards the exclusion of non-offender delinquents from the ambit of juvenile court and he stress towards non penal treatment of such juvenile through committee based social control agency.

Juvenile in conflict with law are to be dealt with by Juvenile Justice Board while the child is in need of care are to be proposed by Child Welfare Committee, Child homes, and Shelter homes to after the child. However it may be opined that it is very difficult to practically demarcate the jurisdiction of the concerned adjusting agency as there is a fine line of distinction between the behaviors which is not. To conclude Juvenile Delinquency it is the shape the nature and punishment of crime of which delinquency happens to be precursor. It further leads to the conclusion that changes social structure for example behavior pattern has direct bearing on the conceptual frames work of the definition. Changing value and norms structure of the society shape the form of the behavior known as delinquent and non delinquent in the legal terminology as crime is basically a social problem and its handle through law must have sociological overtones especially in the working of juvenile justice.

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RIGHT TO PRIVACY IN INDIA VIS A VIS IN USA: AN ANALYSIS

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INTRODUCTION

Privacy is a fundamental right; essential Privacy is a fundamental right, essential to autonomy and the protection of human dignity, serving as the foundation upon which many other human rights are built. Privacy enables us to create barriers and manage boundaries to protect ourselves from the unwarranted interference in our lives, which further allows us to negotiate who we are and how we want to interact with the world around us. Privacy helps us establish boundaries to limit that have access to our bodies, places and things, as well as our communications and our information.

The rules that protect privacy give us the ability to assert our rights in the face of significant power imbalances. As a result, privacy is an essential way we seek to protect ourselves and society against arbitrary and unjustified use of power, by reducing what can be known about us and done to us, while protecting us from others who may wish to exert control.

Privacy is essential for us, the human beings, and we make decisions about it every single day. It gives us a space to be ourselves without judgment, allows us to think freely without discrimination, and is an important element of giving us control over who knows what about us.

Discussing to Black's Law Dictionary "*right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned*".

RIGHT TO PRIVACY IN INDIAN CONTEXT

Article 21 of the Constitution of India states that "*No person shall be deprived of his life or personal liberty except according to procedure established by law*". It has been interpreted that the term 'life' includes all those aspects of life, which go to make a man's life meaningful, complete, and worth living. The Court has implied the right of privacy from Art.21 by interpreting it in conformity with Art.12 of the Universal Declaration on Human

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Rights and Art.17 of the International Covenant on Civil and Political Rights, 1966 that provide for the right of privacy.

Right to privacy is not enumerated as a Fundamental Right in the Constitution of India. The scope of this right first came up for consideration in Kharak Singh's Case¹, where the Supreme Court held that Regulation 236 of UP Police regulation was unconstitutional as it clashed with Article 21 of the Constitution. It was held by the Court that the right to privacy is a part of right to protection of life and personal liberty. Here, the Court had equated privacy to personal liberty and was concerned with the validity of certain regulations that permitted surveillance of suspects. The minority decision of SUBBA RAO J. deals with this light.

In a detailed decision, JEEVAN REDDY J. held that the right to privacy is implicit under Article 21. This right is the right to be let alone. In the context of surveillance, it has been held that surveillance, if intrusive and seriously encroaches on the privacy of citizen, can infringe the freedom of movement, guaranteed by Articles 19(1)(d) and 21. Surveillance must be to prevent crime and on the basis of material provided in the history sheet.

In the above-mentioned Article 21 of the Constitution of India², The right to life has been interpreted as more than mere survival or existence which includes all those aspects of life, which makes a man's life more meaningful, complete and worth living and right to privacy is one such right.

In *Govind v. State of Madhya Pradesh*³, Mathew, J. accepted the right to privacy as an emanation from Art. 19(a), (d) and 21, but right to privacy is not absolute right. "Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, the fundamental right must be subject to restriction on the basis of compelling public interest". Surveillance by domiciliary visits need not always be an unreasonable encroachment on the privacy of a person owing to the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which the surveillance is made. The right to privacy deals with 'persons not places'.

¹ 963 AIR 1295, 1964 SCR (1) 332

² The Constitution of India, 1950

³ 1975 AIR 1378, 1975 SCR (3) 946

In *Maneka Gandhi v. Union of India*⁴, in this case SC 7 Judge Bench said ‘personal liberty’ in article 21 covers a variety of rights & some have status of fundamental rights and given additional protection u/a 19. Triple Test for any law interfering with personal liberty:

- (1) It must prescribe a procedure;
- (2) The procedure must withstand the test of one or more of the fundamental rights conferred u/a 19 which may be applicable in a given situation and
- (3) It must withstand test of Article 14. The law and procedure authorizing interference with personal liberty and right of privacy must also be right just and fair and not arbitrary, fanciful or oppressive.

In Naz Foundation Case⁵ Delhi HC gave the landmark decision on consensual homosexuality. In this case S. 377 IPC and Articles 14, 19 & 21 were examined. Right to privacy held to protect a “*private space in which man may become and remain himself*”. It was said individuals need a place of sanctuary where they can be free from societal control—where individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their nature.

It is now a settled position that right to life and liberty under article 21 includes right to privacy. *Right to privacy is ‘a right to be let alone’*. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. Any person publishing anything concerning the above matters except with the consent of the person would be liable in action for damages

THE PRIVACY BILL, 2011

The bill says, “*every individual shall have a right to his privacy — confidentiality of communication made to, or, by him-including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honor and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and*

⁴ 1978 AIR 597, 1978 SCR (2) 621

⁵ 160 Delhi Law Times 277

financial transactions, medical and legal information and protection of data relating to individual.”

The bill gives protection from a citizen's identity theft, including criminal identity theft (posing as another person when apprehended for a crime); financial identifies theft (using another's identity to obtain credit, goods and services), etc. The bill prohibits interception of communications except in certain cases with approval of Secretary-level officer. It mandates destruction of interception of the material within two months of discontinuance of interception. The bill provides for constitution of a Central Communication Interception Review Committee to examine and review the interception orders passed and is empowered to render a finding that such interception contravened Section 5 of the Indian Telegraphs Act and that the intercepted material should be destroyed forthwith. It also prohibits surveillance either by following a person or closed circuit television or other electronic or by any other mode, except in certain cases as per the specified procedure.

As per the bill, no person who has a place of business in India but has data using equipment located in India, shall collect or processor use or disclose any data relating to individual to any person without consent of such individual. The bill mandates the establishment of a Data Protection Authority of India, whose function is to monitor development in data processing and computer technology; to examine law and to evaluate its effect on data protection and to give recommendations and to receive representations from members of the public on any matter generally affecting data protection. The Authority can investigate any data security breach and issue orders to safeguard the security interests of affected individuals in the personal data that has or is likely to have been compromised by such breach. The bill makes contravention of the provisions on interception an offence punishable with imprisonment for a term that may extend up to five years or with fine, which may extend to Rs. 1 lakh or with both for each such interception. Similarly, disclosure of such information is a punishable offence with imprisonment up to three years and a fine of up to Rs. 50,000, or both.

Further, it says any persons who obtain any record of information concerning an individual from any officer of the government or agency under false pretext shall be punishable with a fine of up to Rs. 5 Lacs.

LATEST JUDGMENT OF SUPREME COURT ON RIGHT TO PRIVACY

Hon'ble Supreme Court in *Justice KS Puttaswamy v. Union of India*⁶, the 9-judge bench of J.S. Khehar, CJ and J. Chelameswar, S.A. Bobde, R.K. Agrawal, R.F. Nariman, A.M. Sapre, Dr. D.Y. Chandrachud, S.K. Kaul and S.A. Nazeer, JJ has unanimously held: “*The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.*”

In the 547-pages long opinion, *Dr. D.Y. Chandrachud*, J writing for himself and on behalf of *J.S. Khehar, CJ, R.K. Agrawal & S.A. Nazeer, JJ*, said that Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. He added, “*While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being*”

On the aspect of Data Protection, he said, “*Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state like protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits.*”

He also addressed the issue of rights of the LGBT community in *Suresh Kumar Koushal v NAZ foundation*⁷, where it was held that the prosecution of a minuscule fraction of the country's population in 150 years cannot be made sound basis for declaring that section 377 IPC ultra vires the provisions of Articles 14, 15 and 21 of the Constitution. Stating that the guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion, he said: “*Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual.*

⁶ (2017)10 SCC 1

⁷ (2014) 1 SCC 1

Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”

All the other Justices wrote separate but concurring judgments. Chelameswar, J, in his judgement, said: “*All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State’s interference with those core freedoms constituting liberty of a human being.*”

He, however, added that every right has limitations and the options canvassed for limiting the right to privacy should include: (a) Article 14 type reasonableness enquiry; (b) limitation as per the express provisions of Article 19; (c) a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and (d) a just, fair and reasonable standard per Article 21 plus the amorphous standard of ‘compelling state interest’, the last one being the highest standard of scrutiny.

Bobde, J, in his judgment, explained the test of privacy and said that privacy may be understood as the antonym of publicity. Giving examples, he wrote: “*taking one or more persons aside to converse at a whisper even in a public place would clearly signal a claim to privacy, just as broadcasting one’s words by a loudspeaker would signal the opposite intent.*”

Nariman, J, discussed the law laid down in *ADM Jabalpur v. Sivakant Shukla*⁸ and said that after this judgment it will be clear that the majority judgment in the said case is no longer good law and that Khanna, J.’s dissent is the correct version of the law. He noted that: “*the majority opinion was done away with by the Constitution’s 44th Amendment two years after the judgment was delivered. By that Amendment, Article 359 was amended to state that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of rights conferred by Part III of the Constitution may remain suspended for the period during which such proclamation is in force, excepting Articles 20 and 21. On this score also, it is clear that the right of privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human*

⁸ (1976) 2 SCC 521

being.”

Sapre, J, wrote the right to privacy emanates from the two expressions of the Preamble namely, “liberty of thought, expression, belief, faith and worship” and “Fraternity assuring the dignity of the individual“ and also emanating from Article 19 (1)(a) which gives to every citizen “a freedom of speech and expression” and further emanating from Article 19(1)(d) which gives to every citizen “a right to move freely throughout the territory of India” and lastly, emanating from the expression “personal liberty” under Article 21. He also added: *“the “right to privacy” has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.”*

SK Kaul, J, on ADM Jabalpur judgment, said that it was an aberration in the constitutional jurisprudence of our country and it should be overruled as there is, *“the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection.”* Stating that declaring right to privacy as a fundamental right is a call of today, he said: *“In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right.”*

All the judges unanimously overruled the law laid down in *M.P. Sharma v. Satish Chandra*⁹ and *Kharak Singh v. State of U.P*¹⁰ and said that all the decisions after the Kharak Singh case where it has been held that Privacy is fundamental right, lay down the correct position in law.

RIGHT TO PRIVACY IN AMERICAN CONTEXT

The right to privacy often means the right to personal autonomy, or the right to choose whether or not to engage in certain acts or have certain experiences. Several amendments to the U.S. Constitution have been used in varying degrees of success in determining a right to personal autonomy:

- The First Amendment protects the privacy of beliefs
- The Third Amendment protects the privacy of the home against the use of it for housing soldiers

⁹ AIR1954 SC 300

¹⁰ AIR 1963 SC 1295

- The Fourth Amendment protects privacy against unreasonable searches
- The Fifth Amendment protects against self-incrimination, which in turn protects the privacy of personal information
- The Ninth Amendment says that the “enumeration in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people.” This has been interpreted as justification for broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.

The right to privacy is most often cited in the Due Process Clause of the 14th Amendment, which states:

No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

However, the protections have been narrowly defined and usually only pertain to family, marriage, motherhood, procreation and child rearing.

For example, the Supreme Court first recognized that the various Bill of Rights guarantees creates a ‘zone of privacy’ in *Griswold v. Connecticut*, a 1965 ruling that upheld marital privacy and struck down bans on contraception.

The court ruled in 1969 that the right to privacy protected a person’s right to possess and view pornography in his own home. Justice Thurgood Marshall wrote in *Stanley v. Georgia* that, “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”

The controversial case *Roe v. Wade* in 1972 firmly established the right to privacy as fundamental, and required that any governmental infringement of that right to be justified by a compelling state interest. In *Roe*, the court ruled that the state’s compelling interest in preventing abortion and protecting the life of the mother outweighs a mother’s personal autonomy only after viability. Before viability, the mother’s right to privacy limits state interference due to the lack of a compelling state interest.

In 2003, the court, in *Lawrence v. Texas*, overturned an earlier ruling and found that Texas had violated the rights of two gay men when it enforced a law prohibiting sodomy.

Justice Anthony Kennedy wrote, “*The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.*”

ACCESS TO PERSONAL INFORMATION

A person has the right to determine what sort of information about them is collected and how that information is used. In the marketplace, the FTC enforces this right through laws intended to prevent deceptive practices and unfair competition.

The Privacy Act of 1974 prevents unauthorized disclosure of personal information held by the federal government. A person has the right to review their own personal information, ask for corrections and be informed of any disclosures.

The Financial Monetization Act of 1999 requires financial institutions to provide customers with a privacy policy that explains what kind of information is being collected and how it is being used. Financial institutions are also required to have safeguards that protect the information they collect from customers.

The Fair Credit Reporting Act protects personal financial information collected by credit reporting agencies. The act puts limits on who can access such information and requires agencies to have simple processes by which consumers can get their information, review it and make corrections.

ONLINE PRIVACY

Internet users can protect their privacy by taking actions that prevent the collection of information. Most people who use the Internet are familiar with tracking cookies. These small stores of data keep a log of your online activities and reports back to the tracker host. The information is usually for marketing purposes. To many Internet users, this is an invasion of privacy. But there are several ways to avoid tracking cookies.

Browsers and social media platforms, such as facebook and Twitter, allow users to choose

levels of privacy settings, from share everything to only share with friends to share only the minimum, such as your name, gender and profile picture. Protecting personally identifiable information is important for preventing identity theft.

The Children's Online Privacy Protection Act (COPPA) enforces a parent's right to control what information websites collect about their children. Websites that target children younger than 13 or knowingly collect information from children must post privacy policies, get parental consent before collecting information from children, allow parents to decide how such information is used and provide an opt-out option for future collection of a child's information.

RIGHT OF PUBLICITY

Just as a person has the right to keep personal information private, he or she also has the right to control the use of his or her identity for commercial promotion. Unauthorized use of one's name or likeness is recognized as an invasion of privacy.

There are four types of invasion of privacy: intrusion, appropriation of name or likeness, unreasonable publicity and false light. If a company uses a person's photo in an ad claiming that the person endorses a certain product, the person could file a lawsuit claiming misappropriation.

MOVABLE BOUNDARIES

The Supreme Court approaches the right to privacy and personal autonomy on a case-by-case basis. As public opinion changes regarding relationships and activities, and the boundaries of personal privacy change, largely due to social media and an atmosphere of "sharing," the definition of the right to privacy is ever changing.

CASE OF *GRISWOLD v. CONNECTICUT*

It originated as a prosecution under the Connecticut Comstock Act of 1879. The law made it illegal to use "any drug, medicinal article, or instrument for the purpose of preventing conception". Violators could be "fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."¹¹

¹¹ 381 U.S. 479 (1965)

By the 1950s, Massachusetts and Connecticut were the only two states that still had such statutes, although they were almost never enforced.

In the late 19th and early 20th century, physicians in the United States largely avoided the publication of any material related to birth control, even when they often recommended or at least gave advice regarding it to their married patients.

Then in 1914, Margaret Sanger openly challenged the public consensus against contraception¹². She influenced the Connecticut Birth Control League (CBCL) and helped to develop the eventual concept of the Planned Parenthood clinics.

The first Planned Parenthood clinic in Connecticut opened in 1935 in Hartford. It provided services to women who had no access to a gynecologist, including information about artificial contraception and other methods to plan the growth of their families. Several clinics were opened in Connecticut over the following years, including the Waterbury clinic that led to the legal dispute.

In 1939, this clinic was compelled to enforce the 1879 anti-contraception law on poor women patients. This caught the attention of the CBCL leaders, who remarked on the importance of birth control for cases in which the lives of the patients depended upon it¹³.

During the 1940s, several cases arose from the provision of contraception by the Waterbury clinic, leading to legal challenges to the constitutionality of the Comstock law, but these failed on technical grounds.

In *Tileston v. Ullman* (1943), a doctor and mother challenged the law on the grounds that a ban on contraception could, in certain sexual situations, threaten the lives and well-being of patients. The U.S. Supreme Court dismissed the appeal on the grounds that the plaintiff lacked standing to sue on behalf of his patients.

Yale School of Medicine gynecologist C. Lee Buxton and his patients brought a second challenge to the law in *Poe v. Ullman* (1961). The Supreme Court again dismissed the appeal, on the grounds that the case was not *ripe*: the plaintiffs had not been charged or threatened with prosecution, so there was no actual controversy for the Court to resolve.

¹² Johnson, John W. (2005) *Griswold v. Connecticut*, University of Kansas, pp. 8-10

¹³ *Ibid*

The polemic around *Poe* led to the appeal in *Griswold v. Connecticut*, primarily based on the dissent of Justice John Marshall Harlan II in *Poe*, one of the most cited dissents in Supreme Court history.

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. – Justice John Marshall Harlan II, dissent in *Poe v. Ullman*.

He argued, foremost, that the Supreme Court should have heard the case rather than dismissing it. Thereafter, he indicated his support for a broad interpretation of the due process clause. On the basis of this interpretation, Harlan concluded that the Connecticut statute violated the Constitution.

After *Poe* was handed down on June 1961, the Planned Parenthood League of Connecticut (PPLC) decided to challenge the law again. PPLC Executive Director Estelle Griswold¹⁴ and Dr. Buxton (PPLC medical volunteer)¹⁵ opened a birth control clinic in New Haven, Connecticut¹⁶. The clinic opened on November 1, 1961, and that same day received its first ten patients and dozens of appointment requests from married women who wanted birth control advice and prescriptions. Griswold and Buxton were arrested, tried, found guilty, and fined \$100 each¹⁷. The conviction was upheld by the Appellate Division of the Circuit Court, and by the Connecticut Supreme Court¹⁸.

CONCLUSION

Right to privacy is an essential component of right to life and personal liberty under Article 21. Right of privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial or even political. Right to

¹⁴ Estelle Griswold, Connecticut Women’s Hall of Fame.

¹⁵ 1965 *Griswold v. Connecticut* Contraception as a right of privacy? The Supreme Court says, Yes!. Action Speaks Radio 2012

¹⁶ Garrow, David J. (Spring 2011). *Human Rights Hero, The Legacy of Griswold V. Connecticut, Section of Individual Rights and Responsibilities*

¹⁷ Alex McBride (December 2006)

¹⁸ Laura Carroll (July 2012) *The Baby Matrix*, LiveTrue Books

privacy is not an absolute right; it is subject to reasonable restrictions for prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Where there is a conflict between two derived rights, the right, which advances public morality and public interest, prevails.

Louis Brandeis J in a celebrated judgment has said that right to privacy is “*the right most valued by civilized men.*” Lord Hoffmann has observed in relation to the complaints against media that there is no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification.

Judges of the American Supreme Court have talked about the right to privacy as an aspect of the pursuit of happiness. The pursuit of happiness requires certain liberties that we are guaranteed by the state so that we may act in a fashion that we may deem fit, as long as it does not encroach upon the rights of others. Liberty is not a limited or quantifiable right. It is visible on the entire gamut of the legal spectrum.

If one looks at the earlier judgments of the apex court in its formative years, one can observe the desirability of the court to treat the Fundamental Rights as watertight compartments. This was felt the most in the case of *A.K Gopalan v. State of Madras*¹⁹ and the relaxation of this stringent stand could be felt in the decision of *Maneka Gandhi v. Union of India*²⁰. The right to life was considered not to be the embodiment of a mere animal existence, but the guarantee of full and meaningful life.

Being part of a society often overrides the fact that we are individuals first. Each individual needs his/her private space for whichever activity (assuming here that it shall be legal). The state accordingly gives each individual that right to enjoy those private moments with those whom they want to without the prying eyes of the rest of the world. Clinton Rossiter has said that privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns. This autonomy is the most special thing that the person can enjoy. He is truly a free man there. This is not a right against the state, but against the world. The individual does not want to share his thoughts with the world and this right will help protect his interests.

¹⁹ 1950 AIR 27, 1950 SCR 88

²⁰ 1978 AIR 597, 1978 SCR (2) 621

HUMAN RIGHT VIOLATIONS IN INDIA: AN OVERVIEW

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Abstract

Human rights are the basic rights and freedoms those belong to every person in the society throughout his/her life. They are applicable irrespective of someone's origin, religion, sex, cast and color. However, it is restricted for someone who indulges in unlawful activities and poses a challenge to the national security. Most of the time, the human right violation takes place during the police investigation, communal violence and in the work places. In India, several initiatives have been undertaken, especially to protect the rights of women and children. The National Human Right Commission of India constituted under the Protection of Human Rights Ordinance and it is an autonomous public body. The National Human Right commission acts as a watch-dog and intervenes whenever the law is misused against any individual or section of people. This article summarizes the Human Right violations in India, the factors which causes the Human Right violation and the composition and activities of Human Right commission.

Keywords: *Human Right violation, Human Right commission, Religious violence, Legal reform, Women rights*

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INTRODUCTION

Every person is eligible to have fundamental rights due to the fact of being human. These are called "human rights". The Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is eligible to have all these rights, without any discrimination. Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. The term 'Human Rights' is a dynamic concept, it may be called as basic rights, fundamental rights, natural rights or inherent rights. The Indian Constitution provides for fundamental rights, including religious freedom. It provides freedom of speech, separation of executive and judiciary, freedom to move within the country and abroad. Our country has an independent judiciary and many autonomous bodies to deal with the issues related human right violations.

INCIDENTS WHICH CAUSE HUMAN RIGHT VIOLATION

Police investigation

Four people per day died while in police custody, with "hundreds" of those deaths being due to police use of torture as estimated by Asian Centre for Human Rights during the period of 2002 to 2008¹. According to a report written by the Institute of Correctional Administration in Punjab, up to 50% of police officers in the country have used physical or mental abuse on prisoners². Similarly, the instances of torture, such as lack of sanitation, space, or water have been documented in West Bengal as well³.

Although, nobody may be made a witness against himself as per Indian constitution, the invasive methods like narcoanalysis, brain mapping, and lie detector tests were once commonly permitted by Indian courts for crime investigation. Concerns regarding human rights violations in conducting deception detection tests were raised long back and the National Human Rights Commission of India had published Guidelines in 2000 for the Administration of Polygraph tests. Unfortunately, only few of the investigating agencies were

¹ *Hundreds die of torture in India every year – Report*, Reuters. 25 June 2008

² Malik, S; *Torture main reason of death in police custody*, The Tribune, Archived from the original on 3 March 2009

³ Custodial deaths in West Bengal and India's refusal to ratify the Convention against Torture Asian Human Rights Commission, 26 February 2004

following these guidelines⁴. In May 5, 2010 the Supreme Court in India (*Smt. Selvi v. State of Karnataka*) declared brain mapping, lie detector tests and narcoanalysis to be unconstitutional, violating Article 20 (3) of Fundamental Rights. Consent is required from individuals, to conduct these tests and it cannot be done forcefully. When they are conducted with consent, the material so obtained is regarded as evidence during trial of cases according to Section 27 of the Evidence Act.

Several wrongful convictions of innocent people lead to causing them to languish in jail for many years. This is due to inadequate investigation and hasty rulings by courts. For instance, the Bombay high court in September 2009 asked the Maharashtra government to pay Rs. 100,000 as compensation to a 40-year-old man who languished in prison for over 10 years for a crime he didn't commit.

Religious Violence

Communal conflicts between religious groups have been prevalent in India since around the time of its independence from British rule. A well-known example for an oldest communal violence in India was the Moplah rebellion, when Militant Islamists massacred Hindus in Kerala. Communal riots took place during the partition of India between Hindus/Sikhs and Muslims where large numbers of people were killed in large scale violence.

In 1984 Anti-Sikh riots, more than two thousands of Sikhs were massacred by members of the secular-centrist Congress Party of India⁵. The killing was supposedly done at the behest of Congress leaders such as Jagdish Tytler. Congress Party officials provided assailants with voter lists, school registration forms, and ration lists. Several Congress leaders were behind this lynching as revealed by Nanavati Commission which investigated this case. Prime Minister Manmohan Singh apologized in the Lok Sabha for the involvement of Congress stalwarts in the Lok Sabha.

Religious violence takes place every now and then in cities and villages. Five people were killed in Mau, Uttar Pradesh during the communal violence which was triggered by the proposed celebration of a Hindu festival⁶. Other such communal violence include the 2002

⁴ Math, SB; *Supreme Court judgment on polygraph, narcoanalysis & brain-mapping: a boon or a bane*, Indian J. Med. Res. 134: 4–7, 2011

⁵ Nichols, B; *The Politics of Assassination: Case Studies and Analysis*, Australasian Political Studies Association Conference, 2003

⁶ Human Rights watch p. 265, 2006

Marad massacre, which was carried out by the militant Islamist group National Development Front, as well as communal riots in Tamil Nadu executed by the Islamist Tamil Nadu Muslim Munnetra Kazagham against Hindus.

Power Struggle

During the period of 1984 to 1994, the state of Punjab in northern India was engaged in a power struggle between the militant secessionist Khalistan movement and Indian security forces. The government of India responded strongly against the University of Punjab by launching Operation Blue Star in 1984. The security force stormed in to the Golden Temple complex in Amritsar, the center of Sikh religious and spiritual life, where some militant groups had retreated. This controversial operation resulted in death of hundreds of civilians, militants and soldiers. This leads to assassination of Prime Minister Indira Gandhi by Sikh bodyguards which led to further violence⁷.

The aftermath of these events were felt for more than a decade⁸. According to a Human Rights Watch report, state security forces adopted “increasingly brutal methods to stem the insurgency, including arbitrary arrests, torture, prolonged detention without trial, disappearances and summary killings of civilians and suspected militants”⁹. Militant organizations responded with increased violence aimed at civilians, state security forces, and Sikh political leaders deemed to be negotiating with the government.

RECENT HUMAN RIGHT VIOLATION IN INDIA

Over the ages, people have been governed by rulers who followed different system and forms of government and used their power and authority to suppress the common people. It was only in 1947 when India got its independence from the British rule and adopted democratic form of government which encouraged India to get its new face. However, even after 70 years of Independence, India still continues to suffer from significant human rights violations, despite framing many laws and policies and promising and making commitments to tackle the problems.

Women Rights

⁷ Kaur, J; *Twenty Years of Impunity: The November 1984 Pogroms of Sikhs in India*, 2004.

⁸ *India-Who Killed the Sikhs*, Archived from the original on 12 September 2007

⁹ *Punjab in Crisis: Human Rights in India*, Human Rights Watch. 1990

Due to the rise of crimes, violence, scams and scandals leads to the frequent human rights violations and the conditions are deteriorated in recent years in India. Violence against women is increasing at an alarming rate and they are at a high risk of sexual harassment, trafficking, and forced labour including violations of equal participation in political, economic and social life. In fact the recent molestation case in Bengaluru was shocking and condemned by all sections of our society. Such horrifying incident took place on the night of 31 December 2016 where many people gathered on the streets and started molesting the women. Despite the various strong laws and acts framed by the government, women across India still continue to suffer from domestic violence, acid attacks, rape and murder etc.

People's Security

The incident which violated the right to security of people was Indore-Patna deadliest train accident which took place on 20 November 2016. This accident took the life of more than 150 people and over 200 people got injured. This accident was one of the deadly derailments of the year. It was one of the worst rail accidents in 6 years. The main reason of this deadliest accident was poor infrastructure maintenance and carelessness by authorities.

Self-Respect & Dignity

The security forces have been accused for serious human rights violations like sexual harassment and killing of innocent tribal villagers during the operation against Maoist insurgents. According to a report given by National Commission of Scheduled Tribe, security forces in Odisha killed five tribal villagers including children and claimed that they were killed during anti-Maoist operations. A tribal woman of Chhattisgarh's Sukma district was forcefully abducted by security personnel and was gang raped and ultimately killed and it was alleged that she was killed in gunfight with armed Maoists.

MEASURES TAKEN TO COUNTER THE HUMAN RIGHTS VIOLATIONS

In India, *Human Rights Act*, enacted in 1993, according to this, '*Human rights*' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India.' The National Human Rights Commission, the State Human Rights Commission in different States and Human Right Courts has been established. Indian government has undertaken several measures for the greater protection of the women, children and certain other groups of

the society. They include, (i) Prohibition of Sati Practice, (ii) The minimum age for marriage has been fixed by law, a boy below the age of 21 and a girl below the age of 18 cannot marry, (iii) Dowry System has been prohibited by law, (iv) Child Labor (below the age of 14) is prohibited in factories and mines, (v) The Protection of Human Rights Act, was enacted in 1993, (vi) The Protection of Women from Domestic Violence Act was passed in 2005 to protect women from domestic atrocities, (vii) Right to Information act was passed in 2005 and (viii) Right to education has been accepted as a fundamental right in India. The Right of Children to Free and Compulsory Education Act was passed in 2009.

