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"The submission that defamation is fundamentally a notion of the majority meant to cripple the freedom of speech and expression is too broad a proposition to be treated as a guiding principle to adjudge reasonable restriction. There is a distinction between social interest and a notion of the majority. The legislature has exercised its legislative wisdom and it is inappropriate to say that it expresses the notion of the majority. It has kept criminal defamation on the statute book as in the existing social climate it subserves the collective interest because reputation of each is ultimately inhered in the reputation of all. The submission that imposition of silence will rule over eloquence of free speech is a stretched concept inasmuch as the said proposition is basically founded on the theory of absoluteness of the fundamental right of freedom of speech and expression, which the Constitution does not countenance."

Dipak Misra, J.

Subramanian Swamy v. Union of India
(2016) 7 SCC 221, para 196

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Lex Revolution

Journal of Social & Legal Studies

Quarterly Published International Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

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

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MESSAGE

It is with great pleasure we announce the release of Volume II Issue 3 (July-Sept 2016) of our Journal ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We express our discontent towards the recent incident in distinguished institutions of higher education and in the court premises in India which put forth a major concern before the judicial system on deciding the ambit of permissible free speech in the country. Every citizen has the right to protest and pursue his political ideology or affiliation but it must be within the framework of the constitution.

We owe our sincere gratitude to Prof. Gopal Krishna Chandani, Mr. K. N. Chaubey and Prof. S. K. Gaur for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of www.advocatekhoj.com that has 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 Professors, Asst. Professors, Research Scholars, Advocates and Students whose views and opinions have been incorporated in the text.

- **Editorial Board**

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HUMAN RIGHTS AND ENVIRONMENT LAW AT CROSSROADS

Lipika Sharma*

Abstract

The recent rapid and environmentally unsustainable pace of natural resource depletion is one of the most visible consequences of globalization. The exploitation of natural resources is a key factor in economic development. Further steadily rising global demand for raw materials, industrial inputs, and energy have been the main drivers of the depletion and degradation of natural resources. Human rights obligations of non-state actors will suggest a state responsibility to create an effective regulatory system capable of enforcing those obligations. There is a need to treat global environment and climate as the common concern of humanity. That is why locating the right to a decent environment within the corpus and institutional structures of economic, social, and cultural rights makes more sense. The need for effective protection of the global environment is nowadays evident. National and international communities search for instruments as effective as possible to stop or rather slow the destruction of the environment. While the predominant legal approaches to environmental protection are currently based on public regulation by imposing duties, there has been a new legal approach emerging based on each individual's right to a certain quality of environment, which supposes connections between environmental protection and human rights. The well-established national and international systems of human rights guarantees have been increasingly used as an effective instrument for environmental protection. This paper will focus on interrelationship between human rights and environmental protection. Same can be discussed under 3 heads namely the environment as a pre-requisite for the enjoyment of human rights, Certain human rights, especially access to information, participation in decision-making, and access to justice in environmental matters, as essential to good environmental decision-making and finally the right to a safe, healthy and ecologically-balanced environment as a human right in itself.

Keywords: Climate, Environment, Human Rights, Legal Approach

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INTRODUCTION

“A clean environment is a human right like any other. It is therefore part of our responsibility toward others to ensure that the world we pass on is as healthy, if not healthier, than we found it.”

- Dalai Lama

The relationship between human rights and environmental protection in international law is not straightforward. It has seen various ups and downs and reached the present state of development. Human rights have been a focus of international law for over sixty years now. A human rights approach to environmental concerns was only introduced long after that. The United Nations Charter of 1945 marked the beginning of modern international human rights law, whereas the Stockholm Declaration of 1972 is generally seen as the starting point of a rights based approach to environmental protection. This declaration formulated several principles, including that “ Man have the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹ Human rights and environmental law have in common that they are both seen as a challenge to, or limitation on, the traditional understanding of state sovereignty as independence and autonomy.² Despite their separate initial stages, it has become more and more acknowledged over the years that human rights and the environment are inherently interlinked. To give a clear example the right to life, personal integrity, family life, health and development of each human being depends on protecting the environment as the resource base for all life. Human rights are universal and absolute.

HUMAN RIGHT TO ENVIRONMENT

Faced with the results of polluting and destructive actions, many international treaties and local laws and regulations on environmental protection have been introduced in the second half of the 20th century. These at first did not mention human rights in relation to environmental protection. But since the 1970's, links between human rights and the environment have progressively been recognized.

¹ <http://www.righttoenvironment.org/default.asp?pid=81>

² ibid

Because each human being depends on protecting the environment as the resource base for all life. And where it started with mere linking acknowledged human rights to cases of environmental disruption, like the Bhopal and Chernobyl disasters³, it has become more acknowledged over the years that human rights and the environment are so inherently interlinked that (a clean and healthy) Environment is a Human Right. At this time there are several regional human rights charters (African Charter and American Convention), other conventions like the Aarhus Convention, and multiple national constitutions that contain an explicit pronunciation of a human right to (a clean and healthy) environment. And late 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples⁴, which in article 29 proclaims “Indigenous peoples have the right to the conservation and protection of the environment.

If the enjoyment of human rights depends on environmental protection, in turn, environmental protection depends on the exercise of certain human rights, such as the rights to information, public participation in decision-making and access to justice⁵. Effective compliance with environmental laws and standards necessitates knowledge of them as well as of environmental conditions. In addition, local communities play a vital role in preserving the resources upon which they depend. Allowing those potentially affected to participate in decision-making processes concerning harmful activities may prevent or mitigate the threatened harm and contribute to public support for environmental action, as well as lead to better decisions consistent with sustainable development⁶. In the event the activity goes forward and harm is suffered, access to justice can provide for restoration or remediation of the damaged environment. In general, procedural human rights – access to information, public participation in decision-making and access to justice – linked to environmental protection have received the greatest attention in legal instruments and jurisprudence ,as well as in doctrine⁷.

In a speech on July 5 2011, United Nations Secretary-General Ban Ki-Moon noted that the Aarhus Convention on Access to Information, Public Participation and Access to Justice “is

³ Prakash Vir Singh ,” Human Rights in relation to Environmental Protection”, SRJIS, Dec-2013, Vol. -I

⁴ Available at <http://pdःba.georgetown.edu/IndigenousPeoples/UNdraft.html>

⁵ www.ohchr.org › OHCHR › English › News and Events

⁶ www.unep.org/.../JointReportOHCHRAndUNEPonHumanRightsandtheEnvironment.p...

⁷ Anton, Don, Is the Environment a Human Rights Issue? (April 29, 2008). ANU College of Law Research Paper No. 08-11.

more important than ever”⁸. The “treaty’s powerful twin protections for the environment and human rights can help us respond to many challenges facing our world, from climate change and the loss of biodiversity to air and water pollution. And the Convention’s critical focus on involving the public is helping to keep Governments accountable...” Strengthening capacities of individuals, stakeholders, and institutions to advance a transition to an inclusive green economy.⁹ Strengthening the procedural rights, access to information, public participation and access to justice, will help develop sustainable development and the green economy. The exercise of these rights will provide information to prevent and address environmental degradation and stop the resulting human rights violations, thereby encouraging sustainable development and encouraging actions that promote a green economy. For example, the public informed with accurate environmental information can make choices that consider both short-term benefits of an economic action, as well as the long-term costs that the action may have on the ecosystem services that they rely on. Access to information, public participation and access to justice are discussed in more detail below to highlight options for considering sustainable development issues and opportunities to integrate human rights and environmental protection into sustainable development.

CODIFICATION OF ENVIRONMENT AS A HUMAN RIGHT

A human rights approach to environmental issues elevates the entire spectrum of sustainability, conservation and environmental issues to fundamental values of society on a level equal to other rights and superior to ordinary legislation¹⁰. A level where these issues belong. It will create both rights and obligations and thus more environmental awareness.¹¹ And from a more legal perspective, it will be a strong legal tool to stop and prevent environmental disruption. Victims will have access to international procedures and environmentalist will be supported as (also) being human rights defenders.

HISTORY OF HUMAN RIGHTS AND THE ENVIRONMENT

International concerns with human rights, health and environmental protection have expanded considerably in the past several decades. There are many non rights-based

⁸ www.unece.org/env/pp/mop4.html

⁹ <https://www.unitar.org/egp/what-we-do>

¹⁰ Dr. Meenu Gupta, “human rights and environmentalism : two sides of the same coin” Journal Of Law And Public Policy, Vol 1/ Issue 3/ Oct 2015 [ISSN 2394-9295]

¹¹ Bambang Yuniato, “Building Citizen Awareness of Environmental Conservation”, International Journal of Scientific & Technology Research, Vol 1/ Issue 7/ August 2012 [ISSN 2277-8616]

regulatory approaches to achieving environmental protection and public health. Economic incentives and disincentives, criminal law, and private liability regimes have all formed part of the framework of international and national environmental law and health law.

The international community has created a vast array of international legal instruments, specialised organs, and agencies at both the global and regional levels to respond to identified problems in each of the three areas. Often these have seemed to develop in isolation from one another. Yet the links between human rights, health and environmental protection were apparent at least as early as the first international conference on the human environment, held in Stockholm in 1972. Indeed, health has seemed to be the subject that bridges the two fields of environmental protection and human rights¹².

At the Stockholm concluding session, the participants proclaimed that: "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights; even the right to life itself."

The Stockholm Declaration established a foundation for linking human rights, health and environmental protection, declaring that: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."¹³In the almost thirty five years since the Stockholm Conference, the links that were established by these first declaratory statements have been reformulated and elaborated in various ways in international legal instruments and the decisions of human rights bodies.

APPROACHES ON HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

The change in approach towards Human Rights and environmental issues could roughly be

¹² HUMAN RIGHTS, HEALTH AND ENVIRONMENTAL PROTECTION:LINKAGES IN LAW AND PRACTICE, A Background Paper for the WHO1, available at http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf

¹³ Declaration of the United Nations Conference on the Human Environment, available at <http://www.unep.org/Documents.Multilingual/Default.Print.asp?documentid=97&articleid=1503>

Set out in three stages¹⁴

First approach

The first rights-based approach, perhaps closest to that of the Stockholm Declaration, understands environmental protection as a pre-condition to the enjoyment of internationally guaranteed human rights, especially the rights to life and health. Environmental protection is thus an essential instrument in the effort to secure the effective universal enjoyment of human rights¹⁵. Those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well. While the predominant legal approaches to environmental protection are currently based on public regulation by imposing duties, there has been a new legal approach emerging based on each individual's right to a certain quality of environment.¹⁶

Second approach

The second rights-based approach, most common in international environmental agreements since 1992, is also instrumentalist, but instead of viewing environmental protection as an essential element of human rights, it views certain human rights as essential elements to achieving environmental protection, which has as a principal aim the protection of human health. This approach is well-illustrated by the Rio Declaration on Environment and Development, adopted at the conclusion of the 1992 Conference of Rio de Janeiro on Environment and Development www.eolss.net/sample-chapters/c16/E1-48-43.pdf. It formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because environmental issues are best handled with the participation of all concerned citizens, at the relevant level. Thus, these procedural rights, contained in all human rights instruments, are adopted in environmental texts in order to have better environmental decision-making and enforcement.