In the recent years the government of India under the leadership of Prime Minister Narendra Modi has taken important strides especially with the legal reform with respect to the treatment of women, dalits and various vulnerable groups. Some of the initiatives launched by Prime Minister are “*Beti Bachao Beti Padhao*”, *UJJAWALA*– a comprehensive scheme for the prevention of trafficking and Rescue, “*Stand-up India*” scheme for Women, Scheduled Caste, Scheduled Tribe and many others. But still in many areas the government continued to fall short, both with respect to legal reform and its implementation. There is a need to sensitize the women, children, youth and various other communities of the people to spread about human rights.

NATIONAL HUMAN RIGHTS COMMISSION OF INDIA

The National Human Right Commission of India is an autonomous public body. It has been constituted under the Protection of Human Rights Ordinance, 28 September 1993¹⁰. It was given a statutory basis by the Protection of Human Rights Act, 1993¹¹. The NHRC is the National Human Rights Commission of India responsible for the protection and promotion of human rights, defined by the Act as “rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants”¹².

Composition

The National Human Right Commission comprise (i) A chairperson should be retired CJI (ii) One member who is Judge of the Supreme Court of India (iii) One member who is Chief

¹⁰ Annual Report 1993-94 of the National Human Rights Commission

¹¹ The Protection of Human Rights Act, 1993, as amended by the Protection of Human Rights (Amendment) Act, 2006.

¹² Nath, D; *NHRC issues notice to T.N.*; The Hindu 23 February 2017

Justice of a High Court, (iv) Two members to be appointed from among persons who has knowledge or experience in matters relating to human rights and (v) In addition, the Chairpersons of four National Commissions (SCs, STs, Women and Minorities) serve as ex-officio members. The sitting Judge of the Supreme Court or sitting Chief Justice of any High Court can be appointed only after the consultation with the Chief Justice of Supreme Court.

FUNCTIONS

The functions of National Human Right Commission are include (i) inquire on a petition given by a victim regarding the violation of human rights or negligence in the prevention of such violation by a public servant; (ii) intervene in any proceeding involving allegation of violation of human rights pending before a court; (iii) visit any jail or other institution where persons are detained or lodged for purposes of treatment, reformation or protection. This is to study the living conditions and make recommendations thereon to the Government; (iv) review the safeguards provided in the constitution for the protection of human rights and recommend measures for their effective implementation; (v) review the factors, including acts of terrorism that pose a challenge to the enjoyment of human rights and recommend appropriate remedial measures; (vi) study treaties and other international instruments on human rights and make recommendations for their effective implementation; (vii) undertake and promote research in the field of human rights; (viii) take the human rights literacy to the various sections of society and create awareness and the safeguards available for the protection of these rights through publications and the media; (ix) encourage the efforts of non-governmental organizations and institutions working in the field of human rights; and (x) such other functions as it may consider necessary for the protection of human rights.

The National Human Rights Commission has always considered media as its equal partner in the promotion and protection of human rights. The media has immensely helped in building awareness about human rights and the role of the NHRC. Media reports have been the basis of several suo motu cognizances that the Commission took about the violations of human rights in the far flung areas of the country, which, otherwise, may not have come to the notice of the Commission.

During the period of October 2015 to September 2016, the NHRC has registered 1, 05,664 cases on the basis of complaints, intimation from Police and Prison authorities etc and on suo motu basis. The number of cases registered during the period on suo motu basis is 133. The

onus is on governments in States and Centre to ensure that the faith of the people in the NHRC is not shaken even by exception, when some of them choose to ignore its recommendations, not on the merits but merely on the ground that they are not bound under the Protection of Human Rights Act to accept them.

CONCLUSION

Human rights describe equal rights and freedom for everyone, irrespective of race, color, sex, language, religion or political affiliation. Every human being is born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. In history, the Human Rights were always been violated. Some leaders do not grant rights to the all the section of people in the society. Even religious leader in some cases were responsible for the violation of human rights. The National Human Right Commission taking many steps to curb the Human Right violation. Every citizen in our country has the responsibility of reporting the Human Right violations to appropriate authority.

A CRITICAL ANALYSIS OF EVIL NEXUS BETWEEN CHARITY & TERRORISM FINANCING THROUGH LEGAL LENS

Mayura Manohar Sabne*

Abstract

The word “Charity” has a very virtuous nature. Charity, either for religious or for humanitarian purposes has always shown to the world the benevolent face of humanity. Unfortunately, at the same time, this pious obligation is exploited as tool to collect finances to fulfill the evil intentions of sustaining terrorism. Post 9/11, the deadly connections between charity and terrorism has exposed to the greatest extent and global community has taken a strong initiative to sever this connection. India has also significantly contributed in this endeavor. In the light of this background, the researcher has initially attempted to understand the basic concept of charity and its various perspectives. After having understood the nature of terminologies, the researcher has tried to analyze the alliance of charity and religion with terrorism and it's financing. Further, the researcher has made an evaluation of international and Indian legal framework dealing with the present issue. The evaluation is supported with the case study of Zakir Naik. This evaluation has resulted into some concrete conclusions. And at the end, the researcher has tried to put forth some valuable practical recommendations which need immediate attention and implementation.

Keywords: Terrorism Financing, Charity, FCRA

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INTRODUCTION

Charity has two perspectives, one is religious and other is neutral. Religious charity is done when persons donate under the name of particular religion for religious purpose or as a religious duty. On the other hand, Neutral charity is not connected to any particular religion but the donor donates out of free will for the purpose of humanity.

The understanding of the concept of charity makes it clear that it is either for religious purpose or for humanitarian aid. Therefore, all over the world, charitable institutions of both the types are working tirelessly and providing their services to the society. These organizations were never suspected of being involved in funding terrorism till their nexus with terrorist activities was exposed after 9/11 attacks.

NEXUS WITH TERRORISM FINANCING

Terrorism financing envisages within its fold all those acts and activities which are providing financial support to terrorism in any form. Financing is the soul of terrorism and every social avenue is exploited by terrorists to develop and sustain their terrorist ideology.

In the context of terrorism financing, it is found that there are certain sections of society, which willfully and out of sympathy to terrorist cause, donate to charities whose money is going to be used for terrorism financing. On the other hand, there are certain innocent sections of population who donate to charity, either as a religious duty or for humanity, without knowing that their money is going to be used to finance terror act. The former people are the culprits of those victims who suffer at the hands of terrorist organizations.

When the Cold War ended and new or perhaps dormant, ideological divides emerged, only to be augmented by socioeconomic factors, extremist organizations propagated their ideas to masses of the same religious or social orientation. Whether or not the prospect of indiscriminate violence was ever expressly addressed, such legitimate gatherings of socio religious groups around the world were exploited as funding vehicles for terrorism. In accordance with this scenario, the vast majority of those donating money were not aware that it would be used in this way. In some cases, under the guise of a "charitable" or "relief" organization, a terrorist group would openly (to the particular audience addressed) solicit funding for its operations, taking advantage of the benefits inherent in the legislation on

charities.¹ Thus, the historical development of geopolitical decisions taken by states paved way for funding through charitable institutions.

The organizational structure, ideological beliefs and goals of terrorist organization decide the pattern of use of charities as a source of fund raising. For example, the organizational structure and ideology of Hamas wanted the use of charity as a source of fund raising in transparent way and it was main source of it. On the other hand, Al Qaeda widely used charities but did not establish public links with them. They formed merely one of the sources and not the only one and main source for all the times. Thus, the preferences of terrorist organizations of using charity as a source of financing are determined by the exigencies of the time and requirements.

Charitable institutions are both the source and channel of terrorism financing. The previous paragraph explains how it works as a source. In the context of channel, it can be seen that due to very less control on charitable institutions, foreign financial aid to the terrorism was channeled through these institutions. The pious purpose was exploited to move the funds across the borders without the fear of being obstructed by CTF agencies.

Under the garb of charitable institutions, blind trusts are established by the terrorists to move and store the funds. The documents of these blind trusts do not reveal either the purpose or the beneficiaries of the trust. Similarly, so-called asset protection trusts are available, which allow the settler retain control over the assets of the trust by becoming the beneficiary. Finally, in some jurisdictions the insertion of "flee clauses" enables the trust to be automatically shifted to another country if it prompts an inquiry.²

Charitable institutions come under the scanner of CTF agencies when it is found that they preserve misleading promotional literature and carry out high-pressure sales techniques. They fail to maintain proper accounting records, destroy records illegally and transfer charity's proceeds to a middleman who operated outside the charity's designated target country. Suspicion can also be raised when these institutions are found to be unqualified to handle such considerable amounts of money and the trustees are unable to explain why certain funds were missing. Due to the humanitarian consequences that CTF measures can cause, it becomes difficult for governments and bodies to apply strict measures to this source.

¹ Ilias Bantekas, *The International Law of Terrorist Financing*, 97/2, The American Journal of International Law, pp. 315, 322 (2003), Available at: <http://www.jstor.org/stable/3100109>, (Accessed on 05/05/2018)

² *Ibid* at 323

MASK OF ZAKAT

Zakat is the payment made annually under Islamic law on certain kinds of property and used for charitable and religious purpose and it is one of the five pillars of Islam.³ Zakat is the Islamic concept of tithing and alms obliging Muslims to contribute to charitable causes.⁴ Zakat is a tax on wealth, payable on various categories of property, notably savings and investments, produce, inventory of goods, salable crops, and precious metals. The source of zakat is the Quran itself, the primary source of legal and religious reference in Islamic law. The Quran sets out five lawful recipients of zakat. Of particular interest are those described as sabil Allah, which refers to persons engaging in deeds for the common good of a particular Muslim society. Terrorist groups have construed sabil Allah to encompass violence against non-Muslim Western targets.⁵ In this way, the pious concept of Zakat is misinterpreted and altered by terrorists to garner funds.

Zakat is a peculiar feature of Islamic charity. Every Muslim person is bound by its religion to pay Zakat. Most of the donors of Zakat are wealthy private Muslim citizens, especially in Gulf countries and Saudi Arabia and therefore, the amount collected is very huge. The donor is unaware about the utilization of amount collected by Zakat. Also, being of pious and religious nature, unregulated and seldom audited, it hardly comes under the scanner of CTF agencies. It can easily be co-mingled with other funds. Therefore, it has been widely exploited by the global jihadists or Islamic terrorists and it is one of the important sources of funding for Islamic terrorism. Most of the Islamic terrorist's organizations had maintained their close contacts with mosques so that they can utilize the amount of Zakat for terrorist purposes.

The state sponsorship of terrorism financing has been indirectly through this source of Zakat. Whenever states officially ended their financial support, they continued to fund terrorists through Zakat. One of the specially designated global terrorist Gulbuddin Hekmatyar was the recipient of vast Zakat from Saudi mosques and wealthy Saudi sheikhs.⁶ This channeled Zakat was also a major source of support for mosques and madrasas in Pakistan which

³ Zakat, Available at: <https://en.oxforddictionaries.com/definition/zakat>, (Accessed on: 8/05/2018)

⁴ Thomas J. Biersteker & Sue E. Eckert, *The Challenge of Terrorist Financing*, 1,9 in *Countering the Financing of Terrorism* (Thomas J. Biersteker& Sue E. Eckert, 2008)

⁵ *Supra* note 1

⁶ Thomas H. Johnson, *Financing Afghan Terrorism*, 93,108 in *Terrorism Financing and State Responses: A Comparative Perspective* (Jeanne K. Giraldo and Herold A. Trinkunas, 2007)

provided recruits for terrorist activities.

IDEOLOGICAL FORCE

It is no doubt that religion plays ideological role in every person's life. But when this ideological force is misused and directed towards ill cause of terrorism, it poses dreadful threat to the whole humanity. The history of terrorism shows that terrorism was earlier characterized as liberation movements; but with the rise of Islamic fundamentalism, terrorism changed its color into religious and ideological terrorism. Islam is a pious religion. It nowhere preaches policy of violence. However, for selfish and imperialistic interests, certain non-state actors initially along with certain state entities misinterpreted Islamic tenets and misused them for spreading terrorism. Thus, the religion of Islam is employed as an ideology to support ill intentions of certain fundamentalists.

The ideological force of Islam is misused to gain sympathy for terrorist cause. The Islamic principles are utilized to make appeal for fund raising. The strategies adopted by superpowers during the period of cold war and after its end , the misguided actions like waging war against Iraq, Taliban and taking over the state of Afghanistan of certain states like U.S.A. have created discontent in the Islamic population. By exploring these mistakes, under the garb of Islamic ideology, extremists and terrorist groups ably exploit Muslim sufferings, resentment and anger.⁷

In this way, the ideological force of Islam has given birth to Al Qaeda and ISIL which today pose a devilish threat to whole humankind.

VEIL FOR INVISIBLE FUNDRAISING

Ethnic and religious Diasporas are appealed in the name of religion to contribute money for the cause of religion. Diasporas are the target of religious fundamentalists because people constituting Diasporas stay in foreign countries. They exhibit more love for their motherland and religion because they are living in the geographic areas which may not have their own religion and the affectionate environment. This vulnerability is fuelled by such fundamentalists and perverted interpretation of religion is used as a tool to gain sympathy and raise funds.

⁷ Rohan Gunaratna, *The Evolution of AL Qaeda*,47,48 in *Countering the Financing of Terrorism* (Thomas J. Biersteker& Sue E. Eckert, 2008)

The discussion on Islamic charity makes it clear that religion itself makes provision for funds for its followers. It is true that religious charity is meant for humanitarian purposes; however the perverted form of religious instructions is used by the terrorists' organizations and networks for wrongful purposes. Fundraising in the name of religion was common propaganda of Al Qaeda. ISIL is appealing to Islamic people to give their contribution in the ongoing global jihad and so Islamic radicalized small groups or individuals are inspired to donate funds to terrorist acts. ISIL is using social media to carry out its jihadist propaganda and radicalize the local youth. Such youth, for the love and sake of religion, finance themselves through various petty channels and sources and carry out terrorist attacks.

INTERNATIONAL AND NATIONAL LEGAL FRAMEWORK DEALING WITH CURRENT ISSUE

Charity has a humanitarian face and hence global legal fraternity had neglected its evil nexus with terrorism financing till 9/11 attacks. Post 9/11 also, barring few actions by U.S.A., the international community has largely given a free hand for charity to flow through the globe. Religion is fuel for war and hence it is very less interfered with by the international legal norms. Nevertheless, it is significant to note that many charitable institutions which had been convicted of supporting terrorism have been banned by most of the nations in the world.

In India, religion is a volcano and hence, religious charity is seldom regulated. The Unlawful Activities Prevention Act, 1967 (Amended up to date) indirectly deals with charitable organizations, only if they are found to be unlawful associations. Apart from this, The Foreign Contribution (Regulation) Act, 2010 is the prime regulatory statute which controls the functioning of non-governmental and charitable institutions in India. However exclusion of certain suspicious sources of foreign contribution and absence of ground of "terrorism financing" from the grounds of disqualification⁸ make it a weak law for curbing the menace of terrorism financing.

The enforcement machinery in India in the National Investigation Agency is burdened with other so many responsibilities that it is not possible for it to dedicate focused attention on the crime of terrorism financing under the garb of charity and religion. The following case study throws light upon the nexus and its analysis done by Indian state-

⁸ Section 12 (4), The Foreign Contribution Regulation Act, 2010

CASE STUDY OF ZAKIR NAIK AND HIS ISLAMIC RESEARCH FOUNDATION

Zakir Abdul Karim Naik is an Indian Islamic preacher. He is the founder and president of the Islamic Research Foundation (IRF). He is also the founder of the “comparative religion Peace TV” channel through which he reaches a reported 100 million viewers. Zakir Naik is known as “controversial preacher” because he has interpreted Islamic fundamental principles in his own way and these interpretations are inspiring Islamic youth to adopt the path of terrorism. The sermons of Zakir Naik include the subjects like why every Muslim is terrorist, jihad, suicide bombings and he referred to Osama Bin Laden as “Soldier of Islam”.⁹ Due to these fiery subjects, his preaching is banned in India, Bangladesh, Canada, Malaysia¹⁰ and United Kingdom. When he was denied physical presence for his lectures at various venues in India, his organization, Islamic Research Foundation, organized his lectures via social media.¹¹

Islamic Research Foundation is established by Zakir Naik for seeking advancement of knowledge through spiritual and intellectual growth.¹² The foundation carries on the activity of raising funds to establish an Endowment Fund for purposes of awarding research grants, scholarships and establishing centers of higher learning which integrate Islamic and modern education and awarding grants for publication of Books that meet the Aims and Objectives of the Islamic Research Foundation. It runs a fully-fledged website which hosts thousands of articles which try to decipher the meaning of Islam and preaches the so called modern interpretations of Islam. This funding for scholarships is exposed to have been linked with individuals who have connections with ISIL. According to recent news, NIA investigators claim that one Abu Anas, an accused charged in the “ISIS conspiracy case” registered by NIA in 2015, received a scholarship from Naik’s IRF for three consecutive years from 2013 to 2015. Sources say that Hyderabad-based Abu Anas was alleged to be part of a

⁹ Rama Lakshmi, *This Islamic preacher might have influenced one of the Dhaka terrorists. Now Indians want him banned*, The Washington Post(06/07/2016), Available at: www.washingtonpost.com/news/worldviews/wp/2016/07/06/did-an-Indian-islamic-tv-evangelist-inspire-one-of-the-dhaka-terrorists-many-indians-say-the-preacher-must-be-banned/?utm_term=.3b9e8ba0a0cb, (Accessed on: 04/05/2018)

¹⁰ Adrija Bose, *10 times ‘Islamic Preacher’ Zakir Naik Proved the He Promoted Anything but Peace*, The Huffington Post,(07/07/2016), Available at: www.huffingtonpost.in/2016/07/07/zakir-naik_n_10851550.html, (Accessed on: 04/05/2018)

¹¹ Mohammed Wajihuddini, *Will Return to India Only Next year: Zakir Naik*, The Times of India,(16/07/2016), Available at: www.timesofindia.indiatimes.com/india/Will-return-to-India-only-next-year-Zakir-Naik/articleshow/53233375.cms, (Accessed on: 04/05/2018)

¹² Islamic Researcher Foundation, Available at: www.irfi.org/about_irfi.htm, (Accessed on: 04/05/2018)

conspiracy linked to an ISIS-affiliated group, Junood-ul-Khalifa-fil-Hind.¹³

Zakir Naik claims himself as a preacher of peace, morality and justice but he has spread hate and anger through his speeches. His sermons are referred by many individual terrorists on social media and therefore, it is alleged that Zakir Naik has links with terrorist organizations and he indirectly, through his speeches, supports pro-terror agenda.¹⁴

Zakir Naik is blamed not only for inspiring terrorism but also for amassing huge wealth under the garb of charity. His web of financial transactions includes at least 10 companies and 19 properties in Mumbai and Pune in which Naik has invested an estimated Rs 104 crore. The National Investigation Agency, on November 18, 2016, on the orders of Ministry of Home Affairs, had registered a criminal case against Naik at its Mumbai branch under Sections 153A of Indian Penal Code and Sections 10, 13 and 18 of the Unlawful Activities (Prevention) Act, 1967. IRF has already been declared as an Unlawful Association by Government of India as per a notification dated November 17, 2016. In September 2012, Zakir Naik obtained a status of Non-Resident Indian. He left India on May 13, 2016, and has not returned since. The special NIA Court at Mumbai issued a non-bailable warrant against Naik on April 21, 2017. The NIA has also initiated proceedings to get a Red Corner Notice against Naik and has sent the requisite documents to National Central Bureau (Interpol) NCB, India on May 11, 2017.¹⁵

Probing Naik's financial assets, investigators are learnt to have found huge investments in various properties across Mumbai and Pune. At least 19 properties have been identified in which Naik reportedly invested more than Rs 104 crore over the last few years. The NIA has also traced a web of at least 11 companies incorporated by Naik with his family members and close aides as Directors of these companies. NIA has tracked the trail of financial transactions running into many crores through these companies. The investigations are currently undergoing.

¹³ Varinder Bhatia, *NIA moves to revoke Zakir Naik's passport, probe his money trail*, The Indian Express (09/06/2017), Available at: www.indianexpress.com/article/india/nia-moves-to-revoke-zakir-naiks-money-trail-probe-his-trail-4695667/ (Accessed on: 04/05/2018)

¹⁴ PTI, *Government hints action against Islamic preacher Zakir Naik for "hate speech"*, The Economic Times(06/07/2016), Available at: www.economictimes.indiatimes.com/news-and-politics/nation/government-hnts-action-against-Islamic-preacher-Zakir-Naik-for-hate-speech/articleshow/53080185.cms, (Accessed on: 04/05/2018)

¹⁵ *Supra* note 13

In this way, Zakir Naik is exploiting the principles of Islam for propagating terrorism and financing terrorist activities indirectly. This case presents recent development in the terror financing investigations and the misuse of charities and religion for spreading and financing terrorism. Therefore, the outcomes of the case registered against Zakir Naik will set a new precedent in the realm of CTF investigations and law enforcement.

CONCLUSION

Religion is made to confer peace of mind and security of soul. Charity is pious obligation, either towards particular religion or humanity. Both of these elements are inherently virtuous. They are omnipotent and whole humanity, with negligible exceptions, follows one or other religion and performs charity in some or other form. However, the evil intentions exploit these devout features of civilizations for satisfying their illegitimate ideological or political greed. Terrorists have misinterpreted religious tenants for their selfish purposes and abused charities for fulfilling their financial needs. Donors of charity, knowingly or unknowingly, have supported this source of terrorism financing since decade.

The subject of religion and charity and its link to terrorism financing is very less discussed; but it has to be considered that this source and channel is the most vulnerable to TF risks and the most widely abused among all other sources and channels. Further, the evaluation of exiting international and national legal framework dealing with the nexus of terrorism financing and charity and religion reveals that there is no legal deterrence at international level. The national laws are inadequate and lack strict enforcement vigor. The relevant case study clarifies the extensive use of charities by terrorists to gain financial support and the present unhappy state of affairs of investigation. At some point of time, the treatment of these charities and religious sections of society by the government authorities under the name of “war on financial terror” had led to the exercise of state coercive power. Under the veil of financial war on terror, U.S. authorities prosecuted many charitable organizations but it can be found that the events took unexpected turn and instead of treating the main cause, innocent persons were unnecessary indicted and prosecuted without due process of law.

India must formulate an umbrella policy dealing with the menace of terrorism financing and covering all preventive, curative and punitive aspects of the said crime. The policy must lay down effective ways for securing adequate and sufficient participation of relevant stakeholders like participants in financing, private players and victims of the said crime. As

the charity and religion are social organs of the society, law must secure community participation in effective manner. It must adopt advocacy function to prevent the community from indulging into charity for evil purposes. It must look into psychological trends of the society to explore the positive side of religion. Only in this way, the law as an instrument of social change can bring social transformation in real terms. The policy must also lay down a comprehensive and consolidated enactment exclusively targeted at preventing the evil of terrorism financing. The enactment must also aim at remedial as well as penalizing aspects of said crime.

In the wake of global and national terrorism assuming religious identity, it is the need of the hour that law must take cognizance of this evil nexus from balanced point of view. It must adopt preventive, regulatory and punitive comprehensive approach along with preservation and protection of freedom of religion. Then only the charity and religion can serve benevolent needs of humanities.

BIOPIRACY OF TRADITIONAL KNOWLEDGE

Priyanka Bhowmik*

Abstract

Traditional Knowledge is knowledge preserved by indigenous communities conducive to their livelihoods who are residing in much adverse condition. Bio-piracy is a violation of the rights of traditional communities over their biological resources and related knowledge by Obtaining IPRs usually patents or Plant Breeders Rights to gain monopoly control over biological resources, related traditional knowledge, or commercial products based on these resources or knowledge, without the consent of, or any benefits going to, the original holders of the resources/knowledge. Lack of legal protection has led to patenting of many TK based products in foreign countries. These activities adversely affect the livelihoods of TK holding societies and also cause serious threats to the biodiversity. There should be complete protection system to protect TK from misappropriation by third parties. In this regard TKDL created by Indian Government is a good intervention, which can ensure the protection and preservation of TK. The crucial importance of indigenous, traditional and local communities in preserving and nurturing biodiversity, biogenetic resources and associated traditional knowledge must be legally recognized by establishing the concept of community right.

Keywords: Traditional Knowledge, Bio piracy, Bio diversity, TKDL, Community right.

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INTRODUCTION

Traditional knowledge¹ is a valuable source of knowledge developed over generation by indigenous and local communities in various parts of the globe. The indigenous and local people who are custodian of TK preserve and conserve the knowledge over thousands of years. However, TK is under current threat of misappropriation by others without accruing any benefits to the original holders of TK which is called bio piracy. Traditional Knowledge is the integral part of indigenous communities around the whole world. Lack of legal protection has led to patenting of many TK based products in foreign countries. These activities adversely affect the livelihoods of TK holding societies and also cause serious threats to the biodiversity. There should be complete protection system to protect TK from misappropriation by third parties. It is necessary to protect TK holder's right which is getting hampered by third parties where benefit sharing method is not following by patent holders of TK based products. Giving proper protection to TK holders will ultimately flourish the TK based industries without hampering sustainable development process. TK plays an important role in the conservation of biodiversity and its traditional uses. The new technological developments clearly demonstrate the usefulness of TK for the development of new product of commercial importance.

OVERVIEW ON BIO PIRACY OF TRADITIONAL KNOWLEDGE IN INDIA

Bio-piracy is a violation of the rights of traditional communities over their biological resources and related knowledge. The implications of bio-piracy are economic as well as ethical: Obtaining IPRs usually patents or Plant Breeders Rights to gain monopoly control over biological resources, related traditional knowledge, or commercial products based on these resources or knowledge, without the consent of, or any benefits going to, the original holders of the resources/knowledge. The original holders of biological resources and related traditional knowledge do not get any share in the profits made from commercializing the products based on their resources/knowledge. They also do not get any recognition for nurturing and developing the resources/knowledge in the first place. Once an IPR is acquired by the bio-pirate, the original holders of a biological resource or related traditional knowledge are barred from making any commercial use of the IPR-protected knowledge or resource. This could lead to a situation where, for example, a community is not allowed to sell an indigenous product that is covered by an IPR. The IPR-holder dictates the terms of use of the

¹ Hereinafter referred as TK

IPR-protected resource/knowledge, which could mean that traditional communities who are the original holder could lose access to, or control over, their resource/knowledge. The investigation of biological resources for new commercial uses has been an inherent part of global economic and social development. The problem arises when bio-prospecting leads to bio-piracy or environmentally unsustainable practices such as collecting huge quantities of samples from an area. The term ‘bio-prospecting’ has acquired strong negative connotations and is often used in a sense that implies that bio-prospecting necessarily leads to bio-piracy. Some traditional communities may also find bio-prospecting offensive because it seeks to commercially exploit biological resources and related traditional knowledge which are sacred, or which support their livelihoods.²

CASES OF TK MISAPPROPRIATION

Turmeric

In 1995 Suman K. Das and Hari Har P. Cohly, two researchers based at the University of Mississippi Medical Center in Jackson, Mississippi, USA, applied for a US patent on the use of turmeric in wound healing (US Patent No. 5,401,504). More specifically, the application related to the use of turmeric to augment the healing process of chronic and acute wounds. The inventors claimed to ‘have found that the use of turmeric at the site of an injury by topical application and/or oral intake of turmeric will promote healing of wounds’. This was based on experimental evidence that showed that turmeric causes endothelial cells to proliferate, indicating that this molecule can be used to augment wound healing. The patent application acknowledged that ‘turmeric has long been used in India as a traditional medicine for the treatment of various sprains and inflammatory conditions’.³ The patent application was examined, and the claimed invention was considered novel at the time of application on the basis of the information then available to the examining authority.⁴ In 1996, The Council of Scientific & Industrial Research (CSIR), India, New Delhi requested the US Patent and Trademarks Office (USPTO) to revoke the patent on the grounds of existing of prior art. CSIR did not succeed in providing that many Indians already use turmeric for wound healing although turmeric was known to every Indian household for ages. Fortunately, it could

² Available at: http://nbaindia.org/uploaded/docs/traditionalknowledge_190707.pdf (Accessed on 16/03/2018)

³ Susette Biber-Klemm, Thomas Cottier, Danuta Szymura Berglas (eds), ‘*Rights to Plant Genetic Resources and Traditional Knowledge Basic Issues and Perspectives*’ (CABI 2005)

⁴ Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions – An overview (WIPO 2012)

provide documentary evidence of traditional knowledge including ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association. The patent was revoked in 1997, after ascertaining that there was no novelty.⁵

The Basmati Case

The basmati rice controversy emerged in the late 1990s in response to a US patent. Specifically, the US Patent and Trademark Office (USPTO) granted patent number 5,663,484 on ‘Basmati rice lines and grains’ to the Texas-based company RiceTec Inc. on 2 September 1997. Originally, the patent had 20 claims on the protected subject matter covering the novel basmati varieties that the researchers claimed to have developed. This caused significant alarm and outrage among Indian farmers and NGOs. At the time, many interpreted the patent to mean an outright monopoly on basmati and thus restrictions on export to the US where the patent had been approved. RiceTec’s claims were for a specific rice plant (Claims 1–11, 14), for seeds that germinate the patented rice plant (Claim 12), for the grain that is produced by the rice plant (Claims 13, 15–17) and for the method of selecting plants for breeding and propagating particular grains of rice (Claims 18–20). The overly broad wording and scope of the patent can be blamed for much of the public outrage. Shortly after the patent was granted, Indian NGOs began a campaign against it, also garnering support from the Indian government and drawing international attention to the patent. A re-examination application was filed by an organization named the Agricultural and Processed Food Products Export Development Authority in India, with government support. Subsequently, RiceTec agreed to withdraw some claims and, under a re-examination certificate (4525, 29 January 2002), these were formally retracted. Claims 1–7, 10 and 14–20 were cancelled and descriptions of the rice were altered in the certificate. However, Claims 8, 9 and 11 for specific novel rice lines were maintained.⁶

Neem

Seeds of a species of neem tree (*Azadirachta indica*) have been ground and scattered on fields by Indian farmers for centuries to protect their crops from insect pests. However, the neem tree has many other uses: it appears to be effective against malaria and internal worms; the leaves are used to protect stored grain from pests and clothes from moths; neem oil is

⁵ Available at: <http://lifeintelect.com/blog/2013/10/24/traditional-knowledge-and-intellectual-property-case-of-turmeric/> (Accessed on 16/03/2018)

⁶ Deniel F. Robinson. *Confronting Bio-piracy: Challenges, Cases And International Debate* (Earthscan, 2010)

used to make candles, soap, a contraceptive, and can even fuel diesel engines; and 500 million Indians reportedly use neem to brush their teeth. Most of these discoveries were first made by members of Indian rural communities. As a pesticide, neem has great potential as a cheap and environmentally friendly alternative to commercial synthetic pesticides.⁷ In the early 1990s, the United States Patent and Trademark Office issued a patent to W.R. Grace, which covers a method of creating a stabilized azadirachtin in solution and the stabilized azadirachtin solution itself (US Patent 5,124,349). Subsequently, the US Environmental Protection Agency registered Grace's stabilized azadirachtin solution for use on food crops under the name of Neemix (Wolfgang, 1995). W.R. Grace also filed a patent for neem for its use as an antifungal product with the EPO (European Patent 0436 257). This patent claimed the invention of a novel insecticide and foliar fungicide derived from a neem seed extract and the processes used to obtain the neem oil. This pesticide was alleged to have the ability to repel insects from plant surfaces, prevent fungal growth, and kill insect and fungal pests at various life stages. This patent was challenged by Indian NGOs and the Indian Government. Eventually, in 2000, the Opposition Division of the EPO revoked the patents after it was shown conclusively that the claims did not fulfill the requirement for novelty in view of their prior public use in India.⁸ The patent on Neem was revoked in May 2000 and it was reconfirmed on 8th March 2005 when the EPO revoked in entirety the controversial patent, and adjudged that there was "no inventive step" involved in the fungicide patent, thus confirming the 'prior art' of the use of Neem.⁹

TRADITIONAL KNOWLEDGE DIGITAL LIBRARY (TKDL) IN INDIA

Indian government has designed a protection for TK whose main goal is to facilitate its use as prior art in the patent examination procedures, and also to use it in order to create a *sui generis* protection. The National Institute of Science Communication of the Indian Council of Scientific and Industrial Research has created the Traditional Knowledge Digital Library (TKDL), and it has planned to sign agreements with international patent offices for the use of this database confidentially, so as to hinder unauthorized uses of the collected TK.¹⁰ India's Traditional Knowledge Digital Library (TKDL) warrants special mention and description

⁷ Susette Biber-Klemm, Thomas Cottier, Danuta Szymura Berglas (eds), '*Rights to Plant Genetic Resources and Traditional Knowledge Basic Issues and Perspectives*' (CABI 2005)

⁸ *Ibid.*

⁹ Available at: <http://www.navdanya.org/campaigns/biopiracy> (Accessed on 29/03/2014)

¹⁰ Evanson C. Kamau and Gerd Winter (eds) *Genetic Resources, Traditional Knowledge and Law* (Earthscan, 2009)

since it is currently accessible to a number of international patent offices and provides a good example of how it can aid the IP system to prevent unwanted use of TK by third parties. TKDL is a collaborative project of the council of Scientific and Industrial Research (CSIR), Ministry of Science and Technology and Department of AYUSH (Ayurveda, Yoga and naturopathy, Unani, Siddha and Homeopathy) as well as the Ministry of Health and Family Welfare, and is being implemented at CSIR. The project was initiated in the year 2001 for purposes of providing information on TK, in languages and format that patent examiners at International Patent Offices (IPOs) can understand. The library is aimed at constructively organising TK and making it available in a format that can be easily disseminated.¹¹ This has so far prevented the granting of wrong patents since TKDL serves as an accessible non-patent literature database that deals with traditional knowledge subject matter.¹² In this regard TKDL is a good intervention, which can ensure the protection and preservation of TK. Access to TKDL agreements have been concluded with a number of international patent offices and TKDL evidence has been utilized to successfully challenge applications for patent registration, which utilized unmodified form TK that already forms part of the TKDL. In this sense, TKDL is used for defensive protection of TK. Defensive protection ‘safeguards against illegitimate third-party assertion of IPRs over TK.’¹³

It includes over 200,000 traditional medicine formulations on Ayurveda, Unani and Siddha comprising 34 million A4 size pages. The encyclopedia published by TKDL contains information on traditional medicine, along with exhaustive references, photographs of plants, and scanned images from original texts of traditional systems. TKDL is trying to prevent “bio-piracy” in the pharmaceutical industry by collating and translating remedies from traditional medicine systems of India. The government is now increasingly concerned about cultural piracy, particularly in regard to yoga. In 2001 copyright had been awarded to Bikram Choudhury, Los Angeles-based “guru to the stars” for the 26 postures he uses in his “hot yoga” sessions. Traditional practices such Yoga have developed over the years and most often viewed as an anthropological knowledge free from commoditization and commercialization. In India, the centuries-old tradition is still taught free of charge in public

¹¹ Jeevan VKJ, Digital library development: identifying sources of content for developing countries with special reference to India, (2004) 36 The International Information & Library Review, 185

¹² Gupta VK, Traditional Knowledge Digital Library, paper presented at the Sub-Regional Experts Meeting in Asia on Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies (Bangkok, Thailand, 13-16 December 2005)

¹³ Pamela Andanda ‘Stricking A Balance Between Intellectual Property Protection Of Traditional Knowledge, Cultural Preservation And Access To Knowledge’ (2012) 17 JIPR 1

parks. Everybody is free to practice yoga but nobody is entitled to claim monopoly right over traditional yoga practices. Efforts are being carried out by the library to document descriptions of less common yoga poses to prevent false claims like a new form of the ancient art has been invented. A list from 16 ancient texts is compiled by the Hindu gurus and some 200 scientists to prevent yoga teachers in the United States and Europe from acquiring monopoly over the established poses through patent, copyrights and trademark. The objective of TKDL is to check misuse of Indian TK and to create new intellectual property for promoting access to medicines. The TKDL also contains translations into French, German, Japanese and Spanish, of these sources, originally written in Hindi, Sanskrit, Arabic, Persian and Urdu. This would be helpful in breaking language barriers and facilitating international search of prior art. For conducting prior art searches TKDL would be an authentic source for patent examiners in global patent offices. This would help the examiners to cross-check the validity and originality of patent applications. It would assist examiners in determining whether an invention is already known and recorded in ancient literature. Traditional Knowledge Resource Classification (TKRC) is an integral part of TKDL and is linked to an internationally accepted International Patent Classification to comply with international standards. TKDL has proved boon to protection of TK from bio-piracy.

TKDL has facilitated the access to information (which is not easily available to patent examiners) with the patent offices of many countries in order to minimizes the possibility of patenting “inventions” based on TK of India. In order to prevent the abuse and misappropriation of TKDL, the access of TKDL to Patent office is based on signing of an Access Agreement on non-disclosure, i.e., there will not be any third party disclosure unless it is essential for search purposes. These patent offices are allowed to utilize the TKDL for prior art searches and examination of patent applications. It is mandatory for these offices not to reveal the contents of the TKDL to any third party in order to protect India’s interest against any possible misuse. After getting access to TKDL, the European Patent Office (EPO) has rejected 15 patent applications based on traditional medicinal knowledge of India of various international companies during the past one year.¹⁴

CONCLUDING REMARK

Bio piracy must be condemned and forsaken by international community as illegal and

¹⁴ Bala, Anu. ‘Traditional Knowledge and Intellectual property rights – An Indian Perspective’ Nov 1, 2011 Available at SRRN <http://ssrn.com/abstract=1954924>

unethical appropriation of bio resources owned by the indigenous and local communities which would perturb the continuous improvement, evolution and development of TK and which lead to the complete erosion of traditional knowledge systems existing in different parts of the globe. Hence, as submitted by India at WIPO,¹⁵ there is a need to provide appropriate legal and institutional means for recognizing the rights of tribal communities on their TK based on biological resources at the international level. There is also a need to institute mechanism for sharing of benefits arising out of the commercial exploitation of biological resources using such TK. This can be done by harmonizing the different approaches of The Convention of Biological Diversity on one hand, and the TRIPS agreement on the other, as the former recognizes sovereign rights of the States over their biological resources and the latter treats intellectual property as a private right. The crucial importance of indigenous, traditional and local communities in preserving and nurturing biodiversity, biogenetic resources and associated traditional knowledge must be legally recognized by establishing the concept of community right. The legal recognition of community rights over biogenetic resources and associated traditional knowledge is fundamental to the protection of TK. The Indian government must develop suitable strategies including legal mechanism and policy decisions for safeguarding and enforcing the community rights of indigenous local communities over their traditional knowledge and associated biogenetic resources.

Hence, there is urgent need to design a *sui generis* legal mechanism in India for the purpose of TK.

¹⁵ Protection of Biodiversity and Traditional knowledge- The Indian Experience, submitted by India at Committee on Trade and Environment Council for Trade-Related Aspects of Intellectual Property Rights, WT/CTE/W/156, IP/C/W/198, 14th July 2000, p. 2.

SUSTAINABLE STOCK EXCHANGE

Priya Kala*

Abstract

Business and environment is often considered as related to each other in terms of industries. But there is lot more connected with industries, along with the environmental issues. There are lots of debates still going on for sustainable environment but this concept of ‘sustainable stock exchange’ is a new concept in itself which deals with the sustainability in business as well industries. It is organized by the UN Conference on Trade and Development (UNCTAD), the UN Global Compact, the UN Environment Program Finance Initiative (UNEP FI), and the Principles for Responsible Investment (PRI). Since its first meeting in 2009, this initiative has been welcomed worldwide. It also provides certain mechanisms to be obtained for the purpose of adhering the goals which has been set by the initiative. It is also interesting to look into the ranking given to the countries which have accepted and implemented the SSE initiative. This initiative is not just about enhancing a company’s listing and share price in the securities market but there are a lot more aspects which affects directly or indirectly to the economy of the country and the business environment as a whole. If we look from the view of the securities markets, the most important pillar of the securities markets is also the trust of the investors in the company which affects the company, at national as well as international level. Sustainable Stock Exchange initiative is also tool through which company can establish more faith in its investors. There is still a dilemma regarding its mandatory and voluntary implementation. Benefits of this initiative look more attractive but how far they are obliging to any company and the country at the end is an issue which is unanswered till now. However, this small and distinctive step towards global development needs to be appreciated and scrutinised.

Keywords: Securities market, Gender equality, Initiative

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INTRODUCTION

“Sustainable development is a shared challenge for all countries and opportunity for all institutions to make a contribution.”

- James Zhan¹

In the globalising world, the problem of one country affects the other country in one or other manner. The development of a country also depends on its relations with other countries. Countries are now well versed about the environmental issues faced by each and every country. The concept of ‘environment’ here does not include only nature but also economic environment of countries. Sustainable Stock Exchange is one of the initiatives of the United Nations for the globalised development of the countries. Development of only one country will not be sufficient enough for the development of all other countries of the world. Therefore, the concept of sustainable development can be used for the development of all the countries of the world. The basic objective behind the sustainable development is the development of all the countries without any discrimination to other country and with the help of the developed countries.

Stock exchanges can also contribute to object of sustainable development by collaborating with each other and making maximum disclosure to the other investors of the world. Developed countries are having strong stock markets compared to developing countries and developing countries. They can aid other countries by making disclosure of their management, working process and by opening the platform for foreign investors. Sustainable Stock Exchange Initiative is a step for the future sustainable market. It is also a call to all the countries to contribute and take actions in their own way to develop themselves. The economy of a country can sustain and develop in a healthy and transparent economic environment.

Sustainable stock exchange can also be an important tool for the gender equality. Through the disclosures made by the countries, other countries can look into the factors behind the success of the other stock markets. And by modifying or adopting those factors or methods, other countries can also develop their own stock markets. There are some hurdles for the implementation of the concept of the sustainable stock exchange because of its limitations.

¹ Director, Division on Investment and Enterprise, UNCTAD, Co-Director, United Nations Sustainable Stock Exchanges Initiative

Besides, every country has its own economic and social limitation which is hard to avoid. Efficiency in the employment and technological development can also be achieved through the sustainability in the stock markets.

Sustainability in the market means that the business of a company will increase its profit in the way that will increase its earnings premium. In the general market, the company may be having the profit from the business but there will be not be any scope for any further opportunity or growth of the business of the company as there will be less competition in the market and the investors will also be available in the less numbers. But sustainability in the market will lead to the innovation which will increase the earnings premium of the company and the earning drags of the company for attracting the investors will be lesser than that of the general market.

The concept, objective and method of the sustainable stock exchange seems beneficiary. But there are many aspects of this concept which need to be looked into before accepting it as a solution or tool for the development.

The corporations cannot work in isolation. They need to have society and economic environment for working efficiently. And it is the moral duty to give back to the environment the resources which we use. Sustainability reporting will help the companies to contribute not only to the environment but also in earning the faith of the investors.

Stock Exchanges also have committed that they have a responsibility to encourage greater corporate responsibility on sustainability issues.² Despite the cutthroat reality of the international exchange business, exchanges are still primarily viewed as national symbols, reflecting the health, vibrancy and investment credibility of the macro economy of their jurisdiction.

STEPS FOR SUSTAINABLE STOCK EXCHANGES

There are many organisations and working groups and campaigns for promoting and providing effective ways for sustainable stock exchanges. All of them are constituted with the understanding that the stock exchanges have a key role to play in a country's economy and after half of the world's stock exchanges are performing profits making functions, their

² Jaideep Singh Panwar & Jenny Blinch, Sustainable Stock Exchanges: A Report on Progress, Sustainable Stock Exchange Initiative, (Mar. 2012)

powers and responsibilities have also been changed. It depends upon the country's economy and stock exchanges, that how the corporations will behave. Some of such efforts for sustainable stock exchanges are as under:

Sustainable Stock Exchange Initiative

In New York, at UN headquarters, in 2004, UN Global Compact initiated a meeting for collaboration between ten stock exchanges from the world. In 2008, UNCTAD and the Principles for Responsible Investment (PRI) collaborated on two meetings at UN Headquarters in Geneva with investors, financial information providers, stock exchanges and public policy officials, which sought to promote responsible investment in emerging markets and examine the corresponding policy context. At the end of 2008, the Chief Executive of Aviva Investors called on all the listing authorities of global stock exchanges to consider whether their listing rules should include a provision promoting disclosure by companies on their sustainability performance and strategy. In 2009 UN Secretary-General Ban Ki-Moon opened the first SSE Global Dialogue in New York City. Participants comprised of a number of the world's exchanges, WFE, IOSCO, and PRI signatories, including Aviva Investors, FRR, TIAA-CREF and PREVI. In 2012, five stock exchanges, participating in the event made a public commitment to promoting long-term, sustainable investment and improved ESG disclosure and performance among companies listed in their markets. UNCTAD Secretary-General *Supachai Panitchpakdi*, speaking on behalf of the Quartet, issued an open invitation to stock exchanges around the world to join Nasdaq, BM&FBOVESPA, the Johannesburg Stock Exchange, Borsa Istanbul and The Egyptian Exchange in making this public commitment to advancing sustainability within their markets. Since the event, several other leading exchanges have joined the group of SSE Partner Exchanges.

The aim of the SSE initiative is to provide an effective platform for peer to peer dialogue among global exchanges. It also explores the ways in which stock exchanges can work together. It also tries to provide corporate transparency and performance in respect to the environmental, social and corporate governance (ESG) issues. In the globalising world, investors need more transparency for establishing their trust in the publicly listed companies. Disclosures involves from performance to the internal corporate governance structure and practice i.e., management of the company. Though, the rules of SSE initiative is not binding on any countries, unless they have signed the SSE commitment letter.

Through this initiative, member countries can promote their stock exchanges for attracting global investors. SSE provides various methods and events through which countries can promote their stock exchanges. ‘SSE Global Dialogue Initiative’ is one of the examples of the efforts of UN in this process. In this event, senior stock exchange executives, regulators, policy makers and companies can share their sustainability experiences with other countries and makes endeavours to find other sustainable approaches in order to combat the global challenges to the stock markets.

The method adopted for the sustainable stock exchange is reporting system. In this system, it is observed that how the companies manage environmental, social and governance risks and opportunities.

Through this initiative, the perspective of the companies has been changed from the corporate perspective to the competitive advantage from sustainability strategies.

Climate Disclosure Standards Board

CDSB is an international consortium of business and environmental NGOs. It has launched corporate climate change reporting requirements for implementation by stock exchanges or securities regulators in 2014 with the understanding of the need of the risks and opportunities relevant to future shareholder value.

ESG Reporting (PRI Reporting Framework)

Environmental, Social and Governance Reporting is one of the tools for the achieving the sustainability. Environmental reporting refers to the companies’ efforts or concern with the environmental issues pertaining to the business of the company. It also covers how the company covers or cures the environmental sources and environment used by them for production and running the business. Social reporting refers to the companies’ relationship with their employees and other staff members and contribution to the society at large for performing the social duties which includes employees’ health and stakeholders’ interest protection by the company. Governance reporting includes the information about the governance of the company i.e., accounting methods, voting rights and patterns, and risk management. It also includes that how a company will handle the political relationships and clean history of the company.

The ESG reporting is necessary for company because it affects various factors of the functioning of the company. The impact of ESG report can be seen on the following matters:

- Investors' access to capital market.

By looking at the report prepared by the company, the investors can decide to invest in the company by keeping full faith on the company and after being aware of the possible consequences of investing in the company. E.g., the investor, by looking into the ESG report, if finds that there is a conflict between the board of members of the company regarding appointment of the director, then he will think twice before investing in the company.

- Cost Savings and Productivity

By preparing the ESG report, the company itself can learn about the performance of the company. This can help the company to reduce its costs and increase the productivity by adopting appropriate measures.

- Risk Management

The governance of the company can reveal the methods adopted for possible risks and its management proceedings. The company will have to keep changing and looking after its risk management during certain periods. Through the report, the company can analyse its risk management.

- Revenue Growth and Market access

The company can increase its revenue growth by disclosing the information which will help the investor to understand the functioning of the company and attract him to invest in the company.

- Brand Value and Reputation

Consumers will also be attracted towards the company which is doing a noble cause. And this will result into increase in the demand and reputation of the product.

- License to Operate

ESG report can impact the company's license to operate in the market. When the company discloses all the necessary fact and information it also ensures the legality of the affairs of the company.

- Human Capital

The working capacity of the human capital of the company will also be affected by the positive report of the company.

- Employee Retention and Recruitment

The company can decide after having the ESG report the working capacity of the employees and their performance. Which can help the company to decide whether the employee should be retained or a new recruitment is necessary or not.

- **Company Value as an Acquisition Target**

The ESG report will increase the chances of the company being acquired by other MNCs which will increase its value in the market.

- **Ability to Acquire Other High quality companies**

ESG report will also increase the ability of the company to acquire other companies which will result into expansion of the business of the company and also increase the value of the value of the company.

There are certain principles which a company has to look into while preparing the ESG report which are as under:

1. **Responsibility and Oversight**

The company should choose a responsible person or board for looking over and preparing the report. The responsibility of overlooking to the report should be done by the person or persons who are having best interest in the company's business. Board of directors can be the responsible persons for this purpose.

2. **Clarity of Purpose**

The report should be made by keeping in mind the purpose and audience for whom the report is being prepared. High quality corporate reporting can help a company address various goals in relation to internal and external stakeholders and inform decision making, to the investors.

3. **Relevance and Materiality**

The report should be focused on material facts which would be relevant according to the present economic environment.

4. **Accessibility**

The report should be easily available to the audience for access. The report should be updated timely and accurate news should be provided through the report. The report should be helpful to the investors and stakeholders as well as internal governance of the company with ESG reporting.

5. **Credibility and Responsiveness**

The report should be credible to be relied upon and the data provided should also be showing the responsibilities of the company.

Some other initiatives include European Union – Non -Financial Reporting Directive, Group Friends of 47, World Federation of Stock Exchanges, Business and SDGs are some other organisations working with the same goal of sustainable development by providing various other instruments and helps companies to achieve economic growth. These initiatives have contributed in the economic development of various countries across the globe while attaining sustainability goals. Countries are also getting influenced with the more promotion of the benefits of these initiatives and by mandatory or voluntary method, trying to adhere with the ways provided by them.

EFFORTS OF WORLD'S STOCK EXCHANGES TOWARDS SUSTAINABLE STOCK EXCHANGE

There are five goals which the stock exchanges are required to comply with viz., gender equality, decent work and economic growth, responsible consumption and production, climate action and partnership for the goals. But all the stock exchanges have not been successful in adopting all the goals because of the economic, social and economic limitations. The awareness towards sustainable stock exchange is increasing rapidly among all the countries and they have adopted it as a measure for development for the economy. The number of partnership for SSE initiative itself shows it which has been tripled in the last two years.³ Increase in the Green Bond issuance is also shows that stock exchanges are also play an important role in sustainable development. The awareness and implementation of green bonds is still developing. Out of 82 stock exchanges, only 11 stock exchanges have listed or are listing green bonds.⁴

Guidance to issuers is also necessary for effective implementation and following of the sustainability rules. But as of 2014, only 15 stock exchanges around the world provided voluntary guidance to issuers on reporting ESG information.⁵ SSE initiative has also provided a Model Guidance on Reporting ESG Information to Investors and value driver model for corporations. Guidance to investors and corporations is much necessary because of lack of any uniform method for reporting. Guidance will also lead to awareness among the investors

³ SSE Report on Progress, 2016, SSE Initiative

⁴ *Ibid* at 2

⁵ *Ibid* at 2

and the corporations. The future consequences and success examples of other stock exchanges have forced the stock exchanges to think about providing guidance. Providing education and training also an effective method for encouraging market participants. Training requires the availability of costs as well as other resources. And due to these reasons, only 18 stock exchanges, out of 79 SE, provides training. SSE's Regional and Executive Dialogues have pioneered the path for this direction.

SEs gets the inspiration from the participation of smaller SEs also. *Pierre Rwabukumba*, Chief Executive Officer of Rwanda Stock Exchange said, "What we do today will shape our future; if we must plan sustainability and collectively, hopefully with no excuse from anyone."⁶ His words are significant because he is emphasising on the future of the SEs and investors as well with keeping in mind their needs and economic environment. He is also conceptualising the idea of collective development where no one shall be left behind.

Communication to stakeholders is somewhat impossible to the stock exchanges because SEs works not only as a platform for the markets, but also as regulators to some extent. And for maintaining the discipline, it is also necessary for them to set an example for the corporations. Being a profit-making corporation itself, the SEs can be examples for other corporate entities. But only 17 SEs have published an SSE Communication to stakeholders.⁷

India, (BSE) have submitted its communication to stakeholders in May 2015. This step is a good example for the companies for increasing their corporate governance and taking it towards corporate sustainability.

Reporting instruments also plays a key role for the encouragement to the companies for making disclosures. The country which has bigger economy provides higher number of reporting instruments. The reason behind this difference is that, the countries with big economies, are trying to encourage the companies to make disclosures with maximum number of options. Around 64 countries are having 400 (383) sustainability reporting instruments, while 44 countries have 180 instruments.⁸ Almost 400 instruments in 64 countries show that the efforts are being made for transparency and accountability.

⁶ Regional Dialogue: South East Asia, (May 2015)

⁷ *Ibid* at 2

⁸ Carrots and Sticks; Global Trends in Sustainability Reporting Regulation and Policy, Wim Bartels, Teresa Fogelberg, Arab Hoballah and Cornelis T. van der Lugt, SSE Initiative, (2016).

Mandatory reporting and voluntary reporting is another issue for debate because most of the successful SEs for sustainability have made the reporting mandatory which should be done voluntarily by the companies. ESG reporting and corporate governance reporting will help the companies at last to improve their own management and working efficiency. The majority of instruments identified in the research, around two thirds of the total, are mandatory and around one third are voluntary.⁹ The instruments which were kept voluntary at the initial stage, were made mandatory over the time because of the lack of implementation on the part of companies. This shows that the companies are not either not aware of the benefits of the sustainability reporting or they are not willing to disclose the information. But complying to the reporting requirements will be helpful to the company at last.

The benefits of reporting and sustainability simultaneously can be understood by some examples and cases. *Siemens (S/G)*¹⁰, have achieved its target of EUR 40 billion in revenue from its environment portfolio by 2014. The company has achieved this target through complying with the sustainability goals. It has also saved energy while controlling the pollution. Same example is of *Unilever (S/P)*¹¹ which has increased its productivity savings through eco- efficiency programmes. There is list of companies for examples such as Dow Chemical Company, DuPont, General Electric, Siemens, Toshiba and so on. All these examples illustrates that a company can also contribute into sustainable development. These companies are providing a broad range of sustainability data to stakeholders and also represent that how a value driver model can be used for the company's own growth.

Another point to be noted here is that the maximum numbers of instruments are provided by the government rather than the SEs or regulators. But most of the SEs which are for profit motives are more active in the ESG related listing requirements. Most of the instruments cover a large listed company which means that the government and SEs are expecting more responsibilities on the part of large companies.

India, being a developing country have 5,789 listed companies on BSE and 1,683 on NSE having higher number of market cap issued has become the partner of SSE initiative. ESG reporting is made mandatory for listing of the company's securities and also provides written guidance on reporting. BSE is also sending the communication to the stakeholders regarding

⁹ *Ibid* at 7

¹⁰ Report 2012, Siemens, (2013)

¹¹ Unilever Sustainable Living Plan, Progress Report 2012, Unilever (2013)

ESG reporting while providing the sustainability related indices. But none of both the stock exchanges provides training to the companies. Green bonds are also not issued on these exchanges.

One of the goals of the SEs is to achieve gender equality among the stock markets which is one of the crucial points for the current economy. The objective of sustainability in gender equality is to increase the number of women participation in stock market. In addition to that companies should also provide equal opportunity to women. The posting of women on higher post is not that much encouraging in recent time. At the current rate of process, the gender gap will not close over a 100 of years, and the global average of women on boards will not reach 30% until 2027.¹² This situation is not limited only to the developing countries only but to the developed countries as well. In the year 2017, the SSE initiative also emphasized on this issue.

PROS AND CONS OF SUSTAINABLE STOCK MARKET

The method which has been adopted for the sustainable stock market is reporting of the management and affairs of the company which is based on the willingness of the CEOs of the companies and owners of the companies and stock markets of the respective country. It is difficult to say that every stock market must comply with this method. And the non-mandatory nature of the reporting system lacks the quality of the data gathered from the reports. In addition to that, till all the countries will not comply with this system, it will be difficult to find out the loop holes of the system and working of the same. In addition to that, the cost saving or increase in revenue growth of the company alone will not show the sustainability of the firm.