Third approach

¹⁴ <http://www.righttoenvironment.org/default.asp?pid=80>

¹⁵ Supra 13

¹⁶ Shelton, D. Human Rights and the Environment: Problems and Possibilities. *Environmental Policy and Law*, 38/1-2 (2008), p. 42.

The third, and most recent approach views the links as indivisible and inseparable and thus the right to a safe and healthy environment as an independent substantive human right.¹⁷ At recent, examples of this are found mainly in regional human rights systems, environmental treaties and national law. And in the UN Declaration on the Rights of Indigenous People. Most formulations of the right to environment qualify it by words such as "healthy", "safe", 'secure' or 'clean', making clear the link between environmental protection and the aim of human health. Some specifically mention environmental protection (including wildlife and/or ecosystems) and some link to the benefit of future generations.

There are three main dimensions of the interrelationship between human rights and environmental protection:¹⁸

- The environment as a pre-requisite for the enjoyment of human rights (implying that human rights obligations of States should include the duty to ensure the level of environmental protection necessary to allow the full exercise of protected rights);
- Certain human rights, especially access to information, participation in decision-making, and access to justice in environmental matters, as essential to good environmental decision-making (implying that human rights must be implemented in order to ensure environmental protection); and
- The right to a safe, healthy and ecologically-balanced environment as a human right in itself (this is a debated approach).

Access to Information

Access to environmental information is a prerequisite to public participation in decision-making and to monitoring governmental and private-sector activities¹⁹. The nature of environmental deterioration, which often arises long after a project is completed and can be irreversible, compels early and complete data to make informed choices. Trans boundary impacts also produce significant demands for information across borders. The rights to information and participation, and their particular importance for both human rights and

¹⁷ <http://www.commonlawreview.cz/human-rights-approaches-to-environmental-protection-at-the-international-level-and-their-application-in-the-czech-r>

¹⁸ <http://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/language/en-US/Default.aspx>

¹⁹ <https://books.google.co.in/books?isbn=1139498525>

environment matters, are well reflected in the international legal framework, in both human rights law and environmental law. Access to information can help impact economic choices by giving involved parties full information regarding the decisions they make.

This will help parties choose decisions that support sustainable development and the green economy by providing information needed to make these decisions. The establishment of the right to access to information is discussed in more detail below, however this report does not cover all treaties in which access to information is raised. The right to information constitutes an essential feature of democratic processes and of the right to participation in public life²⁰. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression; that right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers. The right is also enshrined in article 19 of the International Covenant on Civil and Political Rights. Article 19(2) stipulates that everyone should have the right to freedom of expression; that right should include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice²¹. Article 19(3) does allow certain restrictions, but they should only be such as are provided by law and are necessary: (a) for the respect of the rights and reputations of others; (b) for the protection of national security or of public order, or of public health and morals. In 2011, the Human Rights Committee issued a new general Comment further detailing the rights under Article 19 of the CCPR. This included, with regards to right of access to information, that “States parties should proactively put in the public domain Government information of public interest.”

RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT: ROAD AHEAD

The linkages between human rights and environmental protection are multi-dimensional and reciprocal. Failure to conserve natural resources and biodiversity can undermine human rights, e.g. by destroying resources and ecosystem services on which many people, especially indigenous and local communities, depend. Failure to provide information or consult affected persons, as well as activities that displace local communities, can negatively impact

²⁰ <https://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm>

²¹ Myres S Mac Dougal, William Michael Reisman,” Power and Policy in Quest of the Law: Essays in Honor of Eugene Victor Rostow”, Dordrecht ; at 261, Boston : M. Nijhoff Publishers ; Hingham, MA, U.S.A. : Distributors for U.S.A. and Canada : Kluwer Academic Press, ©1985.

both human rights and environmental protection²². Conversely, environmental protection supports human rights through securing sustainable availability of critical natural resources and ecosystem services.

Almost from the emergence of contemporary concern with environmental protection in the late 1960s, the impact of environmental sustainability on the enjoyment of human rights was strongly perceived. The linkage figured prominently in the United Nations Conference on the Human Environment, held in Stockholm in 1972²³. In preparation for the Stockholm Conference, governments gathering at the 45th session of the Economic and Social Council specified that the conference was to focus on the impairment of the environment and the effects of this on “the condition of man, his physical and mental well-being, his dignity and his enjoyment of basic human rights in developing as well as developed countries.”²⁴

PROGRESSIVE RECOGNITION OF LINKAGES AT THE INTERNATIONAL LEVEL

The Stockholm Declaration set out 25 common guiding principles for the preservation and enhancement of the human environment. Principle 1 underlined that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” The governments also proclaimed in the concluding Stockholm Declaration that “the protection and improvement of the human environment is a major issue which affects the well-being of peoples.”²⁵

After Stockholm, environmental scholars and activists began to consider human rights in a more instrumental fashion, identifying those rights whose enjoyment could be considered a prerequisite to effective environmental protection²⁶. They focused in particular on the procedural rights of access to environmental information, public participation in decision making, and access to justice and remedies in the event of environmental harm.

²² www.unep.org/.../JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf

²³ ibid

²⁴ ECOSOC resolution 1346 (XLV)

²⁵ Report of the U.N. Conference on the Human Environment, Declaration of the U.N. Conference on the Human Environment, U.N. Doc. A/ CONF.48/14/Rev.1, p. 3 (June 5-16, 1972)

²⁶ Donald K. Anton, Dinah L. Shelton,” Environmental Protection and Human Rights:,at 356, Cambridge University Press, 11-Apr-2011 -

The conclusions of the Brundtland Report²⁷ stressed the need for an integrated approach to development policies and projects that, if environmentally sound, should lead to sustainable economic development in both developed and developing countries. The Report emphasized the need to give higher priority to anticipating and preventing problems. It defined sustainable development as development that meets present and future environment and development objectives and concluded that without an equitable sharing of the costs and benefits of environmental protection within and between countries, neither social justice nor sustainable development can be achieved.

THE RIO AND JOHANNESBURG SUMMITS

Subsequent key UN conferences on environment and sustainable development, notably the 1992 Rio Earth Summit (Rio Declaration and Agenda 21), the 2002 World Summit on Sustainable Development (Johannesburg Summit), and the Millennium Summit, reflected on the relationship between human rights and environment. The Brundtland Report led the United Nations to convene a second global conference on the environment in 1992 in Rio de Janeiro, Brazil, under the title U.N. Conference on Environment and Development (UNCED). The Rio Declaration on Environment and Development that emerged from the Conference recognized the right to development in Principle 3, and was clear in Principle 4 that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”²⁸.

The Rio Declaration also recognized the critical role that the exercise of human rights plays in sustainable development by public participation, access to information and access to judicial remedies, well-recognized procedural rights in environmental matters²⁹. Principle 10 emphasized this in providing: Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy,

²⁷ World Commission on Environment and Development, U.N. Doc. A/42/47 (11 Dec. 1987), reprinted in Our Common Future 43 (1987).

²⁸ <https://justicemicar.wordpress.com/2015/07/18/sustainable-development-and-the-rio-conference-1992/>

²⁹ www.ocwjournalonline.com/.../product.../29870b9e4df25472da619015931f945b.pdf

shall be provided³⁰. Chapter 23 of Agenda 21, the action plan related to sustainable development on strengthening the role of major groups, proclaims that individuals, groups and organizations should have access to information relevant to the environment and development, held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, as well as information on environmental protection matters. The Preamble to Chapter 23 also calls broad public participation in decision-making “one of the fundamental prerequisites for the achievement of sustainable development³¹.” This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Section III of Agenda 21 identifies major groups whose participation is needed: women, young persons, indigenous and local populations, nongovernmental organizations, local authorities, workers, business and industry, scientists, and farmers.

POST RIO AND JOHANNESBURG SUMMITS

In the aftermath of the Rio Summit, virtually every major international convention concerning multilateral cooperation added environmental protection as one of the goals of the state parties. Areas of international action that developed during earlier periods, including human rights, began evolving in new directions to take into account environmental considerations. The result was an infusion of environmental norms into most branches of international law, including free trade agreements that mention environmental cooperation as an aim. U.N. Secretary-General Kofi Annan in his 1998 Annual Report on the Work of the United Nations Organization spoke in favour of a rights-based approach to environmental protection, because it “describes situations not simply in terms of human needs, or of development requirements, but in terms of society’s obligations to respond to the inalienable rights of individuals.”

The International Court of Justice’s Judge Weeremantry, in Case Concerning the Gabikovo-Nagymaros Project,³² recognized that the enjoyment of internationally recognized human rights depends upon environmental protection. The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human

³⁰ www.unep.org › ... › Implementation › Principle 10

³¹ <http://www.earthsummit2002.org/msp/report/chapter1.html>

³² [1997] I.C.J. Rep. 7, 91–92

rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments³³.

Commonly linked with the right to water is the right to food, which is also closely associated with the environmental quality. The Human Rights Commission recognized that the links between the issue of right to food with sound environmental policies have already been recognized by Committee on Economic, Social and Cultural Rights and noted that problems related to food shortages can generate additional pressures upon the environment in ecologically fragile areas.³⁴ Moreover, the impact of climate change on food supply is widely recognize and was in 2010 brought to the attention of Committee on Economic, Social and Cultural Rights by the Special Rapporteur on the Right of Food in 2010. The enjoyment of other human rights, such as the right to health, is also inextricably linked to environmental conditions, as recognized in the reports submitted by the relevant UN special rapporteurs. It has been recognized that “[a] fifth of the disease burden in developing countries can be linked to environmental risk factors.³⁵ A direct causality has been established between malaria and deteriorating ecosystems, where in particular the disease flares up in ecological systems altered by irrigation projects, dams, construction sites, standing water and poorly drained areas. It is estimated, for example, that the deforestation and consequent immigration of people into the Brazilian interior increased malaria prevalence in the region by 500 percent.³⁶ The same trend has been observed between ecological damage and other vector-borne diseases across a range of developing countries. The burden of these diseases falls especially hard on the poor who often lack the resources to seek medical treatment. The enjoyment of internationally-guaranteed rights thus depends upon a sound environment.³⁷

Another area with a long, substantial history of linking human rights, in particular the right to life and health, and environmental protection is the transport and disposal of toxic and dangerous products and wastes. Beginning in the 1970s with the increase of hazardous waste and concerns regarding illicit trafficking and dumping of toxic and dangerous products and

³³ Christopher L. Nobbs, “Economics, Sustainability, and Democracy: Economics in the Era of Climate Change” at 212 , Routledge, 2013 - Business & Economics

³⁴ Commission on Human Rights. Res. 2001/25

³⁵ A/HRC/15/L.14, 24 September 2010, “Human rights and access to safe drinking water and sanitation.” Id. at 37

³⁶ Smith A.T.P., *The Wealth of Nations* (MIT Press, Cambridge, MA, 2002).

³⁷ Platt, A.E., *Infecting Ourselves: How Environmental and Social Disruptions Trigger Disease*, Worldwatch Paper 129 (World Watch Institute, Washington, DC, 1996).

wastes, the Commission of Human Rights affirmed that dumping of toxic waste and dangerous products and wastes constitutes a serious threat to the human rights to life and human health. In response to its concerns, the Commission of Human Rights established a Special Rapporteur on Toxic Wastes.