Smaller firms will have to be conscious in their performance while adhering to the sustainability reporting. Foreign investors and domestic investors will need to have access to the data upon which the company is claiming the sustainability reporting. Only 21% of the companies are making the ESG information available for free while 11% are making it available in part and 12% are making it available after subscription.¹³ Some companies also use it only for internal purposes. Governments also need to understand the current economy of the country while making the disclosure mandatory and before issuing the instruments.

¹² SSE Gender Equality 2017 Report, SSE Initiative.

¹³ WFE Annual Sustainability Survey 2016, World Federation of Exchanges

Reporting system aids to understand the ups and downs of the markets through which investors can have a clear picture of the current market situation. In addition to that, the investors can also choose from the variety of markets after properly understanding the market.

The main beneficiaries of this initiative are companies, investors, workforce and society at large. The company can also enhance its corporate governance through management reporting and risk disclosure. Investors can also understand the resources of the company and the management of the company through the report itself. The company can look at the report for setting the future goals and adopting the method for achieving them.

WAY FORWARD

The countries are willing to adhere with the concept of sustainable capital market or stock exchange which can be seen from the growth of SSE itself and its number of members. But there are some difficulties regarding achieving goals for sustainability.

1. Lack of awareness among investors

The companies are not that much interested in thinking about the problems faced by long term investors and shareholders. Investors should be aware about their rights for asking for audits and reports. Companies should also provide access to the corporate governance report of the company so that they can understand the functioning of the company and can advise upon necessary situation. Investors should also be aware about the risk management of the company.

2. Corporate Governance

Yet, governance structures and operations still tend to either ignore sustainability or pigeonhole it.¹⁴ Corporate governance is the backbone of the company. Having a good corporate governance aids the company to grow dynamically. Investors are also interested in the corporate governance of the company because with a healthy corporate governance, the company can understand the needs of the investors in a better manner. By complying with the sustainability reporting, the companies can enhance its internal governance and risk management as well as accounting and auditing standards.

¹⁴ UNEPFI Integrated Governance, Report by Asset Management Working Group of the United Nations Environment Programme Finance Initiative, (June 2014).

But it depends upon the company's directors that in which manner they are adhering to the reporting system. The report, as mentioned earlier, must be used for the internal management of the company as well as for the observation by the investors. By looking at the corporate governance report, the investors can understand that how much the company is concerned about the concept of sustainable stock exchange. But the problem lies in revealing the true data and to analyse it in a proper manner.

3. Training to the corporates

It is important to give training to the corporates who are listing their securities to the stock exchange. Many of the SEs are providing the training for reporting on SEs while others have committed to provide it. Training to the corporates will help them for understanding the concept of the sustainability and obtaining the correct method for reporting it.

4. Voluntary versus Mandatory approach

There are two approaches adopted for the reporting. While over 100 (115) new mandatory instruments have been introduced, the proportion of instruments that are mandatory versus voluntary has dropped to 65 percent of the total in 2016, compared with 72 percent in 2013.¹⁵

This shows that the SEs are also adopting the voluntary approach towards the companies if they are willing to comply with the reporting standards themselves. Some countries have also adopted comply or explain method for reporting which is also a good step for the growth of companies. But this amounts to a mandatory approach by the SEs.

5. Lack of Uniformity in the Reporting System

There is no uniform method for adopting for the reporting which creates a confusion for the companies to adopt the suitable one. If the companies will not be provided training for adhering with the reporting system, it will be difficult for them to understand and adopt any suitable method. “We have national standard setters setting requirements for the front of the accounts, and international standard setters setting requirements for the back. This is resulting in a framework that is not cohesive. Everyone is running at this – we are getting numerous consultations – and it would be helpful if all this was brought together and addressed in one framework. We support a coherent framework of accounts that are harmonised

¹⁵ *Ibid* at 7

internationally. But I am not sure, the way we are going about it, that we are going to achieve it.”; commented *Liz Murrall* from the Investment Management Association (IMA) and chair of the International Corporate Governance Network (ICGN) Accounting and Audit Practices Committee.¹⁶

When almost all the countries have adopted the uniform thinking about the Sustainable Stock Exchange, then it is also necessary to think about the uniform method or platform for achieving it. But the problem regarding adopting a uniform method is the different economies of countries. Every country is not having same economic, social and environmental conditions. Therefore, it is difficult to have a single method of reporting which will be suitable for all the countries.

6. Concern of Developing Countries

Every country has its own norms and laws according to their own socio- economic environment. Developing countries need foreign investment in the era of globalisation, to compete with other countries and simultaneously, to develop its own economy. Any country cannot ignore the benefit of having foreign investment. But when the contradiction arises between the international law and domestic investment laws, and if domestic law will be applied, then the foreign investor might not be willing to invest in the host country anymore. Environmental laws and economic laws of two different countries are in any case, supposed to be in contradictory.

India, being a developing country is welcoming the foreign investment on a large basis. The recent and most relevant example of this is the establishment of GIFT City in Gujarat, which has been given the status of foreign territory and the transaction through that platform will also be done in foreign currency. Still, India needs to develop laws and procedures for the foreign investment; as per the opinion of other regulators of SEs.

CONCLUSION

The concept of Sustainable Stock Exchange is for the benefit of the companies itself. But the companies must take care of its internal governance and management along with other affairs of the company for contributing in the noble concept of Sustainable Capital Market or Stock Exchange. The interest of investors also should not be forgotten while adopting the

¹⁶ *Ibid* at 7

sustainable reporting. Investors also must be alert about their rights and duties and their active participation is also necessary for protecting their own rights. Countries will have to understand the situation of each other's economies and behave according to that. The main objective of this concept is for the benefit of the company and the investors and economy as well. But while focusing on these benefits, protection of small business or start-ups should also be taken care of. The adherence of this concept should not remain as an additional burden on small businesses or start-ups.

The uniform framework and method for Sustainable Reporting is desirable for the companies in order to avoid the complexities. However, at this initial stage, it is difficult to have such uniform method since the concept of Sustainable Development is still developing. But in future, the Stock Exchanges will have to come together for implementing this concept. The main intention for sustainability requires that nobody should be left behind for the development.

SHORT COMMENT ON REGULATORY ROLE OF UNITED NATIONS IN PROMOTING ECONOMIC GROWTH AND DEVELOPMENT

Diksha Dwivedi* & Sonali Khanna**

Abstract

International law is a dynamic law. It has been changing since its inception. However, in last four decades changes have been so radical and tremendous that was not witnessed in the last four centuries. The process of change has resulted in reconstruction and development of international law, and at the same time, has created many faceted problems because of demand of future changes. The most significant change that has taken place is the emergence of a number of territories, which hitherto were colonies, into independent states. One of the promising developments of the present century in inter-state relations has been the proliferation of international organisations.

The failure of the League of Nations on the one hand and the horror ad ruthless destruction caused by the Second World War on the other hand distributed many minds especially in Allied countries. They expressed the desire to establish peace even when the war was in progress. In order to achieve it, frantic efforts to create an international organisational had begun as early as in 1941. Deliberations became intense after the termination of the War which resulted in the creation of the United Nations Organisation on October 24, 1945.

The United Nations has been assigned by the charter, the general task of promoting progress and international co-operation in economic, social, health, cultural, educational and related matters. However, it was contemplated that by autonomous international organisations established by intergovernmental agreements, outside the United Nations.

The specialised agencies and the United Nation affiliated functional agencies have a greater role to play in fostering international co-operation and in improving the life conditions of the people of the World. There is hardly any phase of international life that does not come within purview of this organisation.

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BRETTON WOODS CONFERENCE

Bretton Woods Conference commonly known as Bretton Woods Financial and Monetary System was held from July 1 to July 22, 1944. The Bretton Woods Financial and Monetary System was the gathering of 730 delegates from 44 nations at the Mount Washington Hotel, situated in Bretton Woods, New Hemisphere, and United States.

The Bretton Woods Agreement created the International Monetary Fund and World Bank, which was set up to provide financial assistance to the countries during the First World War phase. They set up the fixed exchange rate of the US Dollar as the international reserve currency.

The Bretton Woods System collapsed between 1968 and 1973. During the 1960, the US dollar value was fixed against gold, which was seen overvalued. The crisis marked the collapse of Bretton wood system.

REGULATORY ROLE OF THE UNITED NATIONS

The International Organisation also is known as the United Nations came into force in 1945 after the failure of League of Nations during the World War II. In 1945, 51 countries signed the United Nation's Charter to dedicate to maintain international peace and security between the countries. It is to be noted that the name of the organisation 'United Nations' was taken from the Declaration of the United Nations and adopted in tribute to the memory of Roosvelt who suggested it.

The preamble of the United Nations is preceded by the words 'Charter of the United Nations'. It indicated the title of that legal instrument and the name of the organisation constituted by it.¹ The charter is a multilateral treaty, albeit a treaty having certain special characteristics.² The term 'charter' was regarded more appropriate designation of the Constitution of the international community than the Covenant, the name given to the Statute of the League of Nations. The term 'Charter' refers to the contents of the Treaty whereas the term Covenant refers to the contact form of the contents.³ The United Nation Organ is not a super national organisation like a federal government.

¹ Kelsen, 'The Law of the United Nations' (1950) p.3

² Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), ICJ Report, 1962, p.157.

³ *Supra* note 1

The purpose for which the United Nations was established is laid down in Article I of the Charter. They are as follows –

- 1) To maintain International Peace and Security
- 2) To develop friendly relations among the nations
- 3) To achieve international co-operatives
- 4) To make the United Nations an International Forum for Harmonisation

The United Nations is an association of States but like other organisations it carries out its functions through organs composed of individuals which in most cases act as representatives of the States. Chapter III of the Charter comprising of Articles 7 and 8 describe the organs of the United Nations. Article 7 provides that organs may be of two kinds i.e., principal organs and subsidiary organs. Principal organs are those organs whose names are mentioned in the Charter under Article 7. They are General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice and Secretariat. The subsidiary organs are those which may be established in future in accordance with the provisions of the charter.⁴

The failure of the League of Nations on the one hand and the horror ad ruthless destruction caused by the Second World War on the other hand distributed many minds especially in Allied countries. They expressed the desire to establish peace even when the war was in progress. In order to achieve it, frantic efforts to create an international organisational had begun as early as in 1941. Deliberations became intense after the termination of the War which resulted in the creation of the United Nations Organisation on October 24, 1945. The United Nations has been assigned by the charter, the general task of promoting progress and international co-operation in economic, social, health, cultural, educational and related matters. However, it was contemplated that by autonomous international organisations established by intergovernmental agreements, outside the United Nations

The constituent instruments describe the structure, purposes and main guidelines of the organisation's activities. International organisations are established for specific purposes. The purposes of the international organisations are more important in establishing legitimacy. There cannot be any organisation without any purpose.

⁴ Dr. H.O Agarwal, International Law and Human Rights, p. 404 – 405, Ed. 21, Central law Publication

The UN works in a variety of ways to promotes economic and social growth. The specialized agencies cover the entire economic and social endeavour.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

The United Nations Conference on Trade and Development was established in 1945 and was one of the principal organs of the UN's General Assembly dealing with trade, investment and development issues in developing countries. It provides a forum for intergovernmental deliberations. UNCTAD is the part of UN Secretariat. UNCTAD has approximately 190 members and the Headquarter is situated in Geneva, Switzerland. The policy making body of the UNCTAD meets every four years to formulate and set policy guidelines. The main functions of UNCTAD are:

1. To promote international trade between developed and developing countries with a view to accelerate economic development
2. To promote activities designed to help developing countries in the areas of trade and capital flows.
3. To review and facilitate the coordination of activities in the field of international trade.
4. To negotiate trade agreements
5. To formulate principles and policies on international trade and related problems of economic development.

UNITED NATIONS COMMISSION FOR INTERNATIONAL TRADE LAW (UNCITRAL)

When it became clear that the International Law Commission would not find time to take up questions of private law, the United nations Commission for International Trade Law (UNCITRAL) was established by the General Assembly by adopting Resolution 2250 (XXXI) on December 17, 1966. In establishing the commission, the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.⁵ The Assembly gave the commission the general mandate to further the progressive harmonization and unification

⁵ Available at: <http://www.uncitral.org/uncitral/en/about/origin.html> (Accessed on 22/04/2018)

of the law of international trade. The commission has since come to be the core legal body of the United Nations system in the field of International trade Law.

The Commission was originally composed of 29 governmental experts in the field of international trade law within the United Nations. Its membership was extended in 1973 to 36 and again in 2002 to 60 states.

The UNCITRAL has also adopted Model Law on different topics such as Model Law on International Commercial Arbitration (1985), Model Law on Procurement of Goods and Construction (1993) Model Law on Procurement of Goods, Construction and Services (1994) and Model Law on International Commercial Conciliation (2002) and Model Legislative Provision on Privately Financed Infrastructure Project (2003)

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANISATION (UNIDO)

UNIDO was established on January 1, 1967 as an integral part of the United Nations system. Its purpose was to promote and accelerate the industrialization of the developing countries which emphasis on manufacturing section. In the Second General Conference of the UNIDO held in Liam (Peru), it was recommended that UNIDO be a specialised agency of the United Nations. In September 1975, a Resolution 3362(S-VII) was adopted at the Seventh Special Session of the General Assembly of the United Nations wherein the Liam recommendation was endorsed, and a committee was established to draw up a constitution for the new agency. The Constitution was established to draw up a Constitution for the new agency. The Constitution of UNIDO as a specialised agency was adopted by consensus on April 8, 1979 by a conference on Plenipotentiaries.⁶ Consequently, on June 21, 1985 UNIDO became a specialized agency.

The principal organ of the UNIDO is the Industrial development Board consisting of members of the United Nations or of the intergovernmental agencies associated with the United Nations, elected by the General Assembly for a period of three years. A permanent Committee was established in 1972 as a subsidiary organ, to oversee the implementation of UNIDO programmes when the Board is not in session. Overall responsibility for UNIDO activities rests with the Executive Director, who is appointed by the Secretary General.⁷

⁶ *Supra* note 4

⁷ *Supra* note 4

The primary objective of the UNIDO is the promotion of Industrial development in the developing countries with a view to assisting the establishment of a new economic order. It also promotes industrial development and co-operation on global, regional, national and secretariat levels. UNIDO also assists developing countries in establishing and operating industries, provides a forum and acts as an instrument to serve developing and industrialized countries in their contracts, consultations and negotiations; and develop special measures designed to promote co-operation among developing countries and between the developed and developing countries.⁸

NEW INTERNATIONAL ECONOMIC ORDER (NIEO)

A number of states have attained political Independence; they are fighting for their economic rights and equality. They therefore, have made a call for the creation of the New International Economic Order (NIEO). At present, it has acquired the most pressing challenge before the international community mainly because ‘power’ prevails over the ‘number’.

New International Economic Order is an economic and political concept with envisaged the need of fundamental changes in the concept of international trade and development for the economic development. It redresses the economic imbalances between the developed and the developing countries. The establishment of NIEO is based on equity, sovereignty, common interest and equality and cooperation among the states, irrespective of theirs social and economic development.

CARTAGENA COMMITTEE

The Head of the State and the Government of the Rio Group, meeting in the city of Cartagena de Indies, on the occasion of the XIV summit of the Head of State and the Government of the Rio Group, reaffirm the unshakable committee to peace, strengthening of democracy and promotion of social and economic development of the peoples, as principles that guide the actions of the Governments, in both their domestic and international policies.⁹

INTERNATIONAL LABOUR ORGANISATION (ILO)

⁸ *Supra* note 4

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Available

at:

[\(Accessed on 22/04/2018\)](http://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/CartagenaCommitment.aspx)

ILO was established after the First World War on April 1919, as a part of Treat of Versailles and was associated with League of Nations. The Constitution was drafted by the Labour Commissioner between January and April 1919 set up by Peace Conference, which first met at Paris and then at Versailles. On October 9, 1946, the amending constitution was signed by the Montreal which became the International Labour Organisation Amendment, 1946. ILO became the first specialized agencies of United Nations with an objective of improvement of labour standards and conditions throughout the world.

The ILO consists of:

- a) International Labour Conference (known as General Conference),
- b) Governing Body (known as Executive Council) and,
- c) International Labour Office (known as Secretariat).

International Labour Conference is the supreme body of International Labour Organisation which generally meets annually at ILO headquarters in Geneva. The first International Labour Conference was first met in Washington in October 1919. The Governing Body which is also known as Executive Council meets three to four times in a year at Geneva. The Director of International Labour Office (secretariat) is elected by governing body in Geneva.

The main objective of ILO in promoting economic growth and development is the improvement of labour standards and conditions throughout the world. It has drafted number of convections and recommendations for International Labour Code, covering variety of subjects such as relating to employment, unemployment, employment of women and children, working hours, industrial health and security, social security freedom of association, trade unions. There are 186 members of the ILO. Member states are required to make regular reports to ILO regarding the adoption of standards.

GENERAL AGREEMENT ON TRADE AND TARIFFS (GATT)

Foreign trades without any restriction on either import or export of goods is called Free Trade. Due to various reasons, countries create hurdle in the free flow of goods and services across the nations. These could be by way of levying import tariffs or duties, by way of quantitative restrictions.

The difference between the nation's total payment to foreign countries, including movements of capital and gold, investments, tourist spending etc, and its total receipt from the foreign countries. It is a statistical statement which summaries for specific period transactions between residents of the country and rest of the world. Balance of payments position indicates various signals in businesses. The policies of the nation are highly affected by the position and status of its Balance of Payment

GATT was founded in 1947 with 23 member counties and covers international trade and goods. Earlier it was not recognised as an organisation but merely a legal agreement between the nations. GATT brings orderly growth in global trade by means of progressive reduction in tariff and non-tariff barriers. There were 8 GATT rounds, including the Uruguay round. The final Act concluding the Uruguay round and officially establishing the WTO regime was signed on 15 April, 1994, during the ministerial meeting at Marrakesh, Morocco. The organisation was created in 1949 and run till 1993 then it was taken by the World Trade Organisation in 1995.

It suggested the full use and development of resources of the world community and the enhancement of production and exchange of goods besides reciprocal and mutually beneficial arrangements involving significant reduction of tariffs and a gradual elimination to other barriers of trade. Despite the interest of various nations to protect self interest, this organisation continued till 1990.¹⁰ India was a signatory to the GATT, which was a binding contract on 128 countries by 1994.¹¹

WORLD TRADE ORGANISATION (WTO)

The World Trade Organisation (WTO) is the international organisation dealing with the rules of trade between nations. As of February 2005, 148 countries are Members of the WTO. In becoming members of the WTO, countries undertake to adhere to the 18 specific agreements annexed to the Agreement establishing in WTO. They cannot choose to be party to some agreements but not others (with the exception of few 'plurilateral' agreements that are not obligatory).¹²

¹⁰ Amit Sen, *WTO/TRIPS and Patent Rights in Indian Perspective*, The Law of Intellectual Property Rights, Edited by Shiv Sahai Singh, 70(2002)

¹¹ Available at: https://www.wto.org/english/thewto_e/gattmen_e.htm (Accessed on 20/04/18)

¹² Available at: http://www.who.int/medicines/areas/policy/wto_trips/en/ (Accessed on 20/04/18)

The main difference between GATT and WTO are as follows:

1. GATT was ad hoc and provisional. The WTO and its agreements are permanent. WTO has a sound legal basis because members have ratified the WTO agreements and the agreements themselves describe how the WTO is to function,
2. The WTO has members. GATT was officially only a legal text with no legal organisation,
3. GATT dealt with trade in goods. The WTO covers services and intellectual property as well,
4. The WTO dispute settlement is faster, more automatic than the old GATT system, which was based on consensus of all members. Majority cannot block WTO rulings,
5. GATT 1947 has been updated and exists as GATT 1994. It operates with other WTO Agreements.¹³

CONCLUSION

The provisions have put the specialized agencies into a special position. They are not the organs of the United Nations yet they have relationship with the United Nations. However, in spite of this relationship, the specialized agencies are independent international organisations. Membership in the United Nations is not an indispensable condition for membership in the specialized agencies. They perform a number of functions in the economic, social, cultural, educational and health fields. Specialized agencies are the several inter-governmental organisations established to deal with specific international problems. International Law lays down the procedure for the settlement of those disputes which arises when a party presents to another a specific claim based upon an alleged breach of law, and latter rejects it. The specialised agencies and the United Nation affiliated functional agencies have a greater role to play in fostering international co-operation and in improving the life conditions of the people of the World. There is hardly any phase of international life that does not come within purview of this organisation.

¹³ Harin Wardha, WTO and Third World Trade Challenges, Commonwealth, 2002

THE FATE OF KYOTO PROTOCOL AND CLEAN DEVELOPMENT MECHANISM

Pooja Ghosh*

Abstract

It has been 5 years since the second commitment period of the Kyoto Protocol commenced. Several have questioned its contribution to the main focus of the Protocol: Climate change. This essay highlights both the pros and cons of the Protocol as its fate will be determined by viewing its performance holistically. This essay also highlights the position of India under the Protocol and the impact of CDM on India. It concludes on the fact that the Protocol is a key-step toward climate change.

Keywords: Kyoto Protocol, Clean Development Mechanism, Climate Change, Sustainable Development

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INTRODUCTION

A mechanism for dialogue has always helped in improving ties and maintaining peaceful existence between the countries. Dialogues are generally preferred by the countries as it provides for a two-pronged solution: the country's stand is made clear to all the other countries and the countries are able to compare as well as compete (if necessary). A platform which provides exchange of information at the international forum builds a certain trust and confidence among the countries. *These platforms ultimately serve their purpose:* of building cooperation and paves the way for a concerted collective effort to achieve the desired goal. The Kyoto Protocol is one such forum. It was envisioned to promote coordination to collectively encourage sustainable development. A collective effort was expected by the parties to successfully reach the required limit of carbon emissions in the atmosphere. It was an ambitious project taken by the UNFCCC completely dependent upon the resolve of the parties which ratified it. But with time this resolve has been waning. Many countries have still not reached their desired limit. Certain developed nations which could have been the torch-bearers of sustainable development did not want to be a part of the Protocol at all. Also, a limited role was assigned to the developing nations like India and China. With all these problems, the fate of the Protocol has been questioned time and again by the Parties to the Protocol, Non-parties and even environmentalists. The dialogue process thus appears weak to the world currently which has bogged down the process for effective steps toward the problem of climate change.

THE INCEPTION- LATE REALIZATION IN ITS SOPHISTICATION

Kyoto Protocol was the result of subsequent acceptance of the fact that climate change was indeed caused by human induced activities mainly focusing on rapid industrialization and urbanization. Its inception was preceded by a long pause of questions and doubts. The world questioned this because defining climate change and its causes was a tougher task. Being an ambiguous term, climate change as an issue was officially highlighted in the Inter-Governmental Panel on Climate Change (IPCC) in 1990. Subsequent assessment reports¹ by IPCC made it clear with evidence that '*Yes! Climate change is induced by human activities.*'

¹ These are published materials composed of the full scientific and technical assessment of climate change, generally in 3 volumes. Available at: <https://www.ipcc.ch> (Accessed on: 26-02-2017)

After this a major breakthrough was the Rio de Janeiro Conference (1992), the United Nations Framework Convention on Climate Change (UNFCCC) was established. It aimed at stabilizing of greenhouse gases² and also promoted international dialogue for framing policies on climate change. Hence, Conference of Parties came into conception. And with this the Kyoto Protocol also became a reality³. This reality was just on papers as it finally came into force in 2005. The inception process of the Protocol speaks to the complex problem that climate change presents economically, socially and politically. Due to its complexity the process for nurturing sustainable development was slower and tardier. Realization that the phenomenon was anthropogenic was unfortunately slow.

AN OVERVIEW OF THE PROTOCOL

The whole process was achieved in three phases. The Protocol was adopted in 1997⁴. It entered into force in 2005⁵. The detailed rules which were contained in the Protocol were adopted in Morocco⁶. The UNFCCC states the main aim of the Protocol as under:

*'...The stabilization of Greenhouse Gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'*⁷ It commits its Parties by setting internationally binding emission reduction targets.

For achievement of this aim, a set of rules have been provided which bind the parties and facilitate emission limitation. The important features of the Protocol are as follows:

- *The Commitment Period has been divided into two phases.* The first commitment period started from 2008 to 2012. The second commitment period began on 1 January 2013 and will continue till 2020. Climate change being a complex issue, the inclusion of commitment period into 2 phases is desirable. The Protocol has kept in mind that every party has to commit to its goal in its own pace.
- *Clearly provides the Greenhouse Gases which are needed to be curbed and reduced.* These have been grouped under *Hydrofluorocarbons and Perfluorocarbons*. The goal is

² Available at: <http://unfccc.int/2860.php> (Accessed on: 19-02-2017)

³ *Ibid*

⁴ Available at: https://unfccc.int>kyoto_protocol>items.php. (Accessed on: 10-02-2017)

⁵ *Ibid*

⁶ The Marrakech Accord- This accord was adopted in Morocco which stated that LULUCF activities should not undermine the environmental integrity of the Kyoto Protocol, Available at: https://unfccc.int/land_use_and_climate_change/lulucf/items/3063.php (Accessed on: 10-02-2017)

⁷ *Supra* note 2

to reduce the emissions of these gases by 5.2% compared to the 1990 levels. It also makes up for those gases which have not been covered under the Montreal Protocol⁸.

- *The obligations set vary according to the country's development and growth.* The limitations are set by the countries themselves according to their capacity and keeping in mind the economic standing and progress. In a way the Protocol facilitates achievement but not at the cost of a country's economy.
- *Acts as a bridge between the developed and developing country.* The Protocol provides for aid by the developed countries so that even the developing countries can benefit.⁹ The countries are expected to even share their information on the measures taken by them to restrict and curb Greenhouse Gases emission. A forum which promotes cooperation between the developed and developing country on a *common issue faced by the world is a distinct feature in a time where isolation is preferred over global interaction and cooperation.*
- *More emphasis on meetings where changes and modalities can be discussed. The Conference of Parties plays an important role under the Kyoto Protocol.*¹⁰ An expert review body has also been set up to check on the information submitted by the Parties to the Protocol pursuant to the decision of the Conference of Parties.¹¹
- *Flexible Mechanism:* Perhaps the most important feature of the Kyoto Protocol is the provision for flexible mechanism which the obligate Parties may adopt while obliging itself to curb and achieve a certain limit on Greenhouse Gases emissions (GHG's). These flexible mechanism all the more have made the Protocol distinct. Flexibility accentuates willingness of the Parties to oblige. These important mechanism includes:
1) *Clean Development Mechanism (CDM)*¹², 2) *Joint Implementation (JI)* and 3) *Emissions Trading (ET)*. According to UNFCCC,¹³ 'the Kyoto mechanisms:
1) Stimulate sustainable development through technology transfer and investment

⁸ The Montreal Protocol is an International Treaty designed to protect the ozone layer by phasing out the production of numerous substances that are responsible for ozone depletion. Available at: <https://ozone.unep.org> (Accessed on: 10-02-2017)

⁹ Korhola, Elja-Riitta, The Rise and Fall of Kyoto Protocol: Climate Change as a Political Process, 15 November, 2014, Available at: <https://helda.helsinki.fi/bitstream/handle> (Accessed on: 19-02-2017)

¹⁰ *Ibid*

¹¹ Article 8, Kyoto Protocol

¹² Available at: <http://www.cdmrulebook.org/84.html> (Accessed on: 19-02-2017)

¹³ Available at: <https://cdm.unfccc.int> (Accessed on:12-02-2017)

- 2) *Help countries with Kyoto commitments to meet their targets by reducing emissions or removing carbon from the atmosphere in other countries in a cost-effective way*
- 3) *Encourage the private sector and developing countries to contribute to emission reduction efforts*

CDM and JI are the two project-based mechanisms which feed the carbon market. The CDM involves investment in emission reduction or removal enhancement projects in developing countries. JI enables developed countries to carry out emission reduction or removal enhancement projects in other developed countries.'

The Kyoto Protocol was a pioneer step in dealing with the climate change phenomenon envisaging a concerted effort of its parties to contribute as well as benefit at the same time. Considering all of these benefits, the Protocol has time and again been questioned by the skeptics about its effectiveness. Hence, this makes it ever so important to read into its future!