In 1998, the Report of the Bureau of the fifty fourth session of the Commission on Human Rights submitted pursuant to Commission decision 1998/112 (the so-called “Selebi report”) recommended to “Convert the mandate of the Special Rapporteur on toxic wastes into that of Special Rapporteur on human rights and the environment.” A similar recommendation was made again in February 2000 by the Commission’s intersession open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights.²⁵ However, the transformation to merge the toxic waste mandate into a more generalized special rapporteur on the environment was never made.³⁸

On 22 March 2012, the Human Rights Council adopted by consensus a resolution (19/L.8 Rev.1) on “human rights and the environment,” with at least 72 cosponsors.²⁹ The resolution welcomed OHCHR’s report and decided to appoint for a period of three years, an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment,³⁰ and encourages the OHCHR to participate at Rio+20 in June 2012 in order to promote a human rights perspective.

Thereafter 2015 Paris Summit has 176 signatories till July 2016. Despite not been binding agreement, voluntary Intended Nationally Determined Contribution (INDC) is given by countries. It is agreed that there will be regular updating by countries to the secretariat regarding the ground realities. As well it is agreed that after every 5 years countries will review their INDC. Further it is agreed that the greenhouse gas will tried to be reduced at the level of 1.5 and which will try to match up to environment standard of prior to industrialized state. It is also agreed that the fossil fuel usage should be reduced and renewable energy generation and usage should be expedited.

JURISPRUDENTIAL ISSUES RELATED TO HUMAN RIGHTS AND ENVIRONMENT

³⁸ A/HRC/19/L.8/Rev.1

International tribunals have dealt with human-rights based challenges to environmental regulation, in cases where measures designed to protect the natural environment or provide clean energy alternatives conflict with individual interests, particularly property interests. These cases show willingness of international judges to consider the special importance of environmental goals in weighing government action against private claims.³⁹ The ICJ has decided several cases relevant to the discussion of human rights and the environment. In an advisory opinion on Legality of the Threat or Use of Nuclear Weapons the ICJ found out that although international environmental law did not prohibit the use of nuclear weapons, it did indicate “important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict” (para. 33). In another case Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)⁴⁰ it was held by Judge Weeramantry that the close relationship between environment and human rights (page 114). “[T]he protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments” (page 92).

CONCLUSION

The linkage of human rights to the environment not only helpful to protect the environment but at the same time the human rights system would be strengthened by the incorporation of environmental concerns, enabling the expansion of the scope of human rights protection in the area of environment.⁴¹ Despite the evident relationship between environmental degradation and human suffering, human rights violations and environmental degradation have been treated by most organizations and governments as unrelated issues. Just as human rights advocates have tended to place only civil and political rights onto their agendas, environmentalists have tended to focus primarily on natural resource preservation without addressing human impacts of environmental abuse. As a result, victims of environmental degradation are unprotected by the laws and mechanisms established to address human rights

³⁹ <http://www.unep.org/delc/HumanRightsandTheEnvironment/tabid/54409/Default.aspx>

⁴⁰ 1997 I.C.J. 140 (Sept. 25, 1997)

⁴¹ <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>

abuses.⁴² The need to bring the environmental and human rights movements together has been rendered both urgent and vital by the impending climate change catastrophe⁴³ within the human rights community. There is a growing recognition of the fact that (a) environmental protection represents a precondition to the enjoyment of internationally recognised human rights, and (b) certain human rights – such as the right of association and assembly or the right of access to information – are essential tools for achieving environmental protection. They also show that human rights are universal, indivisible, interdependent and interrelated, and thus that environmental degradation or pollution may affects negatively the enjoyment of several universally protected rights. Environmental protection and human rights are interrelated, interconnected, and mutually responsive as both of them intended to the well-being of humanity. Safe and healthy environment is the precondition for the enjoyment of fundamental human rights.

“The destruction of the earth’s environment is the human rights challenge of our time.”

- Desmond Tutu

⁴² <http://www.uapress.arizona.edu/Books/bid1492.htm>

⁴³ http://www.conorgearty.co.uk/pdfs/Do_human_rights_help_or_hinder_environmental_protection.pdf

GOOD GOVERNANCE AND THE ROLE PLAYED BY RIGHT TO INFORMATION ACT, 2005 IN ENSURING GOOD GOVERNANCE

Aastha Dube*

Abstract

Good governance can be understood as a tradition in which both the government and its subjects move forward for the welfare of the society. Good governance promotes the government of a country to make such decisions which are beneficial to all the members of the society in a transparent manner and thereby making it accountable. Here, the voices of even the least advantaged sections are heard and their needs are taken into account. This practice guarantees an efficient, participatory, transparent and accountable government. Now, for any democracy, it is very important that the citizens know about the functioning of the government otherwise they will not be able to participate effectively in the democratic process of the country. For this reason, the Government of India has passed Right to Information Act, 2005. The Act has been fruitful in making the government more transparent and accountable by furnishing information to its citizens.

The Article aims to examine the importance of good governance and also the vital role played by Right to Information Act, 2005 in ensuring good governance. It will also discuss in brief the problems present in the implementation of the Act and why such problems must be resolved as soon as possible.

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Good governance is about the processes for making and implementing decisions. It's not about making 'correct' decisions, but about the best possible process for making those decisions.¹

The Supreme Court of India in the recent judgement of *T.S.R. Subramanian and Ors. v. Union of India & Ors.*², recognised the need of good governance and the role played by RTI Act in ensuring good governance.

The Supreme Court of India in this case held, '*Democracy requires an informed citizenry and transparency of information. Right to Information Act, 2005 (R.T.I. Act) recognizes the right of the citizen to secure access to information under the control of public authority, in order to promote transparency and accountability in the working of every public authority. Section 3 of the Act confers right to information to all citizens and a corresponding obligation under Section 4 on every public authority to maintain the records so that the information sought for can be provided. Oral and verbal instructions, if not recorded, could not be provided. By acting on oral directions, not recording the same, the rights guaranteed to the citizens under the Right to Information Act, could be defeated. The practice of giving oral directions/instructions by the administrative superiors, political executive etc. would defeat the object and purpose of R.T.I. Act and would give room for favouritism and corruption.*

³

Therefore by delivering such a judgement, The Supreme Court highlighted the need to incorporate transparency and accountability in the administration and thereby to ensure good governance in the country.

Whenever a decision on any matter or an issue is taken by the government after taking into account the need of the nation and after approaching and consulting the affected population, then definitely people of the nation will have faith and confidence in their government.⁴ This is because of the fact that by doing so, people will feel that every action taken by the government is in the nation's overall interest and care has been taken by the government to reconcile the differing opinions of the citizens while coming to a decision.

¹ 'What is Good Governance', <<http://www.goodgovernance.org.au/about-good-governance/what-is-good-governance/>> accessed 12 July 2016

² AIR 2014 SC 263

³ <<https://indiankanoon.org/docfragment/183945465/?formInput=constitution%20of%20india%20articles%20%20fromdate%3A1-1-2013%20todate%3A31-12-2013%20>> accessed 12 July 2016

⁴ 'Good Governance' <http://yvonnekatambo.com/?page_id=85> accessed 15 July 2016

At the same time the system of good governance also helps in making the Government remember that it is its responsibility⁵ to act on behalf and for its citizens. As soon as the government of any country will start moving on the way of good governance, confidence will be inculcated in the members of the government who are elected by the people and also among the council officers as they will be involved with the local government where needs and wants of the society will be taken into account.

All the decisions which will be taken by the government after providing substantial information to the people, who will be affected by such a decision and after a healthy debate on the pros and cons of such a decision, will definitely be a better and a more meaningful decisions. Decisions will be bad if they are taken without taking into account the views of the community and without ensuring any transparency.⁶

A government which moves on the path of good governance will be able to justify its legislative actions as all the actions will be taken in a transparent manner and there would be no scope to any shortcuts or deviate from any rules and obligations which are necessary for them to follow while discharging their functions.⁷

In an atmosphere where moving on the path of good governance is the goal, decisions will be based on ethical and moral values. Such decisions will be fruitful to the maximum number of the members in a given community. Thus good governance helps in making ethical decisions.⁸

Now, the Right to Information Act has always aimed in disclosing all the information pertaining to the rules made by the government, all the regulations and reports. It has also made available the information regarding the procedure followed by authorities in decision making. Under the Act it is an obligation on every public authority to `maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under the Act'⁹. Therefore, the public authorities are required to make pro-active

⁵ Ibid 3

⁶ Improving Data Quality: Empowering Government Decision Makers With Meaningful Information For Better Decision Flow In Real-Time'<<http://www.inquisient.com/improving-data-quality-empowering-government-decision-makers-with-meaningful-information-for-better-decision-flow-in-real-time/>>accessed 17 July 2016

⁷ 'Why Is Good Governance Important?' (2016) <<http://www.goodgovernance.org.au/about-good-governance/why-is-good-governance-important/>> accessed 12 July 2016

⁸ National Conference of State Legislators <<http://www.ncsl.org/research/ethics.aspx>> accessed 28 July 2016

⁹ Section 4 of Right to Information Act, 2005

disclosures by publishing important documents, which will also include web-based disclosure of information.

In addition to this, under the Act, public authorities are under an obligation to ‘provide as much information suo motu to the public at regular intervals through various means of communication, including internet, so that the public have minimum resort to the use of this Act to obtain information’.¹⁰

Moreover under section 4(1)(d) of the Act, public authorities are also required to ‘provide reasons for its administrative or quasi-judicial decisions to the affected persons.’

In order to ensure compliance with the above given provisions of the Act, public authorities at all the levels, i.e., central, state and local levels have put up their records in public with aid of publications and internet in their regional languages. .

A citizen will have the right to file a complaint or appeal before Public Information Commission if he thinks that the information which is furnished by the public authority is not complete, or it is misleading, or incorrect. The Information Commission then, may take an appropriate action depending on the facts and circumstances of the case and according to the law laid down under the Act.

It is the duty of the Commission under section 20(1)¹¹ of the Act wherein it can impose penalty and can also make any recommendation for the disciplinary action which may be

¹⁰ Section 4'91'(1)(b) of Right to Information Act

¹¹ Section 20 of Right to Information Act: Penalties.- (1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty five thousand rupees: Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him: Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be. (2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed

enforced against information suppliers. This can be done when such information suppliers have been acting as the impediments or hurdles in the free flow information and thereby violating right to information of the citizen.

This Act has enabled the establishment of the partnership between the government and its citizens. This has helped in promoting and organising various development programs to raise the standard of living of the community by providing them with various options of increasing their income, by raising the level of education, providing more medical facilities, and making available clean and healthy environment¹²

The pro-active disclosure of information¹³ has enabled the beneficiaries, mainly through NGOs, to assume a central role in design and execution of projects. The Act has instilled a wider sense of ownership in the development activities. Besides, access to information has enabled the people to participate in economic and political processes through a dialogue between people and the government officials or public campaign on public policies.¹⁴

Since the Act provides people of the nation to avail the benefits of right to information in manner in which they can call for government records and can also ask government officials the rationale behind taking a particular decision and what was the expected outcome or consequence of a particular decision, in this way it imposes a kind of responsibility on the government by making it and its officials accountable or answerable for its actions and decisions.

Also under section 4(1)(d) of the Act every public authority is under an obligation ‘to provide reasons for its administrative or quasi-judicial decisions to the affected persons’¹⁵ Thus one can conclude that under the Act there can be no scope the public authorities to take actions arbitrarily.