FATE THROUGH THE EYES OF A CRITIC

Questions are important for sound understanding of an event, a happening or even a non-happening. It is an integral part to question the consequence of a decision. Pragmatism and skepticism are significant when pitching or adopting an idea. The idea of adopting a system where the emission of GHG's can be controlled by imposing a limit and a duty on the developed countries to help the developing countries in such projects has naturally been doubted by the skeptics. Their views have affected the manner in which the Protocol and International Organizations are viewed. Its criticism has gained popularity and hence through the eyes of a skeptic the Protocol is weak and ineffective. Certain important points which have been time and again raised by the critics of Protocol are stated as follows:

A complex challenge has been oversimplified: Many climate change experts believe that the phenomenon of rapid climate change has been viewed in an oversimplified manner. There is an uncertainty that shrouds its solution but, the Protocol ostensibly views the *emission limitation regime* as an answer. It is a cluster of other problems which transcend just physical aspects. In a way climate change affects the society as well as the economy. Making efforts to find a problem to the solution also speaks to a country's standing. An over-simplification is not the answer. Being a complex challenge, it has been viewed as a wicked problem rather

than a tame problem.¹⁴ The solution to a wicked problem can never be right or wrong as it is in a tangle itself.

The problem of ‘Differentiated Responsibilities’: A major equitable principle of the UNFCCC (United Nations Framework on Climate Change Convention) is the ‘*Common but Differentiated Responsibilities*’ principle. This principle acknowledges the different capabilities and differing responsibilities of individual countries in addressing climate change. The principle of CBDR-RC is enshrined in the 1992 UNFCCC treaty, which was ratified by all participating countries. The text of the convention reads: “... *the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.*”¹⁵

This principle has been criticized by the developed countries as having different interpretations of what is equitable and what is not for these two categories. The principle focuses on two points when imposing duties on the parties, i) historical contribution to the GHG emissions and ii) the economic and technological capacity of the country. They argue that emerging economies like China (one of the major emitter of GHG), India and Indonesia are still seeking an advantage under this principle and hence, remain non-obligated to the Protocol. The application of this principle hinders the efforts of the developed countries and the effectiveness of the Protocol. The flexibility mechanism has been criticized as a simple notification by the developing countries to the Secretary General stating that the country ‘intends to be bound’ by the emission limit. This flexibility principle has also caused stalling of important negotiations and affected decisions of major economies like the USA¹⁶.

No obligation for the developing countries- No obligation for the developing countries is an important feature of the Kyoto Protocol which is an extension of the ‘CDR’ principle of the UNFCCC. This has been criticized as currently the major emitters of GHG’s belong to this category. This singling out process overburdens the developed countries and makes them less willing to oblige the Protocol at all. The EU and the US have pointed out the fact that

¹⁴ Available at: https://unfccc.int/files/pdf/03_unfccc.pdf (Accessed on: 12-02-2017)

¹⁵ *Ibid*

¹⁶ Korhola, Elja-Riitta, The Rise and Fall of Kyoto Protocol: Climate Change as a Political Process, 15 November, 2014, Available at: <https://helda.helsinki.fi/bitstream/handle> (Accessed on: 19-02-2017)

emerging economies should be treated differently from countries which are not fast developing countries.¹⁷

The problem with the Flexibility Mechanisms under the Protocol: The flexibility mechanism has also been put under a scanner by the critics. This majorly includes the Clean Development Mechanism¹⁸. It has been dubbed as the ‘first global, environmental investment and credit scheme of its kind, providing a standardized emissions offset instrument, CER’s (Certified Emission Reduction).¹⁹ This provides an opportunity to the developed countries to start a CDM project activity in a developing country. This earns the developed country saleable certified emission reduction (CER) credits, each equivalent to one tonne of CO₂, which can be counted towards meeting Kyoto targets.²⁰ This mechanism is mainly criticized because of its rigidity. Under the ‘Additionality principle²¹’ the project developer has to show that the project could not be implemented without the support of the Clean Development Mechanism. The other point is the fact such projects are declining. A decrease has been seen in such projects. For instance, in 2014 an announcement was made by the National Clean Development Mechanism Authority to change the submission process for approval of projects, the decrease in number of project was highlighted as a fact. The contribution of CDM toward emission reduction is declining by the years. Its ineffectiveness²² has thus questioned the Protocol itself. Another point raised is the treatment of nature as a commodity. Setting up of a trade mechanism for encouragement to both the developed and developing countries/parties has been to tackle climate change has also not sat down well with environmentalists.

HOW EFFECTIVE HAS THE PROTOCOL REALLY BEEN- AN APPRECIATION

Despite all this criticism, it should be admitted that the Protocol has provided a platform which envisions a medium for dialogue. Negotiations and dialogues are helpful where the issue requires deeper understanding and better cooperation. Kyoto Protocol served this purpose at a time when the realization that anthropogenic factors contributed to climate change had materialized lackadaisically and non-uniformly. Countries were not too willing to

¹⁷ *Ibid*

¹⁸ Article 12, Kyoto Protocol

¹⁹ Available at: <http://unfccc.int/2860.php> (Accessed on: 19-02-2017)

²⁰ *Ibid*

²¹ Available at: <http://www.cdmrulebook.org/84.html> (Accessed on: 19-02-2017)

²² Available at: www.cdmindia.gov.in (Accessed on: 19-02-2017)

share the burden still the Protocol succeeded to continue till its first commitment period entering into the second commitment period. There must be certain advantages to this Protocol that new parties are joining the Protocol. In a way this can be deemed as success.

The Clean Development Mechanism under the Protocol has also been appreciated for its positive impacts. During the First Commitment Period, this mechanism's performance has been nothing short of innovative. It incentivized the development of investments in projects of renewable energy, reductions of methane emissions and for aiding improvement of energy efficiency.²³ It also pioneered the carbon market and helped in capacity building of developing countries. The other important issue that the mechanism covered was the creation of employment in developing countries.²⁴ This helps the developing country and promotes sustainable development in countries which have high unemployment rate and poverty. The mechanism has also been viewed as a *tool for gender equality*. The CDM majorly deals in agriculture and energy projects. Women in the rural areas of the developing countries who contribute to agro-forestry, agriculture etc. can benefit from these. This is because it offers access to a range of beneficial technologies and services which can lighten the burden off women's shoulders and also help them in finding financial security.²⁵

INDIA AND THE KYOTO PROTOCOL

Around 2,295 projects had been registered with India's Designated National Authority for the CDM [2009-2011]. This constituted for 1-4th of the global total of projects.²⁶ Till 2012, India also performed better when it came to issuance of actual CER's²⁷. There was a major collaboration in the field of solar energy, renewable energy and power sector. It has also successfully trained and inter-connected the local government with such projects.²⁸

²³ Ministry for Foreign Affairs of Finland, Gender and the Clean Development Mechanism, November 29, 2010, Available at: <https://unfccc.int/files/application/pdf> (Accessed on: 20-02-2017)

²⁴ Available at: http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2719.php (Accessed on: 19-02-2017)

²⁵ *Supra* note 24

²⁶ Urpelainen, Johannes, The Clean Development Mechanism in India- is it working?, October 01, 2012, Available at: http://www.ideasforindia.in/article.aspx?article_id=58 (Accessed on: 21-02-2017)

²⁷ Castro, Paula, Benecke, Gudrun, Empirical analysis of performance of CDM projects: case study India, 2008, Available at: <http://climatestrategies.org/uploads/2008/02.pdf> (Accessed on: 22-02-2017)

²⁸ Bhat, Pamposh, CDM in India- Challenges and Success, December 23, 2006, Available at: http://www.epco.in/pdf/CDM_India_Challenges.pdf (Accessed on: 22-02-2017)

Still there are certain short-comings which have slowly led to the decline of the impact of CDM in India. Certain important ones are as follows:

The Government participation in such projects is passive. It is the companies which are the front-runners in such investments. The problem with this is that the returns are projected more than what can be achieved in reality.²⁹ Such over-ambitious numbers hurt the main goal in the long run.

This approach also brings in the fact that India also does not have a separate national policy on such projects. Agreed that there is an authority setup which monitors the projects and is involved in its approval but, a clear road-map is required to make this mechanism more effective and less uncertain.

In a study there were certain barriers mentioned by the investors of such projects. These ranged from technological problems, lack of skilled personnel and uncertain support for the project. Further this study provided that the promise of benefits was not evident from the responses of the village holders.

There is lack of measuring guidelines for assessing the contribution of CDM to sustainability benefits which focus on social, economic, environmental and technological well-being.³⁰ The other problem is India's optimism about the Protocol itself. With its focus on the Paris Agreement, the Kyoto Protocol is slowly losing its worth in the eyes of major climate change experts and environmentalists in India. India also demanded for clarity when it came to funding from the developed countries. There is a changing attitude towards the Protocol which is a result of changing politics and stature of India as the fastest growing economy of the World. Its priorities are changing.³¹

SO WHAT IS ITS FATE? - CONCLUSION

'A journey of a thousand miles begins with a single step'- Lao Tzu

²⁹ Urpelainen, Johannes, The Clean Development Mechanism in India- is it working?, October 01, 2012, Available at: http://www.ideasforindia.in/article.aspx?article_id=58 (Accessed on: 21-02-2017)

³⁰ Castro, Paula, Benecke, Gudrun, Empirical analysis of performance of CDM projects: case study India, 2008, Available at: <http://climatestrategies.org/uploads/2008/02.pdf> (Accessed on: 22-02-2017)

³¹ Chatterjee, Bappaditya, Kyoto is dead, long live Kyoto! , December 01-15, 2012, Available at: www.cseindia.org/BE_December_01 (Accessed on: 22-02-2017)

Climate change is no simple issue. A lot needs to be covered and a lot more understanding of this complexity is required. It seems as a long and arduous journey and the first step began with the Kyoto Protocol. It should be appreciated for the fact that at least it provides a road-map to reduce and control anthropogenic activities which contribute to the depletion and deterioration of Mother Nature. Countries are still looking forward to be a part of the second commitment period of the Protocol and even the advanced nations are looking forward to chip in. In his final Presidential address, Barack Obama called for better action on climate change and global warming. '*...Without bolder action, our children won't have time to debate the existence of climate change. They'll be busy dealing with its effects. More environmental disasters, more economic disruptions...Waves of climate refugees seeking sanctuary. We can and should argue about the best approach to solve the problem.*'³²

Prime Minister Narendra Modi also termed the phenomenon of climate change as a global challenge at the Paris Summit³³. His speech reflected the voice of developing nations as he called on for bolder action by the advanced countries. He even touted for better leadership by India so it emerges as a leader in climate change and sustainable development.

It can be said that the bigger picture has come to the attention of all the emerging and advanced economies. This is a step in the right direction. Considering this a fact, the Kyoto Protocol should be viewed as an enabler rather than a regressive step by both the developed and developing nations. For making it more effective, dialogues and exchange of information should be done openly and without any hidden political agenda in mind. As for the Clean Development Mechanism to be more effective in the developing countries, these nations can come together and hold dialogues for better implementation of this mechanism. CDM should be viewed as an opportunity. A better national and international policy, exchange of information which looks at the success stories and causes for failure impartially should be encouraged.

A complex problem has been recognized. What is required is action and this can only be through dialogue and better communication.

³² Emily Holden, In final address, Obama urges U.S. To deal with climate change, E&E News, January 11, 2017, Available at: <https://scientificamerican.com/article/in-final-address-obama-urges-u-s-to-deal-with-climate-change/> (Accessed on: 21-02-2017)

³³ Chetan Chauhan, Climate change is not of our making: Modi at Paris summit, Hindustan times, December 01, 2015, Available at: <http://m.hindustantimes.com/india/climate-change-is-not-of-our-making-modi-at-paris-summit/story-AYCPgLGSqWD2kS2o4cZ0RO.html> (Accessed on: 21-02-2017)

As for India, Prime Minister Narendra Modi rightly put in words at the Paris Summit, ‘India’s progress is our destiny and right of our people...We need a genuine global partnership.’ This is the need of the hour for all developing countries to contribute toward sustainable development. A helping hand by the advanced countries!

Sharing of knowledge and what a person possesses benefits both the receiver and the one who imparts. This is the bigger picture and it should aid the smaller but significant part which is the Kyoto Protocol.

***DEVIDAS RAMACHANDRA TULJAPURKAR v. STATE OF
MAHARASHTRA – AN OXYMORON OF FREEDOM OF SPEECH AND
EXPRESSION***

Sohini Mahapatra*

Abstract

The evolution of freedom of speech and expression in our country, if represented on a graph, would certainly be in a sine wave with momentous ups and downs. The interrelation of media and freedom of speech and expression has been pivotal in not just expanding the interpretation of Article 19(1)(a) but also in bringing forth different dimension of the same. Different forms of media have undergone varied challenges to sometimes emerge victorious and also at times to face limitations. Nonetheless, the restrictions imposed on media under Article 19(2) have been debated since the inception of the Constitution, with the judiciary being the ultimate authority which decides the fate of any form of media.

*In the light of this background, the objective of this paper is to review the decision of the Supreme Court in **Devidas Ramachandra Tuljapurkar v. State of Maharashtra**, which tests the validity of a poem on a ‘historically respected personality’ written in an allegedly obscene manner. The relevance of the judgment lies in the fact that while it is flexible and liberal in interpreting the bearing of obscenity, at the same time it oddly restricts freedom of speech and expression. In a particularly peculiar manner, this case both protects as well as curbs Article 19(1)(a).*

Keywords: Obscenity; Historically respected personality; Freedom of speech and expression; Poetic licence; Contemporary community standard

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INTRODUCTION

Freedom of media, the fourth estate of a democracy, is paramount in dispensing truth, opinions and engaging in fair comments shaping the perspectives of readers or viewers. Media has a very wide connotation today as opposed to how it initially was, restricted only to newspapers. As is the common misconception that media means only news or is news-related, media in fact signifies a plethora of modes such as books, paintings, poetry, cartoons, cinema, advertisements, social media and more. The influence that each of these forms of media have cannot be undermined. Hence, there has been a transition from ‘freedom of press’ to ‘freedom of media’. The freedom guaranteed to media applies equally to each kind of media with the same set of restrictions. While there is no express provision guaranteeing freedom of media per se, the same falls under freedom of speech and expression under Article 19(1)(a) of the Indian Constitution. Not conferring an exclusive freedom does not undermine the importance of freedom of media, rather as stated by the Constitution-makers, refrains from giving them superiority over any other ordinary citizen. Hence, media is subjected to reasonable restrictions enlisted under Article 19(2), meaning thereby that whenever a restriction is invoked against any form of media, the courts play a crucial role in upholding their freedom. In current times, where freedom of media has been going back and forth from being protected to being caged, in this case of *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*¹, the Supreme Court delivers a very interesting decision on the ‘test of obscenity’ as applicable to media.

BACKGROUND AND FACTS OF THE CASE

The petitioner was the writer of a Marathi satirical poem titled ‘*Gandhi Mala Bhetala*’ (Gandhi Met Me), which was published in a magazine in the year 1994, for private circulation amongst members of the All India Bank Association Union. A complaint was filed against the author, printer and publisher by a member of Pune-based ‘*Patit Pawan Sangathan*’ under Sections 153-A², 153-B³ and 292⁴ of the Indian Penal Code (IPC) for being obscene and offensive to the Father of the Nation, by projecting Mahatma Gandhi in improper and profane light. While the lower courts dropped charges under Sections 153-A

¹ 2015 (6) SCALE 356

² **Section 153-A**, Indian Penal Code: Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony

³ **Section 153-B**, Indian Penal Code: Imputations, assertions prejudicial to national-integration

⁴ **Section 292**, Indian Penal Code: Sale, etc., of obscene books, etc.

and 153-B, Section 292 was held a valid ground for objection. Hence, the present appeal was filed in the Supreme Court.

ISSUE INVOLVED

The main issue before the apex court, in this case, was whether a historically respected personality can be used in a poem or a write-up symbolically or through an allusion, which might be obscene.

ARGUMENTS

Counsel for appellant categorically divided his submissions into the following five questions:

- Whether at all a reference can be made to a historically respected person
- If such a reference is made, can it be in the form of an allusion or symbol?
- Whether such an allusion can be part of a written material, poem or otherwise
- Whether ‘poetic licence’ permits the writer to adopt an allusion
- If any of the above four are resorted to, then can a historically respected person be depicted in a manner, which might be obscene to the reader?

He further argues that owing to ‘poetic licence’, the idea of poetic freedom is a part of freedom of speech and expression and the writer has the ‘liberty of perception and expression’, which is a sanctified fundamental right guaranteed not only under the Indian Constitution but also under International Covenants.

However, the Amicus Curiae appointed in this case, put forth that the limits of artistic freedom are transgressed when a renowned person is deformed using imaginary elements, without definite reasons to show that it aimed at satire – it has to be based not on what the author intends to convey but rather on the effect it has on the reader. He adds that a write-up does not become satirical if the reader is unable to comprehend it as one. Hence, artistic freedom is not absolute allowing them to use historically respected persons in a lewd manner under the garb of poetic licence.

DECISION OF THE COURT

This 145-page extensive judgment delivered by a two-judge bench took note of several decisions on obscenity, across national and international courts, and laid down that when deciding a work on grounds of obscenity, the following three facets should be considered –

- Morals of contemporary society
- Fast changing scenario in our country
- Impact of the book/write-up on a class of readers and not an individual

The court expressly upheld the importance of artistic freedom and stated that the Hicklin Test has been long abandoned and has given way to the ‘Contemporary Community Standards Test’, which is to be applied when judging a work of the grounds of obscenity and indecency. Social morality itself is a subjective notion and thus, there needs to be ‘tolerance of unpopular views’. Therefore, verifiability of obscenity has to be from the perspective of an average person of contemporary socio-cultural space. The court further adds that ‘one can express his views freely about a historically respected personality showing his disagreement, dissent, criticism, non-acceptance or critical evaluation’ upholding artistic freedom.

Nonetheless, stepping aside from this view, the court specifically opines that, however, in case of Mahatma Gandhi, the test needs to be applied with greater degree and more stringently. Therefore, what would perhaps be considered not obscene for an ordinary man, the same can turn otherwise when used in the context of Mahatma Gandhi by ‘putting words or showing him was doing acts, which are obscene’. Consequently, the decision was in two parts, wherein charges against the printer were quashed but the appeal by the author of the poem was disposed and charges under Section 292 of IPC were upheld.

CONCLUSION

The judgment is a double-edged sword portraying both progressive and regressive attitude of the judiciary. While it endorses artistic freedom to the extent of expressly permitting freedom of expression pertaining to ‘historically respected persons’, yet it simultaneously pulls the reins by putting Mahatma Gandhi as an exception. The problem with this decision is two-fold,

Firstly, nowhere in the judgment does the court define a ‘historically respected personality’ leaving it as an open-ended subject open to several interpretations, which is likely to curb artistic freedom in the future as well. All historical personalities hold different degrees of

respect – the same person may be revered by some and may not be so by others. Hence, there can essentially be no specific definition of a historically respected personality. A judgment in the future could similarly exclude any other such person, for example, Jawaharlal Nehru, Netaji Subhas Chandra Bose, Akbar, Shahjahan, Mohammad Ali Jinnah, Indira Gandhi or anyone who has ever graced the pages of history.

Secondly, it ignores the fact that poetry is an expression, which can be interpreted in more than one ways, satire being one of them. The power of a poet lies in his imagination and perception, and restraining the same is as good as no freedom of expression. Unlike other forms of media, poetry is one of the few which thrives on interpretation – the same poem may be interpreted in two different ways, which could also be completely different from the poet's original thought, idea and intention.

Taking parts of the judgment pertaining to obscenity in isolation, the decision paves the way for a reduced threshold of test for obscenity recognizing changing stance and perspective of the society. At the same time, if taken as a whole, the same gets diluted at the end. The court, although, has taken a liberal attitude and encourages artistic freedom and creativity, the ultimate exclusion of Mahatma Gandhi defeats the purpose of what it tried to achieve through the judgment. At the end of a voluminous judgment, the reader is left pondering over whether the decision was an upholder of free speech or an anti-thesis of it.

SAFEGUARDING TRADITIONAL KNOWLEDGE - AN INSEPARABLE PART OF INTELLECTUAL PROPERTY RIGHTS

Shusneha Sarkar*

Abstract

This paper tries to throw light on the aspect of Traditional Knowledge which is considered as a branch of Intellectual Property Law. It is a body of indigenous knowledge, based upon the traditions, practices of the regional and local indigenous communities (LICs). In other words, we can say that Traditional Knowledge is ardently required to safeguard and promote the interests of the LICs as it tends to be collectively owned by the LICs and reflective of their identity. As there exist no codified body of legislation in the matters of Traditional Knowledge the LICs have been exploited many a times by the new infringers time and again, silently watching their age old culture and traditions being stolen in front of their eyes, without much to do. In many cases, the poor folk are not even aware of their rights being swept away under their noses without any due recognition not to mention any expectation of monetary aid from them. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was formed by the members of the WIPO in 2000. In 2009 they agreed to develop certain international legal instruments that would render an effective protection to the Traditional Knowledge. But, in trying to do so, the WIPO and the IGC is being faced by numerous procedural challenges. Moreover, there are numerous unanswered questions framed by the WIPO and IGC after consultations with the Governments of various member states and the indigenous people, we have tried seeking answers to those. Basically this has been the aim of the paper to discuss and understand the above mentioned issues in details.

Keywords: Traditional Knowledge, Intellectual Property Rights, Local and Indigenous Community, Know-How, Folklore.

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INTRODUCTION

Traditional Knowledge is a branch of Intellectual Property Law, giving rise to Intellectual Property Rights. Traditional Knowledge is generally regarded as a body of indigenous knowledge which is based upon the traditions, practices, of the regional and local indigenous communities (LICs). In other words, we can say that Traditional Knowledge is ardently required to safeguard and promote the interests of the indigenous communities. Since, Traditional Knowledge is related to the nature and environment, it includes within its ambit a tribal form of life, ethics, morality and the day to day practices followed by the local indigenous people. It is also not linked to any scientific inventions and analysis.¹

Though there is still no proper and definite definition of Traditional Knowledge, still some guidelines have been made available by the WIPO, which are as follows:

- Traditional Knowledge is a branch of Intellectual Property Law, giving rise to Intellectual Property Rights.
- Traditional Knowledge is referred to as a knowledge system which tends to be collectively owned by the local indigenous communities (LICs) and reflective of their identity.
- Traditional Knowledge is generally regarded as a body of indigenous knowledge which is based upon the traditions, practices, of the regional and the LICs. In other words, we can say that Traditional Knowledge is ardently required to safeguard and promote the interests of the indigenous communities.
- Since, Traditional Knowledge is related to the nature and environment, it includes within its ambit a tribal form of life, ethics, morality and the day to day practices followed by the local indigenous people. It is however not linked to any scientific inventions and analysis.

BRIEF OVERVIEW

Traditional Knowledge is referred to as a knowledge system which tends to be collectively owned by the LICs and reflective of their identity. Due to its evolving nature, age and the fact that it is collectively owned makes it difficult to protect it from the conventional

¹ Amit Jha, *Traditional Knowledge System In India*, pp.17-18, (Atlantic Ed. 2009)

Intellectual Property Law system. There are very many types of diverse Traditional Knowledge, for instance Folk lore, traditional cultural expressions, music, dance, symbols, designs of cultural manifestations, etc. Traditional Knowledge also consists of the know-how and certain technical knowledge related to bio-diversity belonging to the local indigenous people which in many cases have been misappropriated and used in an unauthorized way by certain pharmaceutical companies and have been patented in their name. As there exist no codified body of legislation in the matters of Traditional Knowledge the LICs have been exploited many a times by the new infringers time and again, silently watching their age old culture and traditions being stolen in front of their eyes, without much to do. In many cases, the poor folk are not even aware of their rights being swept away under their noses without any due recognition not to mention any expectation of monetary aid from them.

Certain Traditional Knowledge is closely related to plants and other biological resources of flora and fauna. Such as medicinal plants, traditional trends in agricultural.

Way of growing crops and animal breeds. Traditional Knowledge often gives the researchers with a lead to isolate valuable active compounds amidst the numerous biological resources. Such genetic and biological resources, which are connected to Traditional Knowledge and Traditional practices through the utilization and conservation of the resources. These have often occurred over generations of generations and through their common use in the modern scientific research and development (R&D). The protection of Traditional Knowledge has often been closely connected to the protection of biodiversity. This has been practiced in particular under the Convention on Biological Diversity (CBD).

The international framework for the protection and promotion of Intellectual Property Laws developed during the period starting from the Industrial Revolution at the West and continued in that fashion with the advancement of science and technology. With more such developments in the recent time, the people of local and indigenous communities and the governments in the developing nations are demanding for such a protection system of Traditional Knowledge which is quite similar to the system of protecting other Intellectual Property Laws like Patent, Trade Mark, Geographical Indication, etc.

In 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the members of the World Intellectual Property Organization (WIPO). Then on 2009 they agreed to develop certain

international legal instrument or instruments that would render an effective protection to the Traditional Knowledge, genetic resources and traditional cultural expressions i.e. folklore, etc. Such an instrument could be achieved through a recommendation by the WIPO members to form a formal treaty or an agreement that would bind the countries who may choose to ratify it.

Traditional Knowledge also known as the know-how is not so called because of its antiquity. It is a living body of knowledge that is developed, sustained and passed on from one generation to another generation within a particular community, often forming part of its cultural or spiritual identity.² For instance in protecting the traditional remedies and indigenous art and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation.³

As such, it is not easily protected by the current Intellectual Property Rights system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Its living nature also means that it is not at all a static branch of knowledge but rather like a growing organism which changes from time to time. Traditional Knowledge is not easy to define, though certain guidelines have been suggested by the WIPO and other international treaties and organizations.

WIPO's work on traditional knowledge addresses three distinct yet related areas, traditional knowledge in the strict sense includes technical know-how, practices, skills, and innovations related to, say, biodiversity, agriculture or health; traditional cultural expressions; expressions of folklore, cultural manifestations such as music, art, designs, symbols and performances; and genetic resources i.e. the genetic material of actual or potential value found in plants, animals and micro-organisms.

ORGANIZATIONS IN AN INTERNATIONAL BASIS AND AGREEMENTS BASED ON TRADITIONAL KNOWLEDGE

The World Intellectual Property Organization (WIPO) safeguards the Traditional knowledge

² Javier Garcia, *Fighting Bio-piracy: The Legislative Protection of Traditional Knowledge*, Westlaw, p.12 (2007)

³ Susette Biber-Klemm, *Protection Of Traditional Knowledge On Biological Diversity At The International Level: Reflections In Connection With World Trade*, in Protecting And Promoting Traditional Knowledge: Systems, National Experiences And International Dimensions, p. 115 (January 19, 2014)

from being copying and used in commercialization and helping in preservation of their cultural and traditional identity. In 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the members of the WIPO. Then on 2009 they agreed to develop certain international legal instrument or instruments that would render an effective protection to the Traditional Knowledge, genetic resources and traditional cultural expressions i.e. folklore, etc. Such an instrument could be achieved through a recommendation by the WIPO members to form a formal treaty or an agreement that would bind the countries who may choose to ratify it.⁴

Firstly, WIPO along with the IGC facilitates international negotiations taking place between the member states, who have decided to discuss for bringing an international legal instrument that would provide an Intellectual Property like protection, for the Traditional Knowledge. While facilitating this process the member states are those who finally decide on the content of the instrument and in understanding the different issues and options that lie before them. WIPO in accordance with the IGC aids in the process of documentation. Secondly, WIPO and IGC facilitates in setting up of the national systems working with the Governments of the member nations and helping the LICs to understand the Intellectual Property issues better.

In trying to do so, the WIPO and the IGC is being faced by numerous challenges like procedural challenges in which WIPO wants all the nation states to participate and the LICs to get involved in making an international system for granting protection to the Traditional Knowledge under the umbrella of Intellectual Property Law.

Secondly, there is no proper definition of Traditional Knowledge which is yet to be settled upon. There are various questions which are arising, like for instance; Why TK needs to be protected? What are the intended and unintended consequences of such protection? Who should be benefitted from this protection, amidst the different views of various member states? Whether indigenous people should be regarded as the right holders or should the state hold the rights and manage them on their behalf? Exactly what kind of a protection should be provided? A Copyright like or a Patent like protection where an exclusive right is granted to an individual, what should be the kind of penalizing procedure? Or would it be like a system of compensation and punishment? How can TK be actually protected?

⁴ R.M. Dungawat, *Protection of Traditional knowledge: National and International Perspectives*, in The Law of Intellectual Property Rights; Introductory WTO, Patent Laws, Copyright Law

POINTS OF DISTINCTIONS BETWEEN TRADITIONAL KNOWLEDGE AND OTHER BRANCHES OF INTELLECTUAL PROPERTY- HIGHLIGHTING ITS SALIENT FEATURES

These are so many of the unanswered questions which have been framed by the WIPO and IGC after consultations with the Governments of various member states and the indigenous people. Similarly, finding out the answers to these many questions is considered as quite a task. No branch of IP gives in a list of so many unsolved questions of which answers are yet to be found out, have also been put forwarded by the WIPO along with the IGC. Trying to find out the answers to these questions makes my research paper quite a novel one.⁵

For example, a pharmaceutical company or a fashion designer who wishes to use a particular Traditional Knowledge is required to ask for a prior informed consent of the LICs or indigenous groups before it could use their Traditional Knowledge in the form of technical biodiversity or folk lore respectively. But this system is somewhat potentially difficult in practice as much of the Traditional Knowledge has been published already and it is also a complicated phenomenon that from whom the consent should have been taken from.