Before the passing of Right to Information Act, no ordinary person had a right to take accounts of the decision making procedure followed by the government and the government

information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

¹² Freedom of Speech & Right To Information' <https://www.youtube.com/watch?v=Da_qkTcuFSU> accessed 14 July 2016

¹³ Section 4 of Right to Information Act

¹⁴ M.M. Ansari, Central Information Commissioner, 'Right To Information And Its Relationship To Good Governance And Development'

¹⁵ Section4(1)(d) of Right to Information Act, 2005

was not at all transparent. There was no room for holding free and transparent discussions which were of general importance and the government was not accountable for any action or decision taken by it on those matters. After the passing of this Act, people are now more aware of the modus operandi adopted by the government in decision making. Such a step by the government has also enabled the citizens of the country to choose their leaders judiciously so that the government which is actually willing to pass laws and policies which are beneficial to them is elected.¹⁶.

People have now started to take course to this institution of information to resolve issues and problems on the decisions which relates to the decisions of nature of business, administration and commercial matters. The Act has also been a boon in resolving and settling disputes relating to taxation matters, settling claims of insurance, the payment due to the contractors, procedure followed during imposing sanctions and the process of recovery of loans, etc.¹⁷

Right to information is a valuable right because of the fact that it puts life into democracy, making it more purposeful, vivid and strong.¹⁸ Democracy, as defined by Abraham Lincoln is, “government of the people, by the people, for the people”, right to information re-affirms that this definition is not confined into black and white and paves way for the practical implementation of this definition. Thus, citizens of a country, especially those residing in rural areas, are empowered with the aid of this right as it provides them with the means to access information required by them from the public authorities.

It must be the endeavour of every public authority within the meaning of this Act to supply as much information as it can to the people which must be done in such a manner that is easily available to the public at large. ‘It may be done through notice boards, newspapers, public announcements, media broadcast, the internet or any other means. The public authority

¹⁶ Group Discussion: RTI Advantages and Drawbacks <<http://www.jagranjosh.com/articles/group-discussion-rti-advantages-and-drawbacks-1407329072-1>> accessed 17 July 2016

¹⁷ Katiyar M, 'Use Right To Information Act (RTI) -India Inspired' <https://www.youtube.com/watch?v=Ti6Pq_LNq-g> accessed 19 July 2016

¹⁸ Aligarh Muslim University Student Union Organized An RTI Program In AMU, Where Speaker Were Mr. Arvind Kejriwal And Mr. Manish Sisodia, Under The Presidentship Of Mr. Abu Affan Farooquee On March 16, 2011. Initiative Of RTI Club Was Taken By The AMUSU.' <<https://www.youtube.com/watch?v=Xf2OIFXY5sI>> accessed 10 June 2016

should take into consideration the cost effectiveness, local language and most effective method of communication in the local area while disseminating the information.¹⁹

Although this right has been incorporated as a statutory right by passing of RTI Act, 2005, after looking at the outcomes of various surveys²⁰ and various news articles, it can be said that even after ten years of its enactment, still it is not implemented in such a way as to provide maximum benefit which can be actually extracted from such a significant Act. The causes are many like inefficiency of PIOs, their non-friendly nature, non-willingness among them, lack of training, lack of infrastructural facilities, no financial assistance, backlog of no. of cases, lack of independence in information commissions at both central and state levels, etc.

These things indicate that there are lots of problems and hurdles present in our existing system which hampers the effective implementation of the RTI Act. The RTI Act was enacted with a very big and significant objective of aiding the government in moving on the path of transparency and accountability thereby making it an open government. But due to the presence of these loopholes which are present in the Act and also the other factors like lack of infrastructural facilities, non-friendly attitude of PIOs, huge backlog of cases, insufficient staff, improper or lack of training act as hurdles in the proper enforcement of the Act.

Therefore it is the need of the hour to address the issues pertaining to the implementation of the RTI Act. The duties and obligations which are imposed on the public authorities under the Act require a full compliance otherwise this Act which is meant to promote transparency and accountability in the government procedure would not be of any utility. The public authorities and all the information officers who are appointed under the Act to supply information on the receipt of the application made by the citizen are required to perform their duties and obligations with full dedication. They should not show any kind of leniency or should not postpone the disposal of RTI applications as a lot of information which is withheld by these government departments is capable of bringing a huge change or transformation in the government procedures. It gives a feeling of nationality in the minds of the citizens, they feel

¹⁹ ‘Guide For The Public Authority (Page 1): Central Information Commission (CIC) Online’ (Rti.india.gov.in, 2016) <<http://rti.india.gov.in/manual1.php>> accessed 5 June 2016

²⁰ Interim Findings of the People’s RTI Assessment 2008’ <http://participedia.net/sites/default/files/case-files/98_305_RAAG_and_NCPRI.2008_Safeguarding_the_Right_to_Information._Interim_Report.pdf> accessed 2 July 2016

that they are the part of the government and hence by looking at the work of the government and by analysing how the government has reached to a particular decision, they will certainly make better choices in the next elections. Thus this will ensure the improvement in the efficiency of the Indian government by making it more transparent, accountable and an open government.

Even after so many problems which are present in the proper implementation of the Act, it still remains a vital piece of legislation which strives towards moving our government on the path of transparency and accountability. Steps should be taken for the proper implementation of the Act which would motivate the public authorities to comply with all the duties and obligations imposed on them under the Act. The day is not far when our nation will have all the characteristics and elements of good governance. Every nation has few issues in the implementation of some Acts adopted by them due to various factors. But it is the duty of both the government as well as its citizens to remove all the hurdles and impediments which restrains the government from functioning in a transparent and accountable manner. Therefore the nation, as a whole should leave no stone unturned to ensure the proper and fruitful implementation of RTI Act, 2005 by the public authorities under the Act, thereby making citizens of India more powerful in a democracy and making the government more transparent and accountable.

ENTERTAINMENT: LIGHTS, CAMERA, CONTRACT!

Sargam Jain*

Abstract

Entertainment and Media Industry is one of the fastest growing sectors of the Indian economy. However, there is economic insecurity in the entertainment industry as consumers' taste in artistic products change quickly, driving certain artists to the heights of popularity and reducing others to obscurity. Entertainment law covers the legal issues faced in various fields like theatre, art, dance, opera, music, radio, television, film, etc. The entertainment industry relies on complex contracts because of this instability, which are usually drafted to protect entertainment companies against economic risk. For example, in the making of a film, the producer will enter into different contracts with the scriptwriter, actors, music director, etc. All of them will come under the scope of entertainment law as they are contracts entered into for the creation and distribution and broadcast of entertainment product. Thus, an entertainment contract can be defined as a contract entered into by the various players of the entertainment industry. This paper aims to highlight the importance of entertainment industry in India and how it has led to the establishment of legal relationship between various players of this industry through the means of contract. The paper also deals with various cases of copyright infringement and breach of contract in entertainment and media industry. It concludes by suggesting the pros and cons of exclusivity contract entered into by the actors.

Keywords: Entertainment Industry, Entertainment contracts, Copyright Infringement

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“And in my opinion, entertainment in its broadest sense has become a necessity rather than a luxury in the life...”

- Walt Disney

‘Entertainment is the action of providing or being provided with amusement or enjoyment.’¹ It is something that pleases, or diverts, especially a performance or show. The entertainment industry includes the fields of theatre, film, fine art, dance, opera, music, literary publishing, television, radio, live stage performances, etc. The common task of selling or otherwise profiting from creative works or services provided by writers, musicians and other artists is shared by these fields.² Entertainment law covers all of the legal problems and issues generally faced by these industries. The areas of law most often associated with this field are intellectual property, agency, contracts, labour and employment. ‘The Indian Entertainment and Media (E&M) Industry is one of the fastest growing sectors in India and has out-performed the Indian economy.’³ Even television witnessed its transformation from a single government owned channel to a medium telecasting more than 300 national and regional channels. At present Indian film industry or Bollywood is a perfect combination of entertainment and commercial sector, producing nearly thousand movies in a year in various Indian languages. ‘As per the recent report by Price waterhouse Coopers (PwC), Indians are expected to spend more on entertainment in the coming years with a steady growth in their disposable income. And as per the combined survey report by KMPG and FICCI, the entertainment industry in India is expected to expand by 12.5% every year.’⁴ ‘The Indian Media and Entertainment (M&E) Industry is a sunrise sector for the economy and is making high growth strides. It is expected to reach US\$ 100 billion by 2025, from its estimated size of US\$ 17.85 billion in 2015, due to its large capacity to consume new products and businesses. Recently Reliance Entertainment (owned by Mr

¹ Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/entertainment>>, accessed 12 March 2016

² ‘Entertainment Law - Contracts, The Fiduciary Duty Of Entertainment Attorneys: Joel V. Grubman, Unique Aspects Of Entertainment Industry Contracts’ <<http://law.jrank.org/pages/6504/Entertainment-Law.html>> accessed 28 March 2016

³ ‘The Indian Entertainment and Media Industry Unravelling the potential’ (FICCI-PWC, March 2006) <<https://www.pwc.in/assets/pdfs/ficci-pwc-indian-entertainment-and-media-industry.pdf>> accessed 28 March 2016

⁴ ‘Entertainment Industry in India’ (Business maps of India, 10 June 2015) <<http://business.mapsofindia.com/entertainment-industry/>> accessed 27 March 2016

Anil Ambani) and DreamWorks (led by Mr Steven Spielberg), along with Participant Media (led by Mr Jeff Skoll) and Entertainment One (eOne) have formed a new film, television and digital content creation company called ‘Amblin Partners’, and have raised US\$ 500 million in debt to develop and produce films.⁵ There is economic insecurity in the entertainment industry as consumers’ taste in artistic products change quickly, driving certain artists to the heights of popularity and reducing others to obscurity. The entertainment industry relies on complex contracts because of this instability, which are usually drafted to protect entertainment companies against economic risk. For example, in the making of a film, the producer will enter into different contracts with the scriptwriter, actors, music director, etc. All of them will come under the scope of entertainment law as they are contracts entered into for the creation and distribution and broadcast of entertainment product. Thus, an entertainment contract can be defined as a contract entered into by the various players of the entertainment industry. Though there are different types of contracts within the entertainment industry, many of them have certain clauses that are common among them and are unique to the entertainment field. Entertainment contracts will have clauses pertaining to intellectual property rights, restraint of trade and exclusivity, finances and payments, breach and dispute resolution. In India, there is no such one regulation of entertainment contracts. Apart from various Committee recommendations, the following are the most significant sources of entertainment law in India - Indian Contract Act, 1872, the Specific Relief Act, 1963, Indian Copyright Act, 1957, Telecom Regulatory Authority of India Act, 1997, Broadcasting Regulations under the TRAI Act. Several policy documents have also been issued by the Government of India to regulate various aspects of the films sector.

Though the growth of this industry has been astounding, it has seen a dash of litigations for reasons including infringement of Intellectual Property Rights and breach of contract. Sometimes, just before the release, these controversies seem to crop up deliberately. ‘For instance, Bollywood production house BR Films had been sued by 20th Century Fox for allegedly copying the storyline and script of its comedy My Cousin Vinny in the movie Banda Yeh Bindaas Hai. Attempts were made to stall the releases of Jodha Akbar and Singh is King on religious grounds, while Ghajini was

⁵ ‘Media and Entertainment Industry’ (India Brand Equity Foundation, 16 February 2016) <<http://www.ibef.org/industry/media-entertainment-india.aspx>> accessed 26 March 2016

victimized by litigations over remake rights and copyright infringement just five days before its release.⁶ Appropriate due diligence and negotiations at the documentation stage play a critical role in curbing unwarranted litigation. Prior to negotiations one must be aware of not only the commercial aspects but also legal issues such as intellectual property rights and enforceability of the contractual arrangements for ensuring that the contracts are reliable.

One of the early steps in making a film is script creation. It involves conceptualization of idea, creation of a concept note, followed by preparation of the storyboards and script. Theft of idea, story and script i.e. infringement of copyrights is one of the issues that may arise at this stage. Copyright law grants protection not to an idea but to its expression. Hence, there is no copyright protection available to an idea, unless given a tangible form with adequate details. With a single idea, multiple storylines can be developed, each capable of separate copyright protection. Hence, the only way the script writer may be able to protect the idea would be through non-disclosure agreements (NDAs). The courts have upheld protection of idea through such non-disclosure agreements or when the idea has been communicated in confidence. In the case of *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*⁷, Sundial developed the idea of a TV series called 'Krish Kanhaiyya' and approached the Managing Director of Zee and shared a concept note where the basic plot and the character sketches were outlined in confidence. Later, it was found that a TV series called 'Kanhaiyya' was broadcasted on Zee TV and this series was substantially similar in nature to the idea that Sundial had communicated to Zee. Sundial filed a suit against Zee and, inter-alia, sought for injunction. At the interim stage, a single Judge bench of Bombay High Court granted an injunction. In an appeal against this injunction by Zee, the Bombay High Court opined that an average person would definitely conclude that Zee's film was based on Sundial's script and hence upheld the injunction against Zee as Sundial's business prospect and goodwill would seriously suffer if the confidential information of this kind was allowed to be used. In an another dispute, 'PepsiCo after learning about the movie being released under the title "YOUNGISTAAN" sought to restrain the producers, MSM Motion Pictures and Vashu Bhagnani from advertising, promoting

⁶ Ranjana Adhikari, 'PROACTIVE APPROACH, PROMPT ACTION NEEDED TO BEAT BOLLYWOOD BLUES' (dna, 6 August 2009) <<http://www.dnaindia.com/money/comment-proactive-approach-prompt-action-needed-to-beat-bollywood-blues-1280014>> accessed 14 April 2016

⁷ 2003 (5) BomCR 404

and releasing the film under the above mentioned title. The Delhi High Court in its order stated that the two parties agreed to settle the matter amicably with the defendants agreeing to give a disclaimer stating that the movie is not related or associated with Pepsi's Youngistaan Campaign and has no connection with Pepsi's registered trademark "Youngistaan."⁸ Further, the writer would have to prove that he originated the idea and the date of origination. Concepts, scripts, screenplays are protected as literary works under the Copyright Act, 1957 (Copyright Act) and get protection if they are original. India is a member of the Berne Convention and the Universal Copyright Convention. The Government of India has passed the International Copyright Order, 1999 according to which any work first made or published in any country which is a member of any of the above mentioned Conventions is granted the same treatment as if it was first published in India. To create evidence of creation of the concept notes/script, some of the recommended steps are:

- to apply for the registration of the script with copyright offices,
- to register with the writer's association/s,
- to mail the script

The court will look at whether there has been any substantial copying of the key elements of the film in cases of copyright infringement. Very often, Bollywood filmmakers try to overcome any probable liability by adding elements to the story which are more similar to the Indian sensibilities. Therefore, it is recommended to acquire the adaptation or remake rights at the pre-production stage itself. The producers have preferred to procure a license from the owner instead of taking the matter all the way to court.

One of the key assets of the film is its title. Today, "Sholay" is not just a word for us; it is an event. HAHK or DDLJ are not four random letters but landmarks that defined a generation. Hence, the title of a film is the worst nightmare for its makers. If at times, it springs out from the story itself, at times it takes longer to get locked than the entire process of making the film.⁹ A film is generally tentatively titled at the pre-production

⁸ Mathews P.George, 'Producers of 'Youngistan' accused of Infringement' (Spicy IP Blog, 22 February 2014) <<http://spicyip.com/2014/02/producers-of-youngistan-accused-of-infringement.html>> accessed 22 March 2016

⁹ Amey Nadkarni, 'Hindi Film Titles- The disputes, The arguments and The unfortunate mess' <<http://shockaday.blogspot.in/2014/02/hindi-film-titles-disputes-arguments.html>> accessed 17 April 2016

stage and obtains a definite title at a later stage. It has been one of the most disputed aspects of a film in recent years. 'The practice of registering titles with societies or associations like Indian Motion Pictures Producers Association (IMPPA), the Film and Television Producers' Guild of India, the Association of Motion Pictures and Television Programme Producers (AMPTPP) and Western India Film Producers' Association has been developed by the Indian film industry.'¹⁰ The film industry, as a general rule, has great respect for these associations and follows their rules and regulations. Associations allow suffixes and prefixes (including tag lines) to distinguish between the film titles. Around 2009, Anil Kapoor's project Shortkut ran into trouble when producer Bikramjeet Singh Bhullar raised objections that he had registered the title Shortkut with the film associations much before the former had even conceived of the project. Kapoor quickly remedied the situation and changed the title of his film to Shortkut: The Con is On. Titles are protected according to the fundamental tenets of trademark and unfair competition law. Film titles can be divided into two categories: the titles of a series of films and the title of a single film. Particular examples of well-known Indian film series titles are Hera Pheri & Phir Hera Pheri, Dhoom & Dhoom II and Munna Bhai MBBS & Lage Raho Munna Bhai. 'In case of single film titles, it must be proved that such a title has acquired a wide reputation among the public and the industry and has acquired a secondary meaning.'¹¹ Secondary meaning in layman's terms means that the average movie goer associates the title with a certain source, production house, etc. and there would be a possibility of confusion in the mind of such person if the title is used by another person for a different film. Even pre-release publicity of the title may cause the title to acquire sufficient recognition and association with its owners to give a secondary meaning to the title of the film. The courts look at the following factors for contribution towards creation of secondary meaning for the title- the duration and continuity of use; the extent of advertisement and promotion and the amount of money spent; the sales figures on purchase of tickets and the number of people who bought or viewed the owner's work; and closeness of the geographical and product markets of the plaintiff and defendant.

¹⁰ Shrishti Bansal, 'India: Movie Titles Entitled To IP Protection?' (Mondaq, 4 February 2016) <<http://www.mondaq.com/india/x/463448/Copyright/Movie+Titles+Entitled+To+IP+Protection>> accessed 23 March 2016

¹¹ Naik Naik & Company, 'The Role and Rule of Law' (Confederation of Indian Industry, 2014) <https://issuu.com/naiknaikadvocate/docs/ebook_combined> accessed 24 March 2016

Under the Indian Trademarks Act, 1999 (Trademarks Act), film titles qualify as ‘service marks’¹² rather than trademarks. They fall under Class 41 of the Fourth Schedule of the Trade Marks Rules, 2001. To ensure that one has the exclusive right to the title and that it is completely protected by law, it is prudent to register it as a service mark under the Trademarks Act. ‘The registration of a trademark constitutes *prima facie* validity of the same in legal proceedings.’¹³

A fine example of the benefits of the registration of title as a trademark is perhaps the Sholay case. ‘In 2007, Sascha Sippy, grandson of GP Sippy (producer of the 1975 blockbuster film), approached the Delhi High Court alleging Copyright and Trademark infringement by director Ram Gopal Varma. Varma had produced the film titled Ram Gopal Varma ke Sholay and also used the character names from the original film, Sholay. Sholay was one of the most popular movies in India during its time and has become a household name where the audience associates the title with the Sippys, thereby giving it a secondary meaning. They have not only obtained trademark registration for the title of the film Sholay but have also registered the character names ‘Gabbar’ and ‘Gabbar Singh’. After months of legal battle between the parties, Ram Gopal Varma finally accepted to change the title of his film to Ram Gopal Varma ke Aag. He also agreed to abstain from using any of the names of the characters from the original story.’¹⁴

The lyrics or the words in a song are protected as a piece of literary work. ‘The musical compositions including background scores are protected as musical works. It means works consisting of music including any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music, like lyrics of the songs.’¹⁵ ‘Sound recordings are protected, regardless of the medium on which such recording is made or the method by which the sounds are produced.’¹⁶ Performers Rights subsist in the performances rendered by the singers, musicians and other artistes while recording the songs (including audio-visual) and are protected under the Copyright Act. In the case of *Indian Performing Right Society Ltd.*

¹² Section 2(1) (z) of the Trademarks Act, 1999.

¹³ Section 31 of Trademarks Act, 1999

¹⁴ ‘Trademarks: Case Study – Trademark for Film Titles’ (SINAPSE, 27 June 2014) < <http://www.sinapseblog.com/trademark-film-title/> > accessed 24 March 2016

¹⁵ Sec 2 (p) of Copyright Act, 1957

¹⁶ Sec 2 (xx) of Copyright Act, 1957

v. *Eastern Indian Motion Pictures Association and Ors.*¹⁷, the Supreme Court held that the producers of a cinematograph film who commission the works or create the works through composers or lyricists under a contract of employment, are the first owners of the copyright in musical and lyrical works forming a part of the cinematographic film. No copyright vests in the composer or lyricist unless there is a contract to the contrary between the composer/lyricist and producer of the cinematograph film. In *Anandji Virji Shah v. Ritesh Sidhwani*¹⁸, the plaintiff, who is one of the music composers of the songs Yeh Mera Dil and Khaike Paan Banaraswala in the 1978 film Don, initiated action against the producer of the 2006 remake with the same title, Don (defendant). The defendants had procured the rights from M/s Nariman Films, the producers of the original film, under a written contract and modified and incorporated the songs in the remake version. Relying on the Eastern Indian Motion Pictures Association case, the Bombay High Court held that the contract between the producers of the original film and the plaintiff (and Kalyanji) was a contract of service and thus the rights were vested with the producer and not the composers. Therefore, the producer had the legal and subsisting right to assign any part or whole of the rights in the songs to the defendants and thus, the contract between them was valid.

While negotiating the assignment agreement on behalf of the producer/sound recording house, it is important to procure adequate representations and warranties from the lyricists and musicians with respect to the originality of the music and lyrics in the assignment agreement. A corresponding indemnity provision should also be built in the agreement for any breach of these representations and in case of future third party disputes arising out of such breach. In India, the trend for the lyricists and the composers is to assign all the rights subsisting in their works to the producers for a fixed amount owing to the heavy bargaining power of the producers. There is a proposal to amend the Copyright Act to alter this position and to protect the interests of composers and lyricists. It says that an assignment of copyright in any work has no effect on the right of the author to claim royalties for exploitation of works other than as a part of cinematograph film for which it is made. If this amendment goes through, lyricists and composers will have greater bargaining power while negotiating their contracts and royalties.