Secondly, the Traditional Knowledge can be regarded not as an exclusive protection. But it is a right to use the Traditional Knowledge, which belongs to the LICs collectively. Hence, it could be used only by acknowledging them and by granting them their due recognition and respect through this gesture. Also by refraining from all kinds of distortions, mutilations, other forms of derogatory practices and used not in such a way which is quite offensive to the indigenous people concerned.

Thirdly, if benefits are generated from the utilization of these resources of the Traditional Knowledge, then a certain portion of that has to be shared with the indigenous people. This kind of a Moral Right concept should exist in this novel idea of protecting the Traditional Knowledge.⁶

Fourthly, there is always a need for the protection of Traditional Knowledge as innovation is good for human welfare hence one should move forward towards the recognition and

⁵ M. Subramaniam & Balakrishnan, *Traditional Knowledge in Policy and Practice- Approaches to Development and Human Well-Being* (United Nations Publications, December, 2010)

⁶ Christoph Antons, *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, 2009)

protection of novelties of human beings in the form of folk lore, dance, songs, designs, etc which depict a unique kind of cultural manifestations. This being the rationale of Intellectual Property and here lies its credibility.

Fifthly, TK is something of a very unique kind of Intellectual Property as unlike other Intellectual Property like Copyright, Patent, etc it cannot be protected by granting an exclusive right to an individual. As discussed earlier, Traditional Knowledge is a collective right belonging not only to a single individual but to a community as a whole.

Sixthly, Traditional Knowledge is a wonderful combination of the past, present and the future where these three are amazingly blended giving rise to an innovative idea or thing.

Seventhly, it is a branch of evolving knowledge and is not a static one, hence it has an open scope for addition always. Lastly, Traditional knowledge much unlike other popular Intellectual Properties is passed down from one generation to another, which is quite a unique characteristic.

SOME INSTANCES OF TRADITIONAL KNOWLEDGE AT A GLANCE

The following are some examples of Traditional Knowledge, which have been discussed below:

- ‘Neem’ and ‘turmeric’ is used traditionally in cases of first-aid, curing rashes, healing different types of skin infections and skin allergies like ringworms, psoriasis, eczema etc. Turmeric also has other uses due to its unique qualities like it has cosmetic uses in having fair skin and anti-septic medicinal quality which can be termed various age old know-how or Traditional Knowledge.
- In South India, a sports drug named ‘Jeevani’, has been used from time immemorial as part of the medicinal knowledge of the Kani tribes. This ‘Jeevani’ drug led to the formation of an anti-stress and anti-fatigue agent, which is based upon the herbal medicinal plant known as ‘arogyapaacha’.
- The Thai traditional healers make use of ‘Plao-noi’ for treating ulcers.⁷

⁷ S. Swarna Latha, *Bio-piracy and protection of traditional medicine in India*, European Intellectual Property Review, Westlaw 1 (2009)

- The Western Amazonian tribes use the ‘Ayahuasca’ vine to prepare various medicines.
- The San people utilize ‘hoodia’ cactus to stave off hunger while outhunting or doing other work which requires going without food for a longer period of time.
- In Oman, Yemen and in Iran people follow traditional unique techniques of Sustainable irrigation through water systems such as the ‘aflaj’ and the ‘qanat’ respectively.
- Unique bodies of knowledge of seasonal migration patterns of particular species in the Hudson Bay region are maintained by Cree and Inuit as a method of safeguarding their Traditional Knowledge against unjust misappropriation and unfair exploitation.

CONCLUDING REMARKS

In conducting any kind of research work there is bound to crop up certain problems while writing down the research dissertation or thesis whatever maybe it. If the research goes so smoothly that it is not faced by any challenges what so ever, then in my opinion there has to be some flaw in the research work, be it in the process, mode of research or may include any other aspect. In simple words, a good research has to have some problems which maybe faced by the researcher in the form of some stern challenges. The work of a good researcher would then be clear and distinct who will not try to dodge away from the problems but would find and seek ways and means to crack those complex issues. Hence, finding answers to unsolved questions.

Likely, in this particular research work of mine, in which I am seeking for a Sui Generis legislation for the protection and development of Tradition Knowledge, me too is facing some difficulties, which I have enlisted below.

Firstly, not much research work has been done in this branch of law, till now. Rather it is better to say that Intellectual Property is yet to dig upon especially in the subject of Traditional Knowledge.

Secondly, too many books solely dealing with Traditional Knowledge, its significance and its protection are also rare. Thirdly, a precise and exact definition of Traditional Knowledge is yet not available till now. Even the CBD and WIPO along with the IGC are yet to come up

with a proper and conclusive definition of Traditional Knowledge. Nevertheless, they have sketched certain guidelines to consider a particular idea or thing under the purview of Traditional Knowledge.

Fourthly, no codified statutes like International legislations and National laws are available in the aspect of Traditional Knowledge.

Fifthly, although there are no proper legislative statutes based upon Traditional Knowledge but there have been some documentations regarding TK in the countries of Peru and some South African states. However, these inter-governmental arrangements in matters of the TK are not much old but came up for about a little more or less than a decade or so. In such a short span of time it is almost quite impossible to understand its working credibility.

Sixthly, there is lack of a clear cut formula regarding what should be considered as a Traditional Knowledge and what should be not. In other words, which things should be covered and brought under the purview of Traditional Knowledge.

Lastly, the local indigenous people are unable to figure out the standards for providing protection to the Intellectual Property in terms of authorship, ownership, and property. But the simple people belonging to these communities are unable to conform to these international standards of protection. These standards do not necessarily supplement to or complement indigenous communities and local people and the nature of understandings regarding the function and role relating to the knowledge and knowledge practices for the protection of Traditional Knowledge under Intellectual Property Rights.⁸

These are some of the major challenges being faced by the Local Indigenous Communities and the Government as a whole in trying to safeguard and protect the Traditional Knowledge and the know-how which is not just a bunch of ideas and beliefs but a rich cultural heritage which is continuously passed on from generations to generations without decay and damage.

SUGGESTIVE MEASURES

Considering Traditional Knowledge, kinds of creativity and innovations protectable by Intellectual Property Laws / Rights if made possible would be regarded as a historic

⁸ N.K. Sachan, *Contribution Of Indian Traditional and Holistic Medicine to New Drug Development in Biodiversity, Biotechnology And Traditional Knowledge*, p. 175 (Aravind Kumar Govind Das) Ed. 2010

revolution in both the International and National levels. This would enable the indigenous and local communities as well as grant authority over the Governments to have a say in matters when their Traditional Knowledge would be used by others. This can only be possible in the ways as discussed underneath.

Traditional Knowledge though for many a community acted as genetic resources and traditional cultural expressions still forms potion of a single integrated heritage. From the standpoint of Intellectual Property, they raise different issues and may require different sets of solutions. In addition to work by an International legal instrument, WIPO is responding to all the three aspects like requests from communities and governments for practical assistance and technical advice for enabling communities to make more effective use of existing Intellectual Property systems. Which would enable the participation more effective in the IGC's negotiations in addition to the work on an international legal instrument. WIPO's task is inclusive of providing aid in developing and strengthening national and regional systems for the safeguard, promotion and awareness regarding Traditional Knowledge. This also includes policies, laws, information systems and practical tools, and the Creative Heritage Project which gives the indigenous people knowledge in terms of training for managing Intellectual Property Rights and interests when documenting cultural heritage. The knowledge of the past and the ways and procedures that have been considered within the purview of Traditional Knowledge have been enriched by experienced old minds through a series of trials and practices for time and again for so long that they prove to be very much applicable even in the modern era.

The definition of Johnson gives more importance to the knowledge, as it is developed because of the close contact of the aborigines with the nature. His definition is somewhat similar to the definition provided by the Convention on Biological Diversity, as both explains Traditional Knowledge as the body of knowledge, belonging to a group of people, passed on from generations. Though, the definitions of CBD and WIPO has different approaches in protecting traditional knowledge, the CBD's definition on indigenous knowledge gives weight to the practical nature of the knowledge in protecting the biodiversity. Whereas, the definition of WIPO further explains the legal protections related to the Intellectual Property. From all these definitions discussed earlier we can infer that the Traditional Knowledge has the three-fold functions:

1. Traditional Knowledge and biological resources are indispensable for the day-to-day

survival of a great part of humanity, providing sustenance and basic health care, housing, clothing and fuel for cooking and heating.

2. Traditional knowledge, with its capacity to maintain biodiversity and the underlying evolutionary processes, contributes to the long-term survival of humanity as a whole.
3. Traditional knowledge is an asset to international trade.

Intellectual Property Rights should be recognized in the field of Traditional Knowledge by following these points:

- Recognizing the value and promotion of respect for Traditional Knowledge systems is very crucial.
- Responsiveness to the actual needs of the Traditional Knowledge holders.
- Repression of misappropriation of Traditional Knowledge and other forms of unfair practices and inequitable uses.
- Safe guarding of tradition based creativity and innovative practices.
- Supporting of Traditional Knowledge systems and empowering of the holders of Traditional Knowledge.
- Promotion of equitable benefit sharing which arises from the use of Traditional Knowledge.
- Promoting the awareness for the use of Traditional Knowledge for a bottom up approach in the field of development.

Thus, there is a need to protect traditional knowledge in India as it is a collective property belonging to a group. It should be used as a catalyst for development. Since this knowledge is the public domain, it is easily accessible to people in the country or state and so India is morally and socially responsible towards its protection. It is a knowledge which has passed from ages together and its value cannot be measured with time and money. Hence it is required to develop capacity to absorb technology for scientific validation of traditional knowledge. Our research and development sector should be fully occupied to meet stringent international quality standard and should be fully utilised in the interest of country.

Thus it can be concluded with these findings that Traditional Knowledge:

- is a knowledge developed because of aborigines close contact with nature,
- is a body of knowledge belonging to a group of people, passed on from generation,
- is a collective process of learning and sharing knowledge or exchanging knowledge.

Indigenous communities faces many problems like land issues, extinction of forests, relocation of people from one place to another leading to loss of their interest in protecting the knowledge, whereas the protection of such knowledge encounters all these problems.

THE DYNAMICS OF THE MIDDLE EAST: A CENTRIC CUM TACTFUL FEDERALISM IN SYRIA

Abhivardhan*

Abstract

The situation in Middle East has always based on a mere dynamism of least degree of accountability and assurance of harmony due to the basic contingencies of a monopoly-based ethnic hoax existent or capable to be artificially created. Whether it is Syria or Yemen, what is questioned is the lack of tactful federalism. The Security Council may act on this, but the pursuance of the international Criminal Court is not concurrent to the circumstantially deprived areas, where we can understand in a wider way by specially considering the Syrian conflict and the verge of its ending. The author tries to reflect about the glancing influence of the Syrian Conflict on International Law with the role of the Russian Federation as a vague mediator with some special reference to International Statutes their application in the Middle East.

Keywords: *Federalism, Security Council, Diplomacy, Middle East, Progression*

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INTRODUCTION

The situation in Middle East is dynamic; its progression and centres of aversion are based on the sectarian and ethnic engineering, but the external involvement of the nations from the West and the East Blocs do tend to diagnose any crisis or impact in their own intricacies and ways of diplomacy and internal acts. The United Nations, when attempts to prevent the vicinity of such crisis, suffers from its mootness in its bodies as a matter of the representation of the members of the Security Council and the General Assembly are concerned. Interests forge the permanent members to use a negative veto, which is not a legal instrument but a general legal power as a matter of privilege to the Allies, who won the World War II in 1945 against the axis powers. Even if the question of Security Council reform comes, it is inevitably known that the permanent nations never accept it with dilution. The change in the totalitarian policy of the League of Arab States is a gross change in the history of the nations in the Middle East. More liberalization towards the US and vice versa, the Qatari policy and the Syrian concentrating constraint has led the International Community to the verge of a new development in the politics of the world.

THE UTILITY OF DIPLOMATIC TACTICS TOWARDS A PLANNED REALM

When it comes to the powers, such as the United States and the Russian Federation, it is inevitably understandable that their intervention marks an important case of turbulence in any region of the world as they have their own specific interests. The Syrian Arab Republic, which has been in the spotlight of concerns for the International Community, marks an important change in world policies. A centric monopoly, power-intervening limitations and the moot applicability of the United Nations irrespective of its relentless commitment makes the International Community understand that it is imperative that Syria does not become a centralised issue of diplomatic gimmick, when a power is against a political sovereign, who itself is responsible for the devastating condition in Syria. Now, the Russian backing to Bashar-Al-Assad is of a federal tactics. This is not obvious to realize or observe, but is of pragmatic concern.

The persistent violation of the Universal Declaration of Human Rights, the International Covenants of 1966, the International Trafficking Laws and other legal embodiments makes one thing clear- the persistence of International Humanitarian Law is a necessity, but its enforcement is not a simple thing. Even the relevance of legal instruments such as the

International Criminal Law in case of the Syrian Arab Republic lowers down. It is imperative to lay down a more better and diplomatic applicability of the Rome Statute. Article 12, Clause 3 of the Rome Statute of the International Criminal Court¹ runs down as-

“If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”

Unless the Syrian government ratifies the treaty or accepts the jurisdiction of the court through a declaration, the ICC could only obtain jurisdiction if the United Nations Security Council refers the situation there to the court. The Security Council, with what is called an “ICC referral,” could give the court jurisdiction stretching back to the day the Rome Statute entered into force, on July 1, 2002.² The Security Council has referred situations to the ICC only twice, for the Darfur region of Sudan in 2005 and Libya in 2011. The Security Council, however, has failed to act on other key occasions when there was strong evidence of widespread and serious international crimes and little prospect of local accountability.³ Thus, it is quite understandable that the international legal instruments here required are or may be or may not be present; but the municipal laws and the local accountability are conjoining concepts, where they are related to a more viable visibility of legal implementation. This is the basic problem pertaining to all aspects of the Syrian crisis. Now, the unprecedented focus on the Syrian Arab Republic is obviously imperative because its applicative tendencies can lead the International Community to become more vigilant in dealing such issues, where a phobia against Islam is threatening people. However, this phobia has no *locus standi*, as sectarian and ethnic differences and adversities can be resolved by negotiations and not religious or sectarian wars, whether such manifestations, religions, sects, cultures, colour, race, etc. have no proficient stand and replenish by time in its structure. The state parties to the International Covenant on Civil and Political Rights have the rights in time of public emergency, which threatens the life of the Syrian Arab Republic and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures

¹ UN General Assembly, *Rome Statute of the International Criminal Court* (Last Amended 2010), 17 July 1998, Available at: <http://www.refworld.org/docid/3ae6b3a84.html> (Accessed on: 3 January 2018)

² Human Rights Watch, (September 17, 2013). *Q&A: Syria and the International Criminal Court*, Available at: <https://www.hrw.org/news/2013/09/17/qa-syria-and-international-criminal-court> (Accessed on: 23 November, 2017)

³ *Ibid*

derogating from their obligations under the Covenant to the extent strictly required by the demands of the situation, provided that such measures are not inconsistent with their other obligations under international law⁴ and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin subject to Article 4, Clause 1 of the Covenant, which if we can primarily set up as a credible mechanism with limited intervention as the United States of America believes in interventionism, then we can surely set up those agreements and contentions, which put forward a just, fair and reasonable international federalism based on diplomatic contributions and limited consensus with a distributive and gradual local accountability. Possibilities are not scarce and it takes time to take necessary action. Moreover, we know that the United Nations-Organization for the Prohibition on Chemical Weapons has been put to a halt by a veto issued by the Russian Federation and the People's Republic of China in the Security Council in November 2017, where hereafter it pauses a special process of investigative mechanism to expose the usage of chemical weapons by the Syrian Government. A better role by Russia in this plan is discussed in the upcoming paragraphs of the article.

THE RUSSIAN FEDERATION: A VAGUE MEDIATOR TOWARDS A TACTFUL FEDERALISM

The Russian Federation, Iran and Turkey have taken a necessitated action for organizing a conference to solve the post-war conflicts. This is appreciable, but it must be ascertained that the accountability of the official talks and the neutrality of the outcomes must remain as persistent as the International Community may expect. This will be as better as a general set-up to deal with the diluting tendencies of a forging conflict, which shall change the fate of the Middle East forever. It's planned intervention in Syria, unconditional support to Assad and then planned strategies for conditional preservation of the government is strategic and diplomatically interesting.

Russia's decision to entrust Kazakhstan with a mediation role in the latest round of Syrian peace talks can be explained by two main factors. First, Kazakhstan has a long-standing strategic partnership with the Syrian government, and is likely to facilitate the implementation of a settlement that does not undercut Russian leverage in Syria. Second,

⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 174, Available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (Accessed on: 9 January 2018)

Nazarbayev is likely to support Russia's attempts to marginalize Islamist Syrian opposition factions, as Islamic extremist movements pose a threat to Kazakhstan's security and political stability.⁵ Moreover, after the declaration of the United States on the status of Jerusalem irrespective of the valuable presence and resemblance of the Security Council Resolutions 476⁶ and 478⁷, its credibility is affected.

But Russian Federation has arisen diplomatically a better mediator to the US. Even it vetoed UNSC Resolutions on Syrian Conflict, but their purpose are seemingly interesting. A vetoed resolution states-

"Condemning in the strongest terms any use of any toxic chemicals as weapons in the Syrian Arab Republic and expressing grave concern that civilians continue to be killed and injured by toxic chemicals used as weapons in the Syrian Arab Republic,

Reaffirming that the use of chemical weapons constitutes a serious violation of international law and reiterating that those individuals, entities, groups or governments responsible for any use of chemical weapons must be held accountable,⁸"

Now, to prevent the Syrian Arab Republic is another opinion to consider, but we must also consider that Russia needs Syria to maintain its hegemonic and diplomatic tactics to prevent the Western bloc from aggravating any diplomatic strategy in the Middle East. Moreover, a veto does not make Russia win in protecting Syria. A mere idea can be arisen by the consideration of the International Relations theory, in general irrespective of the International Law. The idea is that even if Russia has its own concerns on a country, whose planned aspects are properly infringed with a set of intrinsic planning leading to an enormous crisis of refugees' faced by the International Community, the concerns are actually not beyond International Law, but the situation in Syria does not require Russia to warn of World War III if the international community does not accept Moscow's point of view regarding the conflict.⁹ The cessation of hostilities in Syria, agreed upon in Munich to allow the delivery of

⁵ Remani, Samuel (December 24, 2016), *What Does Kazakhstan Have at Stake in Syria?*, Available at: <https://thediplomat.com/2016/12/what-does-kazakhstan-have-at-stake-in-syria/> (Accessed on: 9 January 2018)

⁶ S/RES/476 (1980)

⁷ S/RES/478 (1980)

⁸ S/2017/315

⁹ Althyadi, Mashari (February 19, 2016). *Russia's monopoly on intervention in Syria*, Available at: <https://english.alarabiya.net/en/views/news/middle-east/2016/02/19/Russia-s-monopoly-on-intervention-in-Syria.html> (Accessed on: 9 January 2018)

humanitarian aid, ended before it began due to Russia's insistence on continuing to shell Aleppo in order to enable Kurdish militias to control the Turkish-Syrian border and prevent the Syrian opposition from communicating with Turkey. All of this benefits Syrian President Bashar al-Assad.¹⁰ Surrendering the country to Moscow and Tehran means handing them the region, but the vast majority of its inhabitants will reject their tyranny.¹¹ Henceforth, these mediating aspects are well-developed, but reality is not far away too.

The legal instruments, as a matter of fact, shall bear required applicability and it will not take time as the Astana Talks and the upcoming Geneva Communiqué may put forward broader aspects of the clarities that have we as the members of the International Community have solemnly achieved. It is that beautiful in the world of diplomacy, which we can expect for a better future of the Middle East as the bridge of peace, harmony and love.

¹⁰ *Ibid*

¹¹ *Ibid*

HUMAN RIGHTS EDUCATION AS UNIFYING MORAL FORCE FOR UNIFORM CIVIL CODE

Lakshay Bansal*

Abstract

Article 44 of the Constitution of India 1950 states that the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. Till date there is no prevalence of the Uniform Civil Code in the country because of the personal religious laws which were effective way before the constitution was drafted.

By enacting a Uniform Civil Code in India one of the most crucial problems of gender inequality can draw to a close, as it deals with uniform laws on civil matters like marriage, adoption, inheritance, succession, divorce. Not only Muslim laws but other personal laws have provisions that do not adequately provide justice to women.¹

On the other side are the religious personal laws which have been prevalent in the country since the very beginning. India is such a vast country with such diverse religions that having uniform laws for everyone is beyond the bounds of possibility. The framers of the constitution didn't intend uniformity of personal laws and only provided for Article 44 in the constitution so that it could be enacted by the state to make an endeavor to govern all its citizens by one uniform code.

This paper elaborates upon Human Rights Education as unifying moral force for Uniform Civil Code for a vast and diverse country like India.

Keywords: Uniform Civil Code, Secularism, Personal Religious Laws

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¹ *Pradeep Jain v. Union of India*, AIR 1984 SC 1420

INTRODUCTION

Human Rights Education (HRE) has evolved as a recognized discipline of Universal Declaration of Human Rights, Convention on Rights of Child, Cairo Declaration on Human Rights, Vienna Declaration and Program of Action 1993 and UN Decade for Human Rights Education which established the ‘World Program for Human Rights Education’. Human Rights Education is an integral part of the Uniform Civil Code. Knowledge of rights and freedoms is considered as fundamental tool to guarantee respect for the rights of all others. Quality education based on a human rights approach encompasses values such as peace, non-discrimination, equality, justice, non-violence, tolerance, democracy and modernity together with respect for cultural and religious diversity. It is the individual, social and collective responsibility of all, irrespective of their religion, culture and faith, to protect the rights of others, irrespective of one’s caste, colour, sex or social position. It is undisputed fact that human rights norms and principles promote mutual respect for diversity, enhances tolerance and provides a basis for people centered human, social, cultural and economic development of diverse societies. It is important to manage diversity for creating an environment conducive for resolving conflicts among people and nations as well as peace-building and peace sustaining. Economic integration and advancement in communication has brought the world closer in which human rights are increasingly recognized as a unifying moral force.

“Common universal value system devoted to protect human dignity and development of human personality, enables all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations, racial, ethnic or religious groups and to further the maintenance of peace”.

Human Rights Education, in accordance with the principles of the universality, indivisibility and interdependence of human rights, is essential for the promotion of universal respect for all human rights and fundamental freedoms.²

UNIFORM CIVIL STRUCTURE UNDER CONSTITUTION

The purpose of Article 44 of the Constitution of India is to have common laws for all the communities which are currently governed by their religious personal laws. Preamble to the Constitution of India is framed with great care and deliberation so that it reflects the high

² Dr. Rajinder Chauhan, Pro-Vice Chancellor, HPU, Shimla

purpose and noble objective of the Constitution makers.¹ It includes the principles of Sovereign, Democratic, Republic, ideas based on the ideology of justice, liberty, equality and fraternity. Later the principles of secularism and socialism were added to the preamble through 42nd amendment in 1976. In general, the term secularism refers to, where in the state having no official religion and gives full opportunity to all persons to profess, practice and propagate religion of their own choice. Goa as one of the only states is an exception to the rule of religion specific civil code in India.

Dr. Radha Krishnan, former President of India, in his book Recovery of Faith said that,

"When India is said to be a secular state, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives. Though faith in Supreme is the basic principle of Indian tradition, the Indian state will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given special status or accorded special privileges in national or international relations for that would be violation of the basic principles of democracy and contrary to the best interest of religion and government. The religious impartiality of the Indian state is not to be confused with secularism or atheism. Secularism as here defined is in accordance with the ancient religious tradition of India. "³

The Supreme Court has declared that secularism is a part of fundamental right and an unalienable segment of the basic structure of the country's political system.⁴ Clearly, the Preamble facilitates the country and people to be secular that is to profess, practice and propagate religion of their own choice with reasonable restrictions.

Fundamental rights regarding freedom of religion were subsisted in the Constitution before its commencement in 1950. Right to practice religion is conferred under Article 25, 26, 27 and 28 of the Constitution of India, 1950. It shields individual's or group's religion by making religious rights as fundamental rights. For people religion is not just a casual part of their personal life. Religion plays a primary role in lives of most of the people. Religion is not just a part of your lifestyle but it's your identity, your personality, your soul. How different religions emerged and how people believed the personal religious laws to be the supreme and

³ Radhakrishnan, Recovery of Faith 202 (George Allen & Unwin Ltd.)

⁴ State of Karnataka v. Praveen Bhai Thogadia, AIR 2004 SC 2081

on the other side the evolution of the concept of the common civil code is further elaborated in the paper.

BACKGROUND OF PERSONAL RELIGIOUS LAWS

“Raw haste, half-sister to delay” - Lord Alfred Tennyson⁵

During the reign of Hindu dynasty, there was minimal interference of the state with Hindu law. The daily affairs were regulated by personal laws. The state kept itself away from the personal laws and it was considered as welfare organization dealing with any matter involving social interest. Also the Hindu sages were considered to be the leaders of the society and almost all the laws were laid down by these influential leaders. The rules not only considered religious ceremonies and rights but acted as court of ethics, morality and governed social intercourse of the life. Laws were considered as an integral part of religion in that era. The laws given by these Hindu sages were considered to be supreme because they were divinely inspired and had sufficient spiritual efficiency to evolve practices to regulate the human conduct from time to time.⁶ It's a well-known fact that the entire spectrum of social, political and economic life of the people revolved around the rules and regulations laid down by the divinely inspired agents like the sages and philosophers of manus, calibre who dominated the entire Hindu period.⁷ Since in that era there were no other religious communities, the question of conflict between different personal laws did not arise. With slight difference of opinions about personal laws in small Hindu communities the uniformity of law was a general rule than an exception.⁸

After the Hindu era, came the Muslim era, wherein the Prophet who was considered to be the religious head of the Muslims, gradually elevated to be the head of the state. Every Muslim was required to owe allegiance to single head who was called imam or caliph. The caliph was required to rule in accordance with tenets of Koran, which were believed to be of divine origin. Consequently no individual could alter the law or question the authority of imam.⁹ When the Muslims invaded India, it became very difficult for them to follow the rules and orders of caliph since all of them were scattered in faraway places. The Mughals were

⁵ Lord Alfred Tennyson in his poem *Love Thou Thy Land, With Love Far Brought*, first published in 1842

⁶ Dr. Parminder Kaur, *Personal laws of India vis a vis Uniform Civil code a retrospective and prospective discussion*, LAW MANTRA, Available at: <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf>.

⁷ U.C. Sarkar, *Its character and evolution*, 6 Journal of Indian Law institute 214, (1964)

⁸ *Supra* note 6

⁹ M. Rama Jois, *Legal and Constitutional History of India* 4 (M Tripathi Pvt Ltd, 1990)

strangers to the country; they could not understand the Hindu personal laws. So they started practicing their own religion and also accepted the Hindu personal laws side by side. Therefore, Muslim personal law was established in the country.

The Personal laws are rooted in British rule in India. With the advancement of East India Company, the only changes which were bought in the laws of the country were changes in the civil and criminal codes, matters pertaining to ‘law and order’ as these enabled them to regulate trade and commerce with which they were primarily concerned. They made no changes in the personal religious laws of any of the communities residing in India.

The Personal laws govern marriage, divorce, inheritance, succession, maintenance and adoption. Each Personal religious law has their own set of provisions which govern their community. Needless, the personal laws are the character of the society. In 1955 & 1956, the Hindu law was codified in the Parliament. As a result the following codes came into force in the year 1955 & 1956: the Hindu Marriage Act, 1955, the Hindu succession act, 1955, the Hindu minority and Guardianship act, 1956 and the Hindu Adoption and Maintenance act, 1956. Hindu law applies to not only those who are born in Hindu caste but also includes Sikhs, Jains and Buddhists.