¹⁷ AIR1977SC1443

¹⁸ Suit (L) 2993 of 2006, Bombay High Court

Entertainment, the source of enjoyment, now involves multi-billion dollar industry. ‘India is the fourteenth largest entertainment and media market in the world with industry revenues contributing about 1% of its GDP. However, industry stakeholders acknowledge the fact that India has the potential to achieve path-breaking growth over the next few years; possibly to reach a size of USD 100 billion.’¹⁹ Entertainment includes various industries and under each industry there are number of contracts that are entered into. However, there is no standard agreement in the entertainment business. Oral contracts may be enforceable in certain circumstances, but it is not advisable to take a chance. Production time moves quickly, so it is best to have a formal contract executed before production begins. ‘Recently, actress Shilpa Shinde has quit popular comedy show ‘Bhabhi Ji Ghar Par Hai’, alleging that the makers ‘mentally tortured’ her, which has prompted the production house, Edit II to send a legal notice accusing her of breach of contact. The actress, who played Angoori Bhabhi on the show, said the problem started when the makers asked her to sign a contract that would bar her from doing other shows.’²⁰ An exclusive agreement might look good on paper, but locking oneself into one always comes at a cost. After all, a better deal that one can't avail oneself of might come along next week, next month or next year, and the person won't be able to take advantage of it. The challenge lies not only in the successful negotiation of the contract but also in avoiding the legal complications that can arise. Hence, there is a dire need for drafting model agreements as per the acceptable standards of the industry. As rightly stated by Producer Robert Evans (*The Godfather, Chinatown*), “There are three sides to every story: yours...mine...and the truth. No one is lying. Memories shared serve each differently.”²¹ And to ensure that everyone has the same memory of the details it has to be made certain that the contract is put in writing.

So remember- lights, camera, *contract!*

¹⁹ Mudrika Mathur, ‘Intellectual Property Rights Conundrums in Indian Film Industry: Need for a Clear Legislation’ (Rostrum Law Academy, 25 March 2016) <<http://rostrumlegal.com/intellectual-property-rights-conundrums-in-indian-film-industry-need-for-a-clear-legislation/>> accessed 29 March 2016

²⁰ <<http://www.ibnlive.com/news/tv/shilpa-shinde-quits-bhabhiji-ghar-par-hai-makers-send-legal-notice-1216820.html>> accessed 19 March 2016

²¹ Evans, *The Kid Stays in the Picture* (First New Millennium Press edition, 2002), Preface

RIGHT TO FOOD - AN INTERNATIONAL PERSPECTIVE

Dr. Manish Yadav*

Abstract

There is wide consensus that every woman, man and child has the right to adequate food - this human right is enshrined in a number of international instruments and is repeatedly reaffirmed in the outcome documents of major international conferences and summits. There is also agreement that an approach grounded on the right to food and good governance is necessary for tackling the root causes of hunger and reducing the persistently high number of people suffering from hunger and malnutrition. Consequently, critical questions are: How can international commitments are translated into realities for people? And how can an approach based on the right to food make a difference?

Many States have accepted the right to food as a legally binding obligation, including the 160 States Parties (as of September 2012) to ICESCR. An increasing number of countries have also enshrined the right to food in their national constitutions and legislation, thus taking a fundamental step towards the realization of this right. The right to food is being increasingly integrated into ordinary laws and policies relating to FNS.

Despite this international agreement, however, there is still a significant gap between formal recognition of the right to food in legislative and FNS frameworks and its practical implementation. While legislative protection is needed to ensure the implementation of the right to food at the national level, it is only one of a number of necessary measures. This study reviews legal protection at the national level through constitutional provisions, national legislation and the direct applicability of international law. It builds on research undertaken for papers dealing with recognition of the right to food at the national level and international level.

This paper briefly reviews the right to food in international law and discusses whether there is a duty to take legislative action. The present paper seeks to make a brief study of the legal provisions relating right to food.

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INTRODUCTION

It is generally agreed that every man, woman and child has the right to adequate food¹. Human rights are the fundamental inherent rights of all human beings to which people are entitled simply by virtue of being born into the human family. While, on the one hand. They limit the power of the State to arbitrarily interfere with people's free exercise of their rights; on the other they require the State to take positive measures to create an enabling environment in which people may enjoy these rights. Governments and other duty bearers are under an obligation to respect, protect and fulfil human rights, and are responsible for ensuring legal entitlements and remedies in case of non-fulfilment². According to the Food and Agriculture Organization of the United Nations (Herein after referred as FAO), more than one billion people are undernourished³.

Over two billion suffer from a lack of essential vitamins and minerals in their food. Nearly six million children die every year from malnutrition or related diseases, that is about half of all preventable deaths. The majority of those suffering from hunger and malnutrition are smallholders or landless people, mostly women and girls living in rural areas without access to productive resources. Although many people might imagine that deaths from hunger generally occur in times of famine and conflict, the fact is that only about 10 per cent of these deaths are the result of armed conflicts, natural catastrophes or exceptional climatic conditions. The other 90 per cent are victims of long-term, chronic lack of access to adequate food.

Adequate food is a human right, a right of every individual in every country. This has been formally recognized by the great majority of states. But there is a large difference between a state's formal recognition of food as a human right and its putting this recognition fully into practice.

Many States have accepted the right to food as a legally binding obligation, including the 160 States Parties (as of September 2012) to the International Covenant on Economic, Social and

¹ 'Right to food' to mean the human right to adequate food as enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (OHCHR, 1966) and elaborated in General Comment No. 12 of the Committee on Economic, Social and Cultural Rights (CESCR, 1999). FAO's Right to Food Glossary is available at http://www.fao.org/righttofood/kc/glossary_en.htm

² OHCHR 2005, *Human Rights: Handbook for Parliamentarians*, Office of the United Nations High Commissioner for Human Rights (OHCHR) and Inter-Parliamentary Union (IPU), Geneva, p. 1.

³ See <http://www.who.int/inf-pr-2001/en/pr2001-30.html> (Last visited on 13 April ,2013)

Cultural Rights (Herein after referred as ICESCR). An increasing number of countries have also enshrined the right to food in their national constitutions and legislation, thus taking a fundamental step towards the realization of this right. The right to food is being increasingly integrated into ordinary laws and policies relating to food and nutrition security (Herein after referred as FNS)⁴.

Despite this international agreement, however, there is still a significant gap between formal recognition of the right to food in legislative and FNS frameworks and its practical implementation.

Combating hunger and malnutrition is more than a moral duty or a policy choice; in many countries, it is a legally binding human rights obligation. The right to food is recognized in the 1948 Universal Declaration of Human Rights as part of the right to an adequate standard of living, and is enshrined in the 1966 International Covenant on Economic, Social and Cultural Rights. It is also protected by regional treaties and national constitutions. Furthermore, the right to food of specific groups has been recognized in several international conventions. All human beings, regardless of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status have the right to adequate food and the right to be free from hunger.

At the World Food Summit organized by FAO in 1996, States agreed to halve the number of undernourished people by 2015. They also called for the obligations arising from the right to food as provided for under international human rights law to be clarified. In response, the Committee on Economic, Social and Cultural Rights issued its general comment No. 12 (1999), which defines the right to food. In the United Nations Millennium Declaration, adopted by the General Assembly in 2000, States committed themselves to halving the proportion of people suffering from hunger by 2015. In 2004, FAO adopted the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, providing practical guidance to States in their implementation of the right to adequate food.⁵

UNDERSTANDING THE RIGHT TO FOOD

Key aspects of the right to food

⁴ See <http://www.uncsd2012.org/thefuturewewant.html> (Last visited on 18 feb. 2013)

⁵ See http://www.fao.org/index_en.htm (Last visited on 12 feb. 2013)

The right to food is an inclusive right. It is not simply a right to a minimum ration of calories, proteins and other specific nutrients. It is a right to all nutritional elements that a person needs to live a healthy and active life, and to the means to access them. Every human being has the right to adequate food and the fundamental right to be free from hunger, according to international human rights law. This is called “the Right to Food” for short. The right to adequate food covers quantity, quality, and cultural the right to food. Some obligations are immediate; others should be realized progressively to the maximum of available resources.

The right to food is not a right to be fed, but primarily a right to feed oneself in dignity. Only if an individual is unable, for reasons beyond his or her control, to provide for themselves, does the State have obligations to provide food or the means to purchase it. See also:

- Article 11 and Article 2 of the International Covenant on Economic, Social and Cultural Rights
- Article 25 of the Universal Declaration of Human Rights General Comment 12 of the Committee on Economic, Social and Cultural Rights: The
- Right to Adequate Food (Art. 11)

The right to food can be described by Committee on Economic, Social and Cultural Rights as follows:

The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement⁶.

The right to adequate food as a human right was first formally recognized by the United Nations in the Universal Declaration of Human Rights (Herein after referred as UDHR) from 1948, as a part of the right to a decent standard of living. In the UDHR Article 25 it was stated that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

⁶ See The Committee on Economic, Social and Cultural Rights (Rev.1), Available at <http://www.codexalimentarius.org>

It was further recognized in Article 11 of the International Covenant on Economic, Social and Cultural Rights, a binding instrument for those states having ratified it. In 1999, the right to food was interpreted by the Committee on Economic, Social and Cultural Rights (Herein after referred as CESCR) in the **General Comment 12** establishing that:

The right to adequate food is realized when every man, woman and child, alone or in community with others, has the physical and economic access at all times to adequate food or means for its procurement.

In addition, the United Nations Special Rapporteur on the Right to Food also defined the right to food:

The right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear⁷.

It is important to emphasize certain elements of the right to food.

Food must be available, accessible and adequate⁸.

- *Availability* requires on the one hand that food should be available from natural resources either through the production of food, by cultivating land or animal husbandry, or through other ways of obtaining food, such as fishing, hunting or gathering. On the other hand, it means that food should be available for sale in markets and shops.
- Accessibility requires economic and physical access to food to be guaranteed. Economic accessibility means that food must be affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs, such as school fees, medicines or rent. For example, the affordability of food can be guaranteed by ensuring that the minimum wage or social security benefit is sufficient to meet the cost of nutritious food and other basic needs. Physical accessibility means that food should be accessible to all, including to the physically vulnerable, such as children, the sick, persons with disabilities or the elderly, for

⁷ See United Nations Special Rapporteur on the right to food, Available at <http://www.fao.org>

⁸ See <http://faolex.fao.org/faolex/index.htm> (Last visited on 12 march 2013)

whom it may be difficult to go out to get food. Access to food must also be guaranteed to people in remote areas and to victims of armed conflicts or natural disasters, as well as to prisoners. For example, to guarantee physical access to food to people living in remote areas the infrastructure could be improved, so that they can reach markets by public transport.

- *Adequacy* means that the food must satisfy *dietary needs*, taking into account the individual's age, living conditions, health, occupation, sex, etc. For example, if children's food does not contain the nutrients necessary for their physical and mental development, it is not adequate. Food that is energy-dense and low-nutrient, which can contribute to obesity and other illnesses, could be another example of inadequate food. Food should be *safe* for human consumption and free from adverse substances, such as contaminants from industrial or agricultural processes, including residues from pesticides, hormones or veterinary drugs. Adequate food should also be *culturally acceptable*. For example, aid containing food that is religious or cultural taboo for the recipients or inconsistent with their eating habits would not be culturally acceptable.

WHY IMPLEMENT THE RIGHT TO FOOD?

Legal Obligation: States that have ratified the International Covenant on Economic, Social and Cultural Rights have an obligation to progressively realize the right to food (Art.11 ICESCR).

Politically Popular: People want to be able to feed themselves in dignity. People want legally enforceable rights and predictability. People do not want to see other people starve.

Economically Sound: Reducing hunger fosters economic growth. Food secure people are more productive, less often sick and tend to invest more in the future. Malnourished children on average lose 5-10 % in lifetime earnings.

Empowering: A rights-based approach empowers individuals to participate in decision making, to claim their rights and to demand recourse. It strengthens local communities to take care of their own members.

Accountability: The language of rights and obligations enables rights holders and civil society to hold public officials and governments accountable for their programmes and policies.

Addressing Root Causes: Chronic food insecurity and poverty are often structural, and caused by underlying social and political factors. Rights based approaches provide the powerless with leverage to address such causes.

Ethics: Malnutrition can be addressed and the Right to Food can be implemented in any country. It is unethical not to act.

HOW THE RIGHT TO FOOD ADDS TO FOOD SECURITY

- States have obligations and are accountable;
- Individuals are rights holders;
- Right to Food links to all other human rights;
- Principles of non-discrimination, participation and rule of law are integral to right to food;
- Implementing the right to food includes

THE RIGHT TO FOOD IN INTERNATIONAL LAW

According to the 1948 UDHR, the right to food is one of the human rights to which all human beings are inherently entitled. The first formal reference to this right was made in article 25 of the UDHR, which states: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food”.

In 1966, the ICESCR established the right to food as a legally binding right. Article 11 of the Covenant provides for this right in two paragraphs:

..the right to adequate food as part of the right to an adequate standard of living (Article 11.1)⁹; and the fundamental right to be free from hunger (Article 11.2)¹⁰.

⁹ Article 11.1, The States Parties to the present Covenant recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

For the 30 years that followed the adoption of the ICESCR, little progress was made towards the implementation of the right to food. In 1996, the World Food Summit asked the Committee on Economic, Social and Cultural Rights (CESCR) to clarify what the right to food meant and ways of implementing it. In 1999, CESCR issued General Comment No. 12 (GC12) (CESCR, 1999), which provides an authoritative interpretation of the right to adequate food. This was subsequently complemented by General Comment No. 15 on the right to water, which is inextricably related to the right to food (CESCR, 2002: 3).

According to CESCR, the right to food is realized “when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement” (CESCR, 1999: 6). It emphasizes the scope of this human right, which “shall not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients”. CESCR considers that the core content of the right to food implies “the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights” (CESCR, 1999: 8). It also explains States’ obligations and recommends the adoption of national strategies “to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks” (CESCR, 1999: 21).

The human right to adequate food is recognized and reaffirmed in a number of binding and non-binding international instruments. Among the most relevant of these are:

- UDHR: Article 25 recognizes the right to an adequate standard of living, including food;

¹⁰ **Article 11.2**, The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

1. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

Taking into account the problems of both food importing and exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

- ICESCR: Article 11 recognizes the right to an adequate standard of living, including adequate food, and the fundamental right to be free from hunger as a separate right (160 States Parties);
- CEDAW¹¹, which recognizes in article 12 the right of pregnant and lactating women to special protection with regard to adequate nutrition and in article 14 the right of rural women to equal access to land, water, credit and other services, social security and adequate living conditions (186 States Parties); and
- CRC: Article 25 recognizes the right to the highest attainable standard of health, and article 27 the right to an adequate standard of living which, in both articles, includes food and nutrition (193 States Parties).

As part of its follow-up to the adoption of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security¹², FAO has developed seven implementation steps for States, as follows: (1) identifying and targeting the hungry and the poor; (2) conducting a thorough assessment of existing policies, institutions and laws; (3) adopting a sound food security strategy; (4) elaborating a framework law; (5) allocating institutional roles and responsibilities; (6) monitoring progress towards established benchmarks; and (7) establishing recourse mechanisms. Steps four and seven are directly related to the issue of constitutional and legal protection of the right to food¹³.

CONSTITUTIONAL RECOGNITION OF THE RIGHT TO FOOD

The role of constitutions

A country's constitution plays a fundamental role in the realization of the right to food because it is the supreme law of the land¹⁴ and the source of all political power within a nation. It is a body of rules that establishes and regulates a government by stipulating checks,

¹¹ Convention on the Elimination of All Forms of Discrimination against women, opened for signature Mar. 1, 1980, 1249 UNTS 13 (entered into force Sept. 3, 1981).

¹² Adopted by the 127th Session of the FAO Council, November 2004

¹³ <http://www.fao.org/righttofood> (Last visited on 1 March, 2013)

¹⁴ See *inter alia*, the Constitution of Australia, Preamble; the Canadian Constitution Act, 1982, Art.552; the Constitution of Italy, Art.1; the Constitution of Ireland, Art.6; the Constitution of Japan, Art. 98; and the Constitution of the United States, Art. 6. For implicit claims, see *inter alia*, the Constitution of India, Arts. 251 and 54; the Basic Law of Federal Republic of Germany, Arts. 20 (3), 23, 28 (1) and (3), 37, 56, 64(2), 70, 87 a(2), 98(2), and 142.

balances and limitations of governmental authority¹⁵. The constitutionality of every law and act of Government is one of the most important political principles of democracies and universally accepted rule of law norms. States have the primary obligation to protect and promote human rights. Human rights obligations are defined and guaranteed by international customary law and international human rights treaties, creating binding obligations on the States that have ratified them to give effect to these rights. Several national constitutions also recognize the right to food and corresponding obligations of the State.

States have to *protect* individuals' enjoyment of the right to food against violations by third parties (e.g., other individuals, groups, private enterprises and other entities). For example, States should prevent third parties from destroying sources of food by, for instance, polluting land, water and air with hazardous industrial or agricultural products or destroying the ancestral lands of indigenous peoples to clear the way for mines, dams, highways or industrial agriculture. The obligation to protect also includes ensuring that food put on the market is safe and nutritious. States must therefore establish and enforce food quality and safety standards, and ensure fair and equal market practices. Furthermore, States should take the legislative and other measures needed to protect people, especially children, from advertising and promotions of unhealthy food so as to support the efforts of parents and health professionals to encourage healthier patterns of eating and physical exercise. A State must also take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.

Some treaties and national constitutions permit States to achieve the full realization of the right to food *progressively*. For example, article 2 (1) of the International Covenant on Economic, Social and Cultural Rights provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

¹⁵ The second kind of constitution, an unwritten constitution, exists for example in Canada, England, Israel and New Zealand. These countries have no written constitution in one single document, but rather a number of Basic Laws, which are primary laws guiding society. In the absence of a formal codified set of laws, tradition and existing legal and political systems may provide enduring constitutional principles.

This is an implicit recognition that States may have resource constraints and that it may take time to fully implement the obligations towards the right to food. However, this does not mean that States do not need to do anything until they have sufficient resources. On the contrary, it means that States must lay down a roadmap towards the full realization of the right to food immediately, and demonstrate that they are making every possible effort, using all available resources, to better respect, protect and fulfil the right to food.

The logical consequence of the superiority of the constitution is that it supersedes all acts of the legislature contrary to it. Consequently, such acts will not bind either the courts or the citizens. Constitutional provisions are also binding for the executive so all administrative authorities are equally limited by its provisions. Any executive or administrative act that contravenes the provisions of the constitution must be considered void and the courts must invalidate it.

On the basis of a right to food provision in the constitution, the constitutional court or the highest court of a country has the power of judicial review. This means that it declares certain laws unconstitutional if they violate the right to food provision, and the person whose rights have been breached may have a right to remedy. This has an enormous impact on the realization of the right to food because a successful claim may lead to the reform of legislation or policies found to violate that right. There have not been many court cases involving the right to food so far. However, a notable example concerning two cases in India.

Right to food case in India

The decision of the Supreme Court of India in both *Kishen Pattnayak & another v. State of Orissa*¹⁶, and *People's Union for Civil Liberties (PUCL) v. Union of India and others*¹⁷ has recognized the right to food under the right to life stipulated in article 21 of the Indian Constitution, with reference also to the Directive Principle of State Policy concerning nutrition, contained in article 47. Interim orders in the latter case have led to new and better-implemented government programmes and have asserted that benefits under these programmes are legal entitlements. Such programmes include mid-day meals for school children, food entitlements in childcare centres, subsidized food for a number of specific vulnerable groups, as well as changes to the subsidies directed at all persons below the

¹⁶ AIR 1989 SC 677

¹⁷ People's Union for Civil Liberties v. Union of India & Ors. (S.C. 2001), Writ Petition (Civil) No. 196/2001, reprinted in Colin Gonsalves ed., 2004. Right to Food. New Delhi, p. 48.

official poverty line. The court case continued for several years and included the appointment of Court Commissioners¹⁸ to monitor the implementation of interim orders¹⁹.

Finally, the inclusion of a specific provision on everyone's right to food particularly that of children and women, within the constitution has significant merit in providing legal protection of the right to food, as such, and in ensuring freedom from hunger.

Types of constitutional recognition of the right to food

The national legal and institutional framework is decisive for the implementation of the right to food. Many countries have included the right to food in their constitutions, either specifically or as part of the provisions on the right to an adequate standard of living²⁰. Several countries are developing a framework law on the right to food. This is useful for fleshing out any constitutional provisions, clarifying rights and obligations, as well as elaborating on institutional roles and coordination for the realization of the right to food. It can also provide for remedies for violations of the right to food and strengthen the mandates of national human rights institutions (NHRIs). The legal framework for institutional coordination is particularly important for the right to food, responsibilities for which typically go well beyond the mandate of any one sectorial ministry.

Sectorial legislation is also important because it regulates the economic environment in which people are, or are not, able to feed themselves in dignity and the adequacy of the food marketed and sold, determines how markets function, regulates access to natural resources, and provides for entitlements to State support. These must be reviewed to ensure there is nothing that hinders people's ability to feed themselves or their right to social assistance²¹. Many national constitutions take into account the right to food or some of its aspects. Constitutional recognition of the right to food can be divided into four broad categories:

- (i) Explicit and direct recognition, as a human right in itself or as part of another, broader human right;
- (ii) Right to food implicit in a broader human right;

¹⁸ Available at: <http://www.sccommissioners.org>

¹⁹ See the website of the Indian right to food campaign for additional information: <http://www.righttofoodindia.org>

²⁰ The Right to Food Guidelines: Information Papers..., pp. 134–137.

²¹ See FAO, Guide on Legislating for the Right to Food (Rome, 2009).

- (iii) Explicit recognition of the right to food as a goal or directive principle within the constitutional order; and
- (iv) Indirect recognition, through interpretation of other human rights by the judiciary.

The following subsections will look at each type of protection in turn.

Explicit and direct recognition of the right to food

According to the survey of Food and Agriculture Organization of the United Nations (FAO), 23 countries recognize the right to food explicitly as an individual human right. It is necessary to distinguish between the different ways in which this recognition takes place. Nine of these countries recognize the right as an independent right applicable to everyone. An example of such a constitutional provision is South Africa Constitution has explicit and direct recognition of the right to food for all²². Of the 23 countries that recognize the right to food as a human right; ten stipulate the right to food for a specific category of the population only, such as children or prisoners. Constitution Colombia²³ has explicit and direct recognition of the right to food for children.