The codification of the Hindu laws was a progressive step of the parliament. Initially women did not have equal rights as compared to men in the family matters. Only a part of the property was kept as maintenance for the women. For instance, usually fathers are considered to be the natural guardians of the child and not the mother. It was only after the amendment of 2005 where the section 4¹⁰, section 6¹¹, section 23¹², section 24¹³ and section 30¹⁴ of the Hindu succession act, 1956 were amended. As a result of this amendment the Hindu women were given coparcenary rights in the joint family property. Same number of shares were allotted to the daughters and as they were allotted to the son. The amount of maintenance given to the wife is decided depending from case to case like in one of the landmark cases where in different courts assigned different amount of maintenance to the wife.¹⁵ In case of Muslim laws, there is no codification of laws. Muslims follow what has been written in

¹⁰ The Hindu Succession (Amendment) Act, 2005

¹¹ *Ibid*

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ *Mohd. Ahmed Khan v. Shah Bano Begum* 1985 SCR (3) 844

Quran. There is a clear demarcation of a sect within Muslims as well, that is, Shia and Sunni, both have a little difference of approach towards the personal laws applicable to them. The customs, traditions followed during nikah are similar yet different. The division between Shia and Sunni originated in the dispute concerning the question of imam, which arose for decision and settlement immediately on the death of the Prophet.¹⁶ The Shia argued that the office should go by right of appointment and succession, and that the Imam was to be confined to the Prophet's family or his nominees. The Sunni, on the other hand, ultimately chose out their Caliph (or Imam) by means of votes.¹⁷ Thus, the difference between the two lies in political events, rather in law or jurisprudence. It is mentioned in the Quran that the woman is entitled to maintenance till the period of iddat, Iddat refers to a period of 3 menstrual cycle or 3 lunar months. In case the wife is pregnant the period will extend up to the time of delivery, or abortion even if it is beyond 3 months.¹⁸ Once the period of iddat is over, the husband is no more liable to give her maintenance. Quran is not a complete code in itself; it has been formed in fragments over a period of 23 years from 609 to 632 A.D.

It doesn't matter if a person is Hindu or a Muslim or a Christian or a Parsi, religion is the supreme body in everyone's life. Though our age has largely ceased to understand the meaning of religion, it is still in desperate need of that which religion alone can give.¹⁹ We live in an age of tension, danger and opportunities. Believing in one's own faith helps in knowing our insufficiencies and overcoming them. Till today customs and traditions prevail over the law in our country. If they are negated, soon enough religions will lose their perspective in social sphere. A study of different religions indicates that they have philosophical depth, spiritual intensity, vigor of thought and human sympathy. Holiness, Purity and charity are not the exclusive possessions of any religion in the world.²⁰

UNIFORM CIVIL CODE: AN OVERVIEW

Article 44 aims at securing a uniform civil code for its citizens. Earlier it was viewed by the framers of the constitution that a certain amount of modernization is required before a uniform civil code is imposed on citizens belonging to different communities. Not much steps

¹⁶ Jake Burman, *What is difference between Sunni and Shia? Ancient Muslim rivalry*, EXPRESS, January 6, 2016

¹⁷ John Harney, *How do Shia and Sunni Islam differ?*, N.Y.TIMES, January 3, 2016.

¹⁸ Prof. Kusum, Family Law-I, 279 (4 ed. 2015)

¹⁹ *Supra* note 3

²⁰ *Supra* note 3

have been taken towards achieving the ideal of a uniform civil code. For the enactment of uniform civil code it is necessary that law be separated from religion. Till date Goa is the only state which has successfully adopted uniform civil code.

The underlying principle of uniform civil code is the replacement of personal laws which are based on the scriptures and customs of religion with a common set of law governing every citizen. Uniform civil code is an umbrella under which all the laws governing rights relating to property, marriage, divorce, adoption inheritance and maintenance are covered. It will ultimately unify all the personal laws and give one set of secular laws and these laws will be applied to all the citizens irrespective of the religion they follow.

For the enactment of uniform civil code attempts have been made from time to time, also through the *Shah Bano*²¹ case and *Danial Latifi*²² case the Supreme Court through its decisions has been giving directions to the government for implementing the same. Also the court strives to reform the personal laws and to remove gender inequality.

It was in 1947, when the idea of uniform civil code was first raised in the constituent assembly. It was then incorporated as one of the directive principles of state policy by the sub-committee on fundamental rights. The argument put forward was that different personal laws of communities based on religion, “kept India back from advancing to nationhood” and it was suggested that a uniform civil code “should be guaranteed to Indian people within a period of five to ten years”.²³ Dr. B.R. Ambedkar was in of opinion that,

*“We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able to invade so far as the marriage and succession ... and it are the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change.”*²⁴

Also Dr. Ambedkar mooted in the Constituent Assembly Debates as follows:

²¹ *Supra* note 15

²² AIR 2001 SC 3958

²³ Mohit Sharma, *Declassifying the Uniform Civil Code*, LIVE LAW, (October 16, 2016), Available at: <http://www.livelaw.in/declassifying-uniform-civil-code/>

²⁴ *Ibid*

*"I quite realise their feelings in the matter related to Uniform Civil Code, but I think they have read rather too much into article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary."*²⁵

This opinion of his was contrasted by many. Pt. Jawahar Lal Nehru said in 1954 in the Parliament,

*"I do not think at the present time the time is ripe for me to try to push it (Uniform Civil Code) through."*²⁶

Hence uniform civil code was considered to be a politically sensitive topic and was placed as Article 44 of the Constitution of India, 1950 under the directive principle of state policy.

The intention of uniform civil code can be understood through various case laws. In Sah Bano case, the issue in question was, whether a Muslim husband was liable to maintain his wife even after the period of iddat has come to an end. In this case the woman along with her five children was thrown out the house when the husband got into second marriage with another woman. The husband divorced his former wife by way of irrevocable talaq and took the defense that she had ceased to be his wife and hence was under no obligation to provide her with maintenance. He had also claimed to have submitted a sum of Rs.3000 by way of Mahr during the period of iddat. A petition was filed by the respondent under section 125 of the Criminal Procedure Code, 1973. The petition was upheld by the magistrate and the appellant was ordered to pay Rs.25 per month as maintenance. In a revisional application this amount was increased to Rs.179.20 per month. This decision was appealed by the appellant in the higher court and the same was dismissed. The Supreme Court had ruled that even if the period of iddat came to an end, a Muslim husband is liable to pay for the maintenance of the divorced wife. The court regretted that Article 44 of the Constitution of India has remained a "dead letter" as there is no evidence of any official activity for framing a common civil code

²⁵ Constituent Assembly Debates (Proceedings), Volume VII, Tuesday 23rd November, 1948; Available at: <http://ili.ac.in/pdf/paper217.pdf>

²⁶ *Ibid*

for the country. The Court had emphasized “A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.” The court accepted the difficulties that were involved in bringing people of different faiths on a common platform but nevertheless in the absence of such a code, and the inaction of the legislatures to reform personal laws, the role of the law reformer has to be assumed by the courts themselves.²⁷

In the case of *Sarla Mudgal v. Union of India*²⁸, a Hindu man who was already married under the Hindu Laws converted himself into Islam and solemnized second marriage. The issue in question was whether the second marriage without the first marriage having been dissolved, would be valid qua the first wife who continued to be a Hindu. The court ruled that under section 494 of Indian Penal Code, 1860, the second marriage of the husband would be void. Cases with similar facts are still prevalent in the country as there are no general rules for matrimony. It was after this case that the court felt the need of uniform civil code so as to protect the rights of the oppressed and to promote national unity and solidarity.

In another case of *Danial Latifi v. Union of India*²⁹, the problems faced by a Muslim divorcee woman have been elaborated. By interpreting section 3 of the Muslim Women Act, 1986, the court drew inference that a Muslim husband was liable to maintain his divorced wife even after the period of iddat was over. This ruling of the court was seen by orthodox Muslims as anti shariat while the liberal accepted it as progressive.

The court has time and again emphasized on the point that it is not necessary that a relation should be there between religion and personal laws. It has also pointed out to the fact that no government in India has till date been successful in implementing uniform civil code and has accordingly urged the government to have a look at article 44 of the Constitution of India. The case of *Lily Thomas v. Union of India*³⁰ has clarified the remarks made by Supreme Court in *Sarla Mudgal v. Union of India*³¹. The court asserted that it had not issued any direction in that case for the enactment of a common civil code.³²

²⁷ M P Jain, Indian Constitutional Law, 7th Ed. 2014

²⁸ AIR 1995 SC 1531 at 1538

²⁹ *Supra* note 22

³⁰ AIR 2000 SC 1650

³¹ *Supra* note 28

³² *Supra* note 27

The problems faced by our country can be eradicated only if laws and present day social and political realities go hand in hand. The debate between uniform civil code and religious personal laws is further elaborated in the next chapter.

CONTROVERSIAL DEBATE OVER UNIFORM CIVIL CODE AND PERSONAL RELIGIOUS LAWS

There has been a constant debate over the prevalence of Uniform Civil Code and Personal religious laws in India. Every aspect has its pros and cons, same goes with Uniform Civil Code and Personal religious laws.

Uniform Civil Code is mentioned under Article 44 of the Constitution. With enactment of the common civil code it is said that it would curb gender injustice. It is said that one of the shortcomings of the personal religious laws is gender injustice, especially in case of Muslim women. There have been a lot of cases in the Indian history; one of the landmark cases is the Shah Bano case where in how is the wife supposed to put up with her and her children's living expenses without any kind of maintenance given to her. Ultimately, in the final judgment given by the court Shah Bano was given maintenance under section 125 of the Code of Criminal Procedure, 1973. In Danial Latifi case where it was decided that a Muslim husband was liable to maintain his divorced wife even after the period of iddat was over. Not only in case of Muslim women, but there has been gender injustice against women of other communities as well. Like in the case of Hindu women, there were no coparcenary rights for women before the amendment of 2005 in the Hindu Succession Act, 1956.

The Uniform Civil Code has been kept in the cold storage since a very long time. It's been 41 years and still no government has been able to implement Article 44 of the Constitution of India. With the enactment of Uniform Civil Code, there are going to be uniform laws for all the matters, there are going to be just and equitable laws for women. Uniformity of laws would overcome the problem of gender injustice. It would not only overcome gender injustice against women on religious basis but it would also strengthen the secular fabric of the country. Next problem which can be diminished by enabling Uniform civil code is the problem of equality amongst the different sects of the societies. Minorities usually feel neglected because of the religious laws of the Hindus, Muslims and other major communities being prevailed over other's laws. It would simply promote unity through uniformity of laws. Some of the personal laws of the minority are not even recognized by the state. Unifying the

laws would enable the minority being recognized in the society. There would be no distinction in the matters of marriage, divorce, inheritance, succession and maintenance. When there can be a uniform criminal code for the whole of the country then why not a uniform civil code? To nurture secularism, Uniform Civil code is certainly needed. However, it can be implemented only when there is wide acceptance from all religious communities after discussing all the pros and cons as no decision, however reformatory, could be thrust on the people without their acceptance³³

On the other side are personal religious laws which have been prevailing in the country since the very beginning. For a country like India it is practically impossible to enforce Uniform Civil code. With such diverse cultures and religions spread all over the country it can get a little tough to enforce the common civil code which is going to bind all the religions and communities together and give them a common platform to deal with the civil matters. The makers of the constitution had this mindset that, India is yet to reach that stage of modernization where it can accept the common civil code and thus did not enforce it at that time. In some cases, as some minorities fear, it may lead to a situation where reconciliation is impossible, pushing the state to choose between two religious beliefs or practices.³⁴

How will the makers of the Uniform Civil Code decide which laws to compile in the code? Which religion is to be given preference? The customs and traditions of religions are very different from each other. For instance, Section 10 of the Christian Marriage Act, 1872 says that a marriage can only be solemnized between 6 am and 7 pm, isn't it common in other faiths to solemnize marriages early in the morning or late in the night? How can this be made uniform in the code? Also, it is prohibited in the Hindu law that two individuals who are related to each other, say children of siblings cannot get married to each other. Whereas Muslim law does not prohibit this. Children of siblings can get married to each other. How will this be governed under uniform civil code? There is no middle path in between. It will lead to communal riots, if Uniform Civil code gives preference to any one particular religion. Every individual thinks that their religion is the best amongst all so they would want their law to be made uniform to all. It is definitely necessary for the government to treat its citizens equally irrespective of their religion, caste or gender. It essentially means there should be

³³ M. Venkaiah Naidu, *Why not a common Civil Code for all?*, THE HINDU, September 18, 2016

³⁴ Jaya Kumar Selvaraj, *A Non-Discriminatory Uniform Civil Code May Be a Step Too Far for Hindus Too*, THE WIRE, (January 19, 2017), Available at: <https://thewire.in/100520/need-for-a-non-discriminatory-uniform-civil-code/>

uniformity of rights and not uniformity of laws. It is very difficult for the government to bridge the gap between all the religions in our country.

Flavia Agnes, a women's rights lawyer said, It is far better to reform personal laws and ensure that laws of all communities are gender-just rather than enacting a law which is uniformly applicable to everyone across religions.

There might be a lot of countries which are being governed by the uniform Civil Code, but for a country like India, practically it is very onerous task to impose a common civil code on the people of the country. With the present state of mind of the people it is not going to be amiable for the people to accept Uniform Civil code. As of now there is no need of the common civil code, since people do not have the kind of modernization which was required by the makers of the constitution to implement the Uniform Civil Code in India.³⁵

Also Dr. Ambedkar mooted in the Constituent Assembly Debates as follows:

“Therefore if it was found necessary that for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindus law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by article 35, I am quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community.”³⁶

CONCLUSION

To summarize, Hindu and Muslim laws are not just a religion but has become our identities. There is no second opinion to the fact that uniform civil code will help us bring gender equality and also help in protecting the rights of the communities. But in a country like India which is so diverse in its nature, implementing uniform civil code will be a big challenge for which the people are not yet ready. The concept of uniform civil code looks good on paper but its enactment poses a task as easy as looking for a needle in the haystack. It has been observed, personal laws have never been a new phenomenon for the country and from beginning only people have been deriving their personal laws from their respective scriptures

³⁵ S. Naskar, *Aim Should Be Uniformity of Rights, Not a Uniform Law: Flavia Agnes on a UCC*, THE WIRE (October 19, 2016), Available at: <https://thewire.in/74183/interview-flavia-agnes-says-the-aim-should-be-the-uniformity-of-rights-rather-than-the-ucc/>

³⁶ *Supra* note 25

and holy books. With uniform code also comes the fear of communal riots and unrest in the country.

Furthermore, minority communities, in fear of extinction, such as the Zoroastrian community have adopted the culture of marrying within themselves in order to preserve their community. Uniform civil code has failed to instill the feeling of protection amongst the minorities and in such a case, if uniform civil code becomes the law of the land their fears might become a reality. The courts through its ruling have always amendment the shortcomings of the personal law and also in the hour of need legislature has always backed these personal laws. No direct connection can be established between reforming certain personal laws and a uniform law for the entire nation. Uniformity in law has been always readily accepted where it was needed like in cases of criminal laws.

“By bringing uniform civil code we will be fencing the fundamental rights that have been guaranteed to its citizens under Article 25 to 30 of the Constitution of India. Therefore we can conclude that state legislative authority forms the basis of personal laws and hence just like any other state laws it can be made subjected to the Constitution.”

HUMAN RIGHTS EDUCATION AND RIGHT TO EDUCATION

Pranav Kumar Kaushal*

Abstract

Education plays a very important role in the development of Human Resources. Education is the only instrument which has been considered important tool in the transmission of values and for the accumulation of knowledge of a society. Thus broadly, speaking education refers to any act that has direct and indirect effect on the personality of an individual. "A key and most prominent pillar of education is learning, how to live in peace and harmony". This process of education involves the three important processes; first of all, strengthening one's own identity, self-worth and self-confidence. Secondly, it provides learning to appreciate the cultures of others, to respect others as individual and groups. Thirdly, to apply the same ethical principle to decisions about other people that one would apply within one's own culture. These are the key processes of education which tend to play a very important and crucial point in the life of human beings in the modern world of science and technology. Man has recognised as a supreme creature of all species on earth, yet man is the only one who has unpardonable record of his own destruction and degradation.

Thus in the threshold of new millennium, today we are witnessing mass violations of Human rights within the nations.

"If we want to preserve this humanity we need to adopt the values of Human Rights through Education".

Keywords: Human Beings, Rights, Education, Humanity and Personality

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Education shall be directed to the full development of Human Personality and to the strengthening of respect for human rights and fundamental freedoms”¹

INTRODUCTION

“Education is the most powerful weapon which can use to change the world”-Nelson Mandela

Education plays a cardinal role in transforming a nation into civilized nation. It accelerates the progress of the country in every sphere of national interest and activities. Education operates as ‘Multiplier’ by enhancing the entitlement of all individual rights and freedom. Education has referred as a key to unlock and protect other human rights. It embodies all civil, political, social, economic and cultural rights. It is the duty of the state to do all it could, to educate every section of citizens who need a helping hand in marching ahead along with others.² According to sociological perspective³ education does not arise in response to individual needs, but it arises according to the needs of the societies. The educational system of the society is related and derived from the social pattern followed by the people. In a static society, the main function of the education is to transmit the cultural heritage to the new generations. But in the dynamic society (changing society) the main function of the education is not only to transmit the cultural heritage but also aid in preparing the youth for the adjustments to any changes in them that may have occurred or likely to occur in future. The right to education directly flows from the ‘right to life’ as right to life and dignity of an individual cannot be assured unless it accompanied with right to education.⁴ The right to education is the fundamental right that establishes the proximate relationship with life of the individual, protection of environment, eradication of untouchability and other related rights of humanity. The right of education has been recognised as *Human Right* by the United Nations and is made to establish an entitlement to free, compulsory primary education for all children, an obligation to develop secondary education accessible to all children, as well as equitable access to higher education and a responsibility to provide basic education to all the individual who do not have the primary education. In addition to all the objectives mentioned above, the right to education also encompasses also the obligation to eliminate discrimination

¹ Article 26 of Universal Declaration of Human Rights 1948

² Quadri, J. in *T.M.A.Pai Foundation v. State of Karnataka* (2002) 8 SCC 481 as a referred in *P.A.Inamdar v. State of Maharashtra*, (2005) 6 SCC 537 at 588 para 85

³ Kulbir Singh Sidhu, *Education the Hope for a Better World*, (Sterling Publishers Pvt. Ltd., 2010.) p.11- 14

⁴ *Mohini Jain v. Union of India* AIR 1992 SC 1858

of all sets that have been prevailing in the society in order to improve and provide each and every individual a quality life which provides Right to life, personal liberty, equal opportunities to develop him to the fullest extent.

Thus, Education is that primary vehicle from which the Human beings derive social, political, cultural, economic and civil rights without which the Human existence in any man made society won't be possible.

MEANING AND DEFINITION OF HUMAN RIGHTS

Human beings are rational beings. They by virtue of their being human possess certain basic and inalienable rights which are commonly known as Human Rights. Since these rights belong to them because of their existence they become operative with their birth. Human rights being the Birth Right are therefore, inherent in all individuals irrespective of their caste, creed, colour, religion, sex and nationality. Because of their immense significance to human being; Human rights are also sometimes referred to as fundamental rights, basic rights, inherent rights, natural rights and birth rights⁵. In general terms Human Rights may be referred as all those rights that all people have by virtue of being human are human rights. The idea of human rights is bound up with the idea of Human Dignity. Chief Justice of India, J.S Verma has rightly stated that 'Human dignity is quintessence of human rights'⁶. All those rights which are essential for the protection and maintenance of dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent may be termed as "Human Rights"⁷. Modern concept of Human rights is that the rights possessed by the Human beings in their natural capacity of being human and not because of any particular system of law under which they happen to live.

HUMAN RIGHTS EDUCATION

According to Amnesty International defines Human Rights Education as a deliberate, participatory practice aimed at empowering individual, groups and communities through fostering knowledge, skills and attitudes consistent with internationally recognized Human Rights Principle.⁸ As a medium for long term processes, Human Rights Education seeks to

⁵ Maurice Cranston quoted in L.J Macfarlane The Theory and Practice of Human Rights (1985) p.7

⁶ David P. Forsythe, *The Internationalization of Human Rights* p.1

⁷ P.N Bhagwati J. in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 at 619

⁸ Oppenheim's , *International Law*, Volume 1, 9th Ed. Edited by Sir Robert Jennings and Sir Arthur Watts, p.847

develop and integrate people's affective, cognitive and attitudinal dimensions including critical thinking to human rights. Education in itself is a goal to build the culture of respect for and action in the defence and promotion of Human Rights for all. Human Right Education is not just for Human Rights i.e., acquiring knowledge. It is also an education for Human Rights, helping people to feel the importance and need off Human Rights, to integrate them in a way they live and to take action to promote and protect the rights of other on individual, local, national and at international level. Human right education directly contributes to improve the life of both individuals and the community. It is an education which not only provides understanding of one's own rights and therefore inculcation of one's own rightful place in the society also fostering an attitude of tolerance, goodwill and removal of prejudices towards fellow human beings. Human rights Education is all about helping people to develop to the point where they understand Human rights and where they feel that they are important and should be respected and defended.⁹

IMPORTANCE OF HUMAN RIGHT EDUCATION

The increasing recognition of the universal right to learn about human rights is making Human Right Education, a vital part throughout the world. In recent years there has been tremendous growth in how we think about and apply Human Rights ideals. Values of tolerance, equality and respect can help to reduce friction within the society. Putting Human Rights Education into practice can help us to create the kind of society we want to live in.

Human Rights are an important part of how people interact with others at all levels in society-in family, community, in schools, in groups, in workplace, in politics and international relations. It is important that people everywhere should strive to understand what Human rights are.

“When people better understand Human rights, it will be easier for them to promote justice and the well –being of society. Human rights education develops awareness that there is a guarantee of equality before law”.

CONCEPT OF RIGHT TO EDUCATION

“Nation as well as human Beings will be strengthened if education is of higher quality”

⁹ Henle, S.J., *A Catholic view of Human Rights*, A Thomistic Reflection in Alan S. Rosenbaum, 1980 p. 1445

The right to education is a fundamental human right. It is the key which unlocks the treasure of sustainable development and peace and stability within and among countries and thus, indispensable means for effective participation in the societies and economies of 21st century which is effected by rapid globalization. It is essential, when looking at the sustainable development from a right perspective to first acknowledge that in order for a person or society to continue advancing; right to education shall be the basic need for every individual. Social and economic conditions like lack of education and information, as well as poor health conditions, severally limit the person's ability to work and enjoy personal economic growth and development. Education helps the individual to achieve their own social and economic status and helps society to better protected, better served by its leader and more equitable in many ways. The difference between education and poverty reduction is quite liner as education is empowering; it enables a person to participate in the development processes, it inculcates the knowledge and skills needed to improve the income earning potential and in turn provide the quality of life, which is the need of the time.¹⁰ Education is a process which provides for intellectual, moral, social, economic and physical development of a child of good character formation; mobility to social status, an opportunity to secure equality and a powerful instrument to bring attainment of employment and other sources of income and help in eradicating specific social problems such as child labour, oppression and any kind of discrimination that may be prevailing in the society.¹¹ Education therefore, should be correlated to the social, political or economic and cultural needs of our developing nation fostering secular values, breaking the barriers of casteism, linguism, religious bigotry and should act as an instrument of social change. Education kindles its flames for pursuit of excellence, enables and ennobles the young mind to sharpen his or her intellect more with reasoning than blind faith to reach intellectual heights and inculcate in him or her to strive for social equality, justice and dignity of person.

INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted on 10th December 1948 and two International Covenants were adopted in 1966 codifying the two sets of Rights outlined in the

¹⁰ Bhandari J. *Bandua Mukti Morcha v. Union of India & Others*, (1997) 10 SCC 549 p.547 para 11, referred in *Ashoka Kumar Thakur v. Union of India and Others* (2008) 6 SCC 1

¹¹ Dreze, J. and Sen, A. *India: Economic Development and Social Opportunity*, (Oxford University Press, New Delhi, 1996) pp.14-15

universal Declaration. International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights came into force in 1976. The Declaration has been hailed as an historic event of the profound significance and as one of the greatest achievements of the United Nations.

The declaration' is the mines from which other conventions as well as national constitutions protecting these rights have been are being quarried.¹²

PREAMBLE OF UNIVERSAL DECLARATION OF HUMAN RIGHTS;

It is as follows;

"Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the Human family is the foundation of the freedom, Justice and peace in the world".

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for the people, and of all nations, to the end that every individual and every organ of the society, shall strive by education to promote respect of these rights and freedom and by international measures shall try to secure the universal and effective recognition of the Human Rights by the member states among the people of their territories under their jurisdiction. Thus, under Article 26 of the Universal declaration of Human Rights deals with Right to Education. It has been considered important from the viewpoint that Right to education is a Human, Fundamental right that every individual of the society is entitled to have.

*Education shall be directed to the full development of Human Personality and to the strengthening of respect for **HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**"¹³*

International Covenant for Civil and Political Rights & International Covenant on Social, Cultural and Economic Rights

The International Conference of Human rights at Tehran has pointed out that without "Education the full realization of economic, social and cultural rights the implementations of

¹² J. E.S. Fawcett, The Law of Nations(1968), p.158; See also Percy E. Corbett, The Growth of World Law (1971), pp. 181-182.

¹³ Article 26 of Universal Declaration of Human Rights 1948

Civil and Political Rights was not at all possible.¹⁴ The International Covenant of Social, Economic and Cultural Rights include the following Rights; Right to work¹⁵, Right to education¹⁶, Right to health¹⁷, Right to adequate food¹⁸, Right to culture and Social Security¹⁹ and Right to adequate standard of living²⁰.

RIGHT TO EDUCATION AND NATIONAL PERSPECTIVE

“A man without the education is equal to animal”. Education means Knowledge and Knowledge itself is POWER”.

Initially the Constituent Assembly did not make the education a fundamental right, it provided for free and compulsory education as Directive Principle of State Policy which are although not enforceable in the court of law but are made fundamental in the governance of the country and it has been the duty of the state to apply these principles in making laws. In the original constitution the term education was confined to Part IV of the Indian Constitution; Article 41 of the Indian Constitution provides that the state within its limits of its economic capacity and development make effective provisions for securing right to work, and right to education.²¹ Further to protect the educational interests of religious and linguistics minorities' special provision has been inserted under Part III of the Indian constitution under Article 30, entitling to establish and administer educational institution of their choice. Further Article 26 provides that every religious denominations or any sect thereof have been authorised to establish and maintain religious institutions and charitable purposes. On the other hand Part IV of the Indian Constitution deals with the Directive Principles of State policy which are non-justifiable rights. The failure of the policy makers in implementing the provision of Article 45 of Indian Constitution even after five decades seems to have a serious problem. The words of C. Gopalchari seem to be true in this context;

“Corruption, injustice and the power and tyranny of wealth, and inefficiency of the administration, will make a hell of life as soon as freedom is given to us. Men will look

¹⁴ United Nations action in the field of human rights, United Nations, New York and Geneva, 1994, p. 131, para 1142

¹⁵ International Covenant on Economic, Social and Cultural Rights Article 6

¹⁶ *Ibid* Article 13 and 14

¹⁷ *Ibid* Article 12.

¹⁸ *Ibid* Article 11

¹⁹ *Ibid* Article 15 and Article 9

²⁰ *Ibid* Article 11

²¹ Constitutional Assembly Debates, (Vol. II) (1948-49)

regretfully back to the old regime of comparative justice, and efficient, peaceful, more or less honest administration". He further added that "hopes lies only in universal education by which right conduct, fear of God and Love will be developed among the citizens from childhood".²²

Dr. Amedkar the chief Architect of the Indian Constitution wanted to spread knowledge and freedom of thought among its citizens as reflected in the constitution. When the Constitution of India was adopted in 1950, the framers of the constitution were aware of the importance of education as an imperative tool, for the realization of a person's capability and for the full protection of rights. But as the "states" economic conditions was not sound, so it was placed in the directive principles. The Directive Principles which were fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III of the Indian Constitution. Indeed the Preamble of the Indian Constitution resolves that these objectives can be achieved only if the country's children are not in work and are attending schools and as far as the dignity of the individual is concerned, without education dignity of the individual cannot be assured. Hence, some child specific provisions are contained both in both the "Directive Principles and Fundamental Rights".²³

RIGHT TO EDUCATION A FUNDAMENTAL RIGHT (ARTICLE 21 A)

The Constitution (86th Amendment) Act,2002 has added a new Article 21 A after Article 21 and has made education for all children of the age of 6 to 14 years a Fundamental Right. It provides that "*The State shall provide free and compulsory education to all the children of the age of 6 to 14 years in such manner as the state may, by law determine*". It is well known fact that the education is basic human right. For the success of democratic system of

²² N.A. Palkhivala (1999), *Selected Writings*; P.P. Rao, *Fundamental Right to Education*, 50 Journal of Indian Law Institute, (2008) p.591

²³ 'Our Constitution-makers, wise and sagacious as they were, had known that India or their vision would not be a reality if the children of the country are not nurtured and educated. For this, their exploitation by different profit-makers for their personal gain had to be first indicted. It is this need, which has fund manifestation in Article 24, which is one of the two provisions in Part IV of our Constitution on the fundamental right against exploitation. The framers were aware that this prohibition alone would not permit the child to contribute its mite to the nation building work unless it receives at least basic education. Article 45 was therefore inserted in our paramount parchment casting a duty on the State to endeavour to provide free and compulsory education to children. (It is known that this provision in Part IV of our Constitution is, after the decision by a Constitution Bench of this Court in *Unni Krishnan, J.P. v. State of Andhra Pradesh*. AIR 1993 SC 2178 has acquired the status of a fundamental right.) Our Constitution contains some other provision also, desiring that a child must be given an opportunity and facility to develop in a healthy manner.' *M.C.Mehta v. State of Tamil Nadu* (1996) 6 SCC 756 p.760

government, education is one of the basic elements. An educated citizen has to choose the representatives who form the government. Education gives the person the essence of Human dignity that develops him as well as contributes to the development of the country. The framer of the constitution realising the importance of the education have imposed the duty under Article 45 as one of the Directive Principle of the State Policy to provide free and compulsory education to all children until they complete the age of 14 years within 10 years from the commencement of the constitution. The object was to abolish the illiteracy from the country. It was expected that the elected governments of the country would honestly implement the directives. But it is unfortunate that since the lapse of 71 years from the independence they did not take any concrete steps to implement these directives and 35% of the population of the country is still illiterate. The framers perhaps were of the view that in the view of the financial conditions of new state it was not feasible to make it as a fundamental right under Part III of the constitution. Article 21 A may be read with new substituted Article 45 and new clause (k) inserted in Article 51 A of the constitution (86th Amendment Act 2002)²⁴. While the substituted Article 45 obligates the State “To endeavour to provide early childhood care and education for all Children until they complete the age of 14 years, clause (k) inserted in Article 51 A imposes a fundamental duty on parents/guardian “to provide opportunities for education to his child or, as the case may be ward, between the age of six and fourteen years”. To ensure the proper implementations of the provision of the 86th Amendment Act 2002 in terms of not just the funds spent but the content of the implementations, Dr. M. M. Joshi, the then Human Resource Development Minister,²⁵ said that the monitoring system would be put in a place. It is hoped that the measure adopted would herald the Nation’s march to cent per cent literacy.

Justice Earl Warren, Chief Justice of the U.S. Supreme Court in *Brown v. Board of Education*²⁶, emphasized on the right to education in the following words;

Today Education is the most important function of the state and local governments.... It is required in the performance of our most basic responsibility, even services in the armed forces. It is the very foundation of good citizenship. Today, it is the principal instrument in awakening the child to cultural values in preparing him for later professional training and in

²⁴ This amendment is made after taking into the considerations the 165th Report of the Law commission of India and the recommendations made by the Standing Committee of the Parliament.

²⁵ The Tribune, December 17,2009

²⁶ 347 US 483 (1954), quoted in *Unni Krishna v. State of A.P.* AIR 1993 SC 2178 and referred to in *Election Commission of India v. St. Mary's School*, AIR 2008 SC 655.

helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

In *Mohini Jain v. State of Karnataka*²⁷, the matter was raised by the petitioner that the right to education is a Fundamental Right under Article 21 of the constitution of India²⁸ which cannot be denied to a citizen by charging high fees known as the capitation fees.²⁹

³⁰Stating that “Right to education” is outcome of Article 21 of the Indian Constitution. The Supreme Court in *Bharatiya Seva Samaj Trust Tr, Press. v. YogeshBhai Ambalal Patel* observed that

“Without education, a citizen may never come to know of his other rights..... Democracy depends for its very life on a high standard of general, vocational and professional education.

CONCLUSION

“EDUCATION is the special mainstream of man.

EDUCATION is the treasure which can be preserved without the fear of the loss

EDUCATION secures material pleasure, happiness and fame.

EDUCATION is GOD in carnate.

EDUCATION secures the honour of the hands of the State, not money.

India is home to 19% of the world’s children that means India has the world’s largest number of youngsters as well as youth which is largely beneficial, especially as compared to countries like China, which has an ageing population. It is curse to say that, India also has one-third of the world’s illiterate population. It’s not as though literacy levels have not increased, but rather that the rate of the increase is rapidly slowing. India is a country where more than 3 million children are living on the streets, more than 150 million children are bonded labourers, one sixth of girl child does not live to see her 15th birthday and only 50%

²⁷ AIR 1992 SC 1858

²⁸ *State of Karnataka v. Associated Management of P. & S. Schools*, AIR 2014 SC 2094

²⁹ *Ng. Komon v. State of Manipur* AIR 2010 GAU.102

³⁰ AIR 2012 SC 3285

of children have access to education. Hence, there is always a scope for a need for amendments which makes the Right to Education Act as a *Sunshine Act*.

To combat this worrisome trend, the Indian government proposed the Right of children to Free and Compulsory Education Act, 2009 making education a fundamental right so that every child in the age group of 6 to 14 can have the basic education.

“The child is a soul with a being, a nature and capacities of its own, who must be helped so find them, to grow into their maturity, into a fullness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation”.

- Justice P.N Bhagwati

HISTORICAL ADVANCEMENTS IN THE PRINCIPLES OF NATURAL JUSTICE

Shivesh Raghuvanshi* & Divyangi Singh**

Abstract

Natural justice is an important concept of constitutional as well as administrative law. It express a choose relationship between the common law and moral principles and has an impressive history. The term, however, cannot be defined precisely and scientifically. The concept of natural justice doesn't vary clear, yet the principles of natural justice are accepted and enforced. The rules of natural justice are basic values which a man has cherished throughout the ages. The principle applies rules relating to reasonableness, good faith and justice, equity and good conscience. There is no statutory provision for its observance; however, out it has been enforced through the various judicial pronouncements. The main principles as recognised by the traditional English law are 'Nemo debet esse jidex in propria causa' and 'Audi altrem partem' however certain other principles have also been recognised in the modern times as principles of natural justice. The basic concept behind applying these principles as law is to avoid any kind of biases or partiality for or against any of the litigating parties by an anticipating authority and to provide an equal opportunity to all the parties in any case to fulfil the purpose of a fair trial. It is a general rule and there is no necessity of the existence of any kind of duty to act judicially- an adjudicating authority must always act fairly.

Keywords: Administrative Law, Authority, Fair Trial, Justice, History.

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INTRODUCTION

Justice is a natural virtue. Well-functioning humans are just, as are well-ordered human societies. Roughly, this means that in a well-ordered society, just humans internalize the laws and social norms (the *nomoi*)—they internalize lawfulness as a disposition that guides the way they relate to other humans. In societies that are mostly well-ordered, with isolated zones of substantial dysfunction, the *nomoi* are limited to those norms that are not clearly inconsistent with the function of law—to create the conditions for human flourishing. In a radically dysfunctional society, humans are thrown back on their own resources—doing the best they can in circumstances that may require great practical wisdom to avoid evil and achieve well. Justice is naturally good for humans—it is part and partial of human flourishing¹.

Justice is a very elaborate conception, the growth of many centuries of civilization; and even now the conception differs widely in countries usually described as civilized.²

Natural justice has meant many things to many writers, lawyers, and systems of law. It has many colours and shades and many forms and shapes. In the words of Megarry J³ it is "justice that is simple and elementary, as distinct from justice that is complex, sophisticated and technical." They are better known than described and easier proclaimed than defined.⁴

In *Drew v. Drew & Lebura*⁵, Lord Cranworth defined it as "universal Justice".

In *James Dunber Smith v. Her Majesty the Queen*⁶ the Judicial Committee of Privy Council, used the phrase 'the requirements of substantial justice'.

In *Arthur John Specman v. Plumstead District Board of Works*⁷ Earl of Selbourne, S.C. preferred the phrase 'the substantial requirement of justice'.

In *Vionet v. Barrett*⁸, Lord Esher, MR defined natural justice as 'the natural sense of what is right and wrong'.

¹ Lawrence B. Solum, Natural Justice, Natural Law Lecture 65, 65 (2006)

² *Maclean v. The Workers Union* (1929) 1 Ch. 602, 624

³ *John v. Rees* (1970) 1 Ch d 345: (1969) 2 WLR 1294

⁴ *Abbott v. Sullivan* (1952) 1 KB 189, 195

⁵ 1855 (2) Macg. 18

⁶ 1877-78 (3) App Case 614, 623 JC

⁷ 1884-85 (10) App Case 229, 240

While however, deciding *Hookings v. Smethwick Local Board of Health*⁹, Lord Fasher, M.R. instead of using the definition given earlier by him in Vionet's case chose to define natural justice as 'fundamental justice'. In *Ridge v. Baldwin*¹⁰, Harman LJ, in the Court of appeal countered natural justice with 'fair play in action' a phrase favored by Bhagawati, J. in *Meneka Gandhi v. Union of India*¹¹.

In Re *R.N. (An Infant)*¹², Lord Parker, C.J., preferred to describe natural justice as 'a duty to act fairly'.

The principles of natural justice constitute the basic elements of fair hearing, having their roots in the innate sense of man for fair play and justice which is not the perverse of any particular race or country but is shared in common by all men. It supplies the omission made in codified law and helps in administration of justice. Natural justice is not only confined to 'fairness' it will take many shade and colour based on the context. Thus natural justice apart from 'fairness' also implies reasonableness, equity and equality. They are neither cast in a rigid mould nor can they be put in legal straitjacket. These principles written by nature in the heart of mankind, they are immutable, inviolable, and inalienable.¹³

GREEK PHILOSOPHY ON NATURAL JUSTICE

As far back in ancient Greek literature as Homer, the concept of *dikaion*, used to describe a just person, was important. From this emerged the general concept of *dikaiosune*, or justice, as a virtue that might be applied to a political society. Plato claims that the laws of justice, matters of convention, should be obeyed when other people are observing us and may hold us accountable; but, otherwise, we should follow the demands of nature. The laws of justice, extrinsically derived, presumably involve serving the good of others, the demands of nature, which are internal, serving self-interest. He even suggests that obeying the laws of justice often renders us helpless victims of those who do not. If there is any such objective value as natural justice, then it is reasonable for us to attempt a rational understanding of it. On the other hand, if justice is merely a construction of customary agreement, then such a quest is

⁸ 1885 (55) LJR 39, 41

⁹ 1890 (24) QBD 712

¹⁰ 1963 (1) WB 569, 578

¹¹ (1978 92) SCR 621

¹² 1967 (2) B. 617, 530P

¹³ Mustafa Rashid Issa, *Natural Justice in Islam and Humans Law*, 15 An International Peer-reviewed Journal, 2015, p. 5

doomed to frustration and failure.¹⁴ The translations of ancient texts show that the term "justice" sometimes name a state of personal character (usually Greek to *dikaiosyn* or *dike*, Latin *iustitia*) , sometimes a more abstract understanding of right and wrong (usually Greek to *dikaion* or *dike*, Latin *ius*) and sometimes a condition of a political community or institution. A basic question about ground of requirements of Justice was raised as to whether justice is conventional or natural. It was agreed upon that justice and its norms are God-given because god works through nature and in particular through human beings¹⁵.

ISLAMIC VIEWS ON NATURAL JUSTICE

God declares in the Quran: “God commands justice and fair dealing...”¹⁶ Natural justice in Islam that can also be referred to Islamic law or Islamic jurisprudence (fiqh) or Islamic Sharia derives its roots from three main sources according to Islamic scholars : The Quran, Hadith and Sunnah. These sacred scripture and sayings of Islam, considers justice to be a supreme virtue. It is a basic objective of Islam to the degree that it stands next in order of priority to belief in God’s exclusive right to worship (Tawheed) and the truth of Muhammad’s prophet hood.

HINDU SCRIPTURES ON NATURAL JUSTICE

Hindu scriptures reflect a deep fascination with and commitment to justice, both as a social reality and as a cosmic principle. The earliest narratives identify justice with the work of a god, such as Yama, who weighs the actions of the dead on his scale, or Varuna, who binds sinners with the fetters of illness. By the end of the Vedic period (sixth century BCE), justice was equated with a cosmological principle, called rita, which governed nature as well as human ethical conduct. To follow Rita was to act in accordance with justice, or natural law. However, it was not until the concept of karma emerged, in the early Upanishads, that justice became a logical consequence of action. Karma stipulated that good actions are rewarded and bad actions punished, if not in this life then the next. This became part of the intellectual foundation for social inequality and a corresponding explanation for social evil.¹⁷ Though now it is believed that Principles of Natural Justice were systematized in ancient Rome,

¹⁴ Western Theories of Justice, Available at: <http://www.iep.utm.edu/justwest> (Accessed on: 27/12/ 2017 at 10:04 AM)

¹⁵ The Oxford encyclopedia of ancient Greece and Rome 165-166 (Michael Gagrin, 2010)

¹⁶ (Quran 16:90).

¹⁷ *Hinduism on Justice and Injustice*, Available at: <https://berkleycenter.georgetown.edu/essays/hinduism-on-justice-and-injustice> (Accessed on: 26/12/ 2017 at 09:40 PM)

principles of natural justice are not new India. Principles of fair hearing and rule against bias were well recognized in ancient India.

In ancient India foremost duty of a judge was his integrity which included impartiality and a total absence of bias or attachment. The concept of integrity was given a very wide meaning and the judicial code of integrity was very strict, Brihaspati Says: A judge should decide cases without any consideration of personal gain or any kind of personal bias; and his decision should be in accordance with the procedure prescribed by the texts. A judge who performs his judicial duties in this manner achieves the same spiritual merit as a person performing a Yajna. Further, the judges and counselors guiding the king during the trial of a case were required to be independent and fearless and prevent him from committing any error or injustice. Says Katyayana: If the king wants to inflict upon the litigants (vivadinam) an illegal or unrighteous decision, it is the duty of the judge (samya) to warn the king and prevent him.”¹⁸ In India the principle is prevalent from the ancient times. It is invoked in Kautilya's Arthashastra. In this context, para 43 of the judgment of the Hon'ble Supreme Court In the case of *Mohinder Singh Gill v. Chief Election Commissioner*¹⁹, may be usefully quoted:

“Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colors and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautilya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.”²⁰

¹⁸ Origin and Development of Principles of Natural Justice, Available at: <http://www.legalservicesindia.com/article/article/origin-and-development-of-principles-of-natural-justice-1528-1.html> (Accessed on: 07/12/ 2017 at 11:10 AM)

¹⁹ AIR 1978 SC 851

²⁰ Justice Brijesh Kumar, PRINCIPLES OF NATURAL JUSTICE, Institute's Journal, July-September 1995, 1-2, Available at:

Thus the Principle of natural justice is not a concept newly arrived at, but an age old principle being practised since the beginning of human existence in most of the ancient civilizations.

COMMON LAW AND NATURAL JUSTICE

Natural justice is an expression of English common law and involves a procedural requirement of fairness. As early as the mid18th century, Lord Mansfield founded liability to repay money had and received on “natural justice and equity”, in case of *Moses v. Macferlan*²¹. Then, in the 19th Century Kindersley V.C. invoked natural justice in case of *Rice v. Rice*²²to help to determine the conflicting priorities of two equitable interests. Further during the late 19th century, examining the origin of the right of a cargo owner to general average contribution Brett M.R. said in case of *Burton & Co. v. English & Co.*²³

“...it seems to me that the right arose at the time of the making of the Rhodian laws, it is consequence of the peculiarity of sea danger and has become incorporated into the municipal law of England as a law of the ocean and of marine risk, because when two parties were jointly in danger of the same misfortune, natural justice required that any loss falling upon one party for the safety of the whole adventure should be recouped by the other party in proportion.”

Without going into the ramifications of the doctrine of the natural justice at this stage, it may be said that the doctrine as understood in England, rests on two broad principles resting on Latin maxims which were drawn by common law from “justice naturelle”, as in case of *Local Govt. v. Arlidge*²⁴. In the 19th Century, the phrase came to be applied by the superior courts in controlling the decisions of courts of summary jurisdiction and it was asserted that any court of justice or judicial tribunal must observe these minimum safe guard of natural justice for justice to be done i.e. being impartial and without bias and further no man should be condemned unheard, otherwise failing which the decisions would lose their judicial character.

<https://www.google.co.in/url?sa=t&source=web&rct=j&url=http://ijtr.nic.in/articles/art36.pdf&ved=0ahUKEwi6op3W2KzYAhXDui8KHY3GA70QFggmMAA&usg=AOvVaw2MZFNdlldsrUIuiDbrMfNG> Accessed on: 26/12/ 2017 at 10:24 PM)

²¹ (1760) 2 Burr, 1005(1012)

²² (1853) 2 Drew 73(79)

²³ (1883) 49 L.T. 768(769)

²⁴ (1915) A.C. 120(138) HL

That these are the essential requirements of a judicial decision would appear from the notable words of Viscount Haldane as in case of *Local Govt. v. Arlidge*²⁵ : -

“.....those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.”

It is not possible to produce an exhaustive list of the rules of natural justice in this formal sense or of the requirements of the rules, because the rules of natural justice are means to an end and not an end themselves, as in case of *Official Solocitor V.K*²⁶. In the words of Tucker L.J.,

“The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter i.e. being dealt with and so forth”

NATURAL JUSTICE IN U.S.A.

In the United States, the expression, natural justice, as such is not so frequently heard of, it appears to have been used in the late 18th and 19th centuries in the cases of *Calder v. Bull* and *Ex parte Robinson*, because it is not necessary to rely on common law when due process is to be affected by State action (5th and 14th Amendments.). Due process is a vague and undefined expression, the implications of which are not finally settled even today. But, the American judiciary has secured the observance of the minimum requirement of justice embodied in the principle of natural justice, by taking advantage of the very vagueness of the phrase ‘due process’. Thus, in case of *Synder v. Massachussets*²⁷, the Supreme Court observed that there was a violation of due process whenever there was a breach of a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”

DEVELOPMENT OF THE PRINCIPLE IN INDIA

²⁵ *Ibid.*

²⁶ (1965) A.C. 201

²⁷ (1934) 291 U.S. 97, (105)

The development of the Principle in India can be traced through the various judgements of the High Court and Supreme Court. These principles of natural justice are treated as a part of the Constitutional guarantee contained in Art. 14 and the violation of these principles by the administrative authorities are taken as violation of Art 14. Actually the concept of quasi-judicial, natural justice and fairness all have been developed to control the administrative action. The object has been to secure justice and prevent miscarriage of justice.

The concept of rule of law would have its importance if the administrative authorities are not charged with the duty of discharging their functions in fair and just manner. Art 14 & 21 has strengthened the concept of natural justice. Art. 14 apply not only to discriminatory class legislation but also to discriminatory or arbitrary state action. Violation of the principle of natural justice results in arbitrariness and, therefore, its results in the violation of Art. 14. Art. 21 require substantive and procedural due process and it provides that no person shall be deprived of his life or person liberty except according to the procedure established by law. The procedure prescribed for deprivation of person liberty must be reasonable, fair, just and a procedure to be reasonable, fair and just must embody the principle of natural justice²⁸. A procedure which does not embody the principles of natural justice cannot be treated as reasonable, just and fair as in case of *Vionet v. Barrett*²⁹. The earlier view as in case of *Franklin v. Ministry of Town& Country Planning*³⁰, which the principle of natural justice were applicable to the judicial and quasi-judicial orders only and not to the administrative orders has been changed now. Both in English Law and in India the courts have made it clear that the principle of natural justice is applicable in administrative proceedings as in case of *A.K. Kraipak v. Union of India*³¹. In *Sate of Orissa v. Birapani Devi*³² the Supreme Court has specifically held that even an administrative order which involve civil consequences must be made consistently with the rules of natural justice. The Supreme Courts has observed in case of *Union of India v. P.K. Roy*³³ that the extent and application of the doctrine of natural

²⁸ The Principle And Essential Elements Of Natural Justice – Its Historical Perspective And Role Of Judiciary, Available at:

https://www.google.co.in/url?sa=t&source=web&rct=j&url=http://shodhganga.inflibnet.ac.in/bitstream/10603/40127/6/06_chapter%25201.pdf&ved=0ahUKEwjyiLT2KzYAhXIuI8KHZbmAmkQFggmMAA&usg=AOvVaw1eY3rPaj_KaPaAZTFNdJhU (Accessed on: 26/12/2017 at 10: 35 PM)

²⁹ (1885) 55 LJ RB, 29

³⁰ (1947) 2 All E.R. 289 (H.L.)

³¹ AIR (1970) SC 150

³² AIR (1967) SC 1269

³³ AIR (1968) SC 850

justice depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case. In *A.K. Kraipak v. Union of India*³⁴ the Supreme Court has observed:

"What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice has been contravened, the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

As regards the application of the principles of natural justice the distinction between quasi-judicial and administrative order has gradually become thin and now it is totally eclipsed and obliterated. The aim of the rules of natural justice is to secure justice or put it negatively to prevent miscarriage of justice and these rules operate in areas not covered by law validly made or expressly excluded. The rules of natural justice would apply unless excluded expressly or by implication.³⁵

The most recent of the judgements lay down the conditions when the Principle of natural justice can be excluded and the effects of breach of natural justice.

EXCEPTIONS TO THE PRINCIPLE

It has been held in the case of *Rash Lal Yadav v. State of Bihar*³⁶ that Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provisions conferring the power, the nature of power conferred, the purpose for which it is conferred and the effect of the exercise of that power. In *State of Haryana v. Piara Singh*³⁷ the Supreme has held that in service matter the Rule of Court is to ensure rule of and to see that the executive acts fairly and gives fair deals to employee as required under Articles 14 & 16. For example, if a Municipal corporation is established, the Govt. is not required to hear the residents of the Municipal area before taking

³⁴ AIR (1970) SC 150

³⁵ *Ibid*

³⁶ (1994) 5 SCC 267

³⁷ AIR 1992 SC 2130

decision for its establishment because the establishment of a Municipal Corporation is a legislative Act and the rule of natural justice are not applicable to the legislative Act as in the case of *Sundarjas Kanegala Bhatiyja v. Collector, Thane*³⁸. According to Paul Jackson, A Minister or any other body in making legislation is not subject to the rule of natural justice. For example, in the case of powers derived from the Royal Prerogative, the courts may refuse to interfere on the ground that the applicant has not been deprived of any legal right as in case of *De Freitas v. Benny*³⁹ the Privy Council held that a Minister could not be required to disclose the evidence on which he based his advice on the exercise of the Royal Prerogative of Mercy because “Mercy is not the subject of legal rights. It begins where legal rights end.” In *MRF Ltd. v. Inspector, Kerala Government*⁴⁰ the court has made it clear that the principle of natural justice cannot be imported in matter of legislative action. If the legislative, in exercise of its plenary power under Article 245 of the Constitution, proceeds to act in a law, those who would be affected by that law cannot legally raise a grievance that before the law was made, they should have given an opportunity of hearing.

EFFECT OF BREACH OF NATURAL JUSTICE

When the Authority is required to observe the principle of natural justice in passing an order but fails to do so, the general judicial opinion is that the order is void. For example, in case of *Ridge v. Baldwin*⁴¹ in England the Court held the decision of the authority void on the ground of the breach of rule of fair hearing.

In India, the position is well settled and the order passed in violation of the principles of natural justice is void as in the cases of *Nawab Khan v. State of Gujarat*⁴², *State of U.P. v. Mohd. Noor*⁴³, *A.K. Kraipaipak v. Union of India*⁴⁴ and *Collector of Monghyr v. Keshav Pd.*⁴⁵, when the reasons for the decision are not given to the person concerned or reasons are not given to the Court, the order is quashed and the authority is directed by the Court to examine the matter afresh as in case of *Bhagat Raja v. Union of India*⁴⁶. When the reasons

³⁸ AIR 1990 SC 261

³⁹ (1976) AC 238

⁴⁰ AIR 1999 SC 188

⁴¹ (1964) AC 40

⁴² AIR 1974 SC 147

⁴³ AIR 1958 SC 87

⁴⁴ AIR 1970 SC 150

⁴⁵ AIR 1962 SC 1674

⁴⁶ AIR 1967 SC 1606

are not communicated to the person concerned that they are on record as in *Ajantha Industries v. Central Board of Direct Taxes*⁴⁷ the court has not upheld the decision because the court has held that recording of reasons on the file is not sufficient and it is necessary to give reasons to the affected person and in this case the order was quashed on the ground that the reasons were not communicated to the person concerned.

In the Lecture⁴⁸ delivered at judicial Academy on 1st June, 2009, Justice T.S.Sivagnanam stated that there are certain other principles which have been stated to constitute elements of Natural Justice. These are

- i. The parties to a proceedings must have due notice of when the Court / Tribunal will proceed
- ii. The Court / Tribunal must act honestly and impartially and not under the dictation of other persons to whom authority is not given by Law. These two elements are extensions or refinements of the two main principles stated above.

SPEAKING ORDERS

Recently a third principle of natural justice has emerged, namely, speaking order (reasoned decisions). According to this, a party has a right to know not only the result of the enquiry but also the reasons in support of the decision.⁴⁹ There is no general rule of English law that reasons must be given for administrative or even judicial decisions. In India also, till very recently it was not accepted that the requirement to pass speaking orders is one of the principles of natural justice. But as Lord Denning⁵⁰ in *Breen v. Amalgamated Engineering Union* says, the giving of reasons is one of the fundamentals of God administration. Subba Rao J in *M.P. Industries Ltd.*⁵¹ has observed:

⁴⁷ AIR 1976 SC 437

⁴⁸ Justice T. S. Sivagnanam , PRINCIPLES OF NATURAL JUSTICE Lecture delivered at Tamil Nadu State Judicial Academy on 01.06.2009 to the newly recruited Civil Judges (JR Division) during Induction Programme 2009,

Available

at:

https://www.google.co.in/url?sa=t&source=web&rct=j&url=http://www.tnsja.tn.nic.in/article/Pri%2520of%2520Natural%2520Jus%2520by%2520TSSJ.pdf&ved=0ahUKEwi4vdf_2azYAhWLqI8KHSTKCnUQFggmMAA&usg=AOvVaw2xdiD6AeXsxVIM4UtgDbm0 (Accessed on: 26/12/ 2017 at 10:41 PM)

⁴⁹ C.K.Takwani, Lectures on Administrative Law 218 (5th ed., 2012).

⁵⁰ (1971) 2 QB 175: (1971) 2 WLR 742 (CA)

⁵¹ AIR 1966 SC 671

There is an essential distinction between a court and an administrative tribunal. A judge is trained to look at things objectively, but, an executive officer generally looks at things from the stand-point of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties: and the least they should do is to give reasons for their orders.

For the first time in *Siemens Engg.*⁵², the Supreme Court held that the rule requiring reasons to be recorded by quasi-judicial authorities in support of the orders passed by them must be held to be a basic principle of natural justice.

A special reference may be made in this connection to a decision of the Constitution bench of the Supreme Court in *S.N. Mukherjee*⁵³. Referring to a number of leading cases on the point, Agarwal J observed:

“Keeping in view the expanding horizon of the principle of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities.”⁵⁴

CONCLUSION

Natural justice is a legal philosophy used in some jurisdictions in the determination of just, or fair, processes in legal proceedings. The concept is very closely related to the principle of natural law which has been applied as a philosophical and practical principle in the law in several common law jurisdictions. Natural justice in essence could just be referred to as ‘Procedural Fairness’, with a purpose of ensuring that decision-making is fair and reasonable. Natural justice must underpin departmental decision-making as those decisions affect the interests of persons or corporations.

This is the universal element which restricts the perjury to the persons’ intrinsic rights and values. To quote *Victor Cousin*⁵⁵:-

⁵²(1976) 2 SCC 981

⁵³ (1990) 4 SCC 594

⁵⁴ *Ibid*, SCC 614: AIR 1996.

⁵⁵ Victor Hugo on Natural Justice, Available at: <http://www.azquotes.com/quotes/topics/natural-justice.html> (Accessed on: 28/12/ 2017 at 11:05 AM)

“The Universal and absolute law is that Natural Justice which cannot be written down, but which appeals to the hearts of all.”

This clearly illustrated the true assertive principles of Natural Justice which dignifies the literal status of morality as well as the human values. The Law made for the humanity and not the sole human should be the *prima facie* interest of the society. Sociological and Historical Schools which enunciated the Natural Justice were able to overrule the dictatorship of the Analytical School's Approach. Without seeing the necessity of natural justice, no law can be just, fair and reasonable. The judicial construction based on the justice, equity and good concise is too based on the unanimous principles of natural Justice which come handy when all the legal elements fail. Henceforth, the overall democracy of India shall be beneficial for the India Society when the legal norms and their fulfillment are submissive with Natural Justice.