Five countries have constitutional provisions that stipulate the right to food explicitly as being part of another human right. This is often worded in ways similar to article 11.1 ICESCR as part of a human right to an *adequate standard of living, to a quality of life or to development*²⁴.

CONCLUSION

Amartya Sen once remarked in his characteristically economical prose, that ‘the law stands between food availability and food entitlement’²⁵. What he meant is that unless we take seriously our duties towards the most vulnerable, and the essential role of legal entitlements

²² Article 27:

1. Everyone has the right to have access to [...] (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
2. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

²³Article 44: States that Children have fundamental rights to: life, integrity, health and social security, and adequate food.

²⁴ See UN Declaration on the Right to Development, proclaimed in 1986 by UN General Assembly resolution 41/128.

²⁵ Amartya K. Sen, *Poverty and Famines. An Essay on Entitlements and Deprivation*, Clarendon Press, Oxford, 1981, p. 166.

in ensuring that the poor have either the resources required to produce enough food for themselves or a purchasing power sufficient to procure food from the market, our efforts at increasing production shall change little to their situation. For they are hungry not because there is too little food: they are hungry because they are marginalized economically and powerless politically.

Over the past few years, significant progress has been made in the implementation of the human right to adequate food, the result of the co-construction of issues by civil society, social movements, and governments. Governments now understand that hunger is not simply a problem of supply and demand, but primarily a problem of a lack of access to productive resources such as land and water, of unscrupulous employers and traders, of an increasingly concentrated input providers sector, and of insufficient safety nets to support the poor. They understand that while attention has been focused on addressing the mismatch between supply and demand on the international markets -- as if global hunger were the result of physical scarcity at the aggregate level --, they should now pay greater attention both to the imbalances of power in the food systems and to the failure to support the ability of small-scale farmers to feed themselves, their families, and their communities. They understand the importance of more equity in the food chains, of empowerment, and of accountability: they understand that the right to food can constitute a tool to improve the effectiveness of policies that seek to combat hunger and malnutrition.

JUDICIAL PERSPECTIVE ON CLIMATE CHANGE: A COMPARATIVE STUDY

Sarvesh Kumar Shahi*

Abstract

“Climate Change is by its very nature a threat, but it is a deadly threat only because it fails to trigger the brain's alarm. It leaves us sleeping in a burning bed.”- Dan Gilbert

The word ‘Climate’ is derived from the Greek word “*Klima*” literally it means- “*Inclination*”. Climate is generally defined as the weather conditions averaged over a long time. “Climate change” is on everyone’s lips these days. The earth is rapidly warming owing to the unrelenting emission and accumulation of Carbon dioxide and other greenhouse gases in the atmosphere. This is causing accelerated melting of ice-sheets and glaciers, a rise in sea levels and changes in hydrological cycles, wind circulations and ocean currents.

In this paper we are going to discuss about the history of climate change law, what major factors are responsible for the climate change, the legal and ethical issues for implementing the environmental law, what are the regulations relating climate change law in India & World and how much they are effective in the current scenario and its judicial perspective followed by conclusions and suggestions.

Keywords: Climate Change, Greenhouse Gases, Judiciary, Laws & Regulations

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INTRODUCTION

“We can’t cure the planet, we haven’t the power, but we just might be able to make it go into reverse phase and cure itself”

—Lovelock and Rapley¹

The fifth assessment synthesis report of IPCC (Intergovernmental Panel on Climate Change), 2014, shown that most of the developed countries like US, UK, Canada are facing the danger of heating of atmosphere which results in their climate change. But, what about the developing situation of countries that, in the race of becoming developed are not taking proper measures to train and educate their people about the consequence of overheating of climate.²

Above the path of this century, the connection between living creature and the earth on which they survive has altered basically. Climate change is broadly known to be the most vital ecological crisis facing mankind. Climate change is on everyone’s lips these days. Taking action to substantially reduce our carbon emission is important for our future prosperity.³ The earth is rapidly warming owing to the unrelenting emission and accumulation of Carbon dioxide and other greenhouse gases in the atmosphere. This is causing accelerated melting of ice-sheets and glaciers, a rise in sea levels and changes in hydrological cycles, wind circulations and ocean currents.

At present, there is massive exploitation and utilization of various resources in unsustainable paths. This might compromise the ability of future generations to meet their own developmental needs and values. Here comes the important role for judiciary to play in order to prevent environmental degradation which leads to climate change. Judiciary are being proactive in the promotion of intergenerational justice and fight against climate change in order to bequest clean and healthy environment to future generations.

MEANING AND DEFINITION OF CLIMATE CHANGE

¹ (Letter from James E Lovelock and Chris G Rapley, “Ocean Pipes Could Help the Earth to Cure Itself”, Nature, 449 (September 27 2007), p 403

² Adam Jolly, “Managing Climate Change Risk: A Practical Guide For Business”, Thorogood publishing ltd. 2008, P. 23-32 titled “Projections Of Climate Change”.

³ Ibid.

Climate is derived from the Greek word “*Klima*” literally it means- “*Inclination*”. Climate is generally defined as the weather conditions averaged over a long time. The standard averaging period is 30 years.⁴

According to Collins English Dictionary, “*Climate means typical weather conditions of an area*”.

According to Class Zone, “*Climate is defined as an area's long-term weather patterns. The simplest way to describe climate is to look at average temperature and precipitation over time. Other useful elements for describing climate include the type and the timing of precipitation, amount of sunshine, average wind speeds and directions, number of days above freezing, weather extremes, and local geography*”.⁵

CLIMATE CHANGE

Climate Change is an important and permanent alteration in the statistical allocation of weather conditions pattern over periods ranging from decades to millions of years. It might be a change in average climate conditions, or in the allocation of weather around the average conditions (i.e., more or fewer extreme weather events). Several definitions given by various writers, national and international Institutions in the following manner:

- **Oxford Dictionary** - “*Changes in the earth's weather, including changes in temperature, wind patterns and rainfall, especially the increase in the temperature of the earth's atmosphere that is caused by the increase of particular gases, especially carbon dioxide*”.
- **Velma I. Grover** - “*Technically, climate change can be defined as a statistically significant variation in either the mean state of the climate or in its variability*”.⁶
- **H.D. Kumar** - “*It is the statistically significant variations of the mean state of the climate or of its variability typically existing for decades or longer, which are referred to as climate change*”.⁷

⁴ “Climate averages”-Met Office, Accessed on 2008-05-17

⁵ http://www.classzone.com/books/earth_science/terc/content/investigations/es2101/es2101page01.cfm; Accessed on 19.08.2013

⁶ Velma I. Grover, “*Global Warming and Climate Change: Ten years after Kyoto and Still Counting*”, (2008), volume 1, pg.no. 5

⁷ H.D. Kumar, “*Global Climate Change: Insights, Impacts and Concerns*”, (2006), pg.no. 1

- **IPCC** - “*A change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer*”.⁸

Climate change may be due to natural internal processes or external forcings, or to persistent anthropogenic changes in the composition of the atmosphere or in land use.

- **Article 1, UNFCCC:** “*A change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods*”.⁹
- **Environmental Protection Agency (EPA):** “*Climate change refers to any significant change in the measures of climate lasting for an extended period of time. In other words, climate change includes major changes in temperature, precipitation, or wind patterns, among other effects, that occur over several decades or longer.*¹⁰”
- **According to the World Meteorological Organization (WMO):** “*Climate change refers to a statistically significant variation in either the mean state of the climate or in its variability, persisting for an extended period (typically decades or longer). Climate change may be due to natural internal processes or external forcing, or to persistent anthropogenic changes in the composition of the atmosphere or in land use*”.¹¹

FACTORS RESPONSIBLE FOR CLIMATE CHANGE

On the broadest scale, the rate at which energy is received from the sun and the rate at which it is lost to space determine the equilibrium temperature and climate of Earth. This energy is distributed around the globe by winds, ocean currents, and other mechanisms to affect the climates of different regions.

Factors that can shape climate are called climate forcing or "forcing mechanisms". These include processes such as variations in solar radiation, variations in the Earth's orbit, mountain-building and continental drift and changes in greenhouse gas concentrations. There are a variety of climate change feedbacks that can either amplify or diminish the initial

⁸ (<http://www.thegwpf.org/ipcc-introduces-new-climate-change-definition/>)

⁹ (http://unfccc.int/essential_background/convention/background/items/2536.php)

¹⁰ ”(<http://www.epa.gov/climatechange/basics/>)

¹¹ http://www.wmo.int/pages/index_en.html.

forcing. Some parts of the climate system, such as the oceans and ice caps, respond slowly in reaction to climate forcing, while others respond more quickly¹².

Climate change is caused by factors that include:

- oceanic processes (such as oceanic circulation),
- biotic processes,
- variations in solar radiation received by Earth,
- plate tectonics,
- volcanic eruptions, and
- human-induced alterations of the natural world;

These latter effects are currently causing global warming, and "climate change" is often used to describe human-specific impacts¹³.

IMPACT OF CLIMATE CHANGE

Some expected impacts of climate change include disruption of ecosystems, species, extinctions, inundation of coastal areas from rise in sea level, increasing precipitation and floods, and frequent storms¹⁴.

Impacts of climate change can be of several forms such as health impact, agriculture impact, food & natural regions impact, forest impact which are enlisted as follows:

1. Health Impact¹⁵

- Changes in the climate may affect vector-borne diseases in several ways, namely, their survival and reproduction rates, the intensity and temporal pattern of vector activity and the rates of development, survival and reproduction of pathogens within vectors.

2. Agriculture Impact¹⁶

¹² Also available at http://prezi.com/8tgtp_dclapb/climatic-changes/ (accessed on 09/09/2013)

¹³ Ian Plimer, “Heaven & Earth Global Warming The Missing”, Science Publisher ,Connor Court Publishing Ltd. 2009.

¹⁴ HD Kumar , “Global Climate Change: Insights, Impacts And Concerns”, P. 10 titled *Management And Mitigation Of Climate Change*, Vitasta Publishing Pvt.Ltd ,2007.

¹⁵ Also available at:

http://envis.maharashtra.gov.in/envis_data/newsletter/climatechange/Links/Climate%20change%20impacts/cc_impacts.html (accessed on 09/09/2013)

¹⁶ Ibid.

- Simulations using dynamic crop models indicate a decrease in yield of crops as temperature increases in different parts of world.
- In context of India, food security of India may be at risk in the future due to the threat of climate change leading to an increase in the frequency and intensity of droughts and floods, thereby affecting production of small and marginal farms.
- Local weather changes can cause disruption of flowering / fruiting cycles & change in pest profile.
- General rise in temperature can cause Sea level rise & intrusion of salt water into coastal farmlands and Stormy weather can cause Strong winds leading to crop damage & soil erosion.

3. Forest & natural Regions Impact¹⁷

- Even in a relatively short span of about 50 years, most of the forest biomes in India seem to be highly vulnerable to the projected change in climate.
- Climate Change, leading to warning and water stress could further exacerbate land degradation, leading to desertification.
- These impacts on forests will have adverse socio-economic implications for forest dependent communities and the national economy. The impacts of climate change on forest ecosystems are likely to be long-term and irreversible.
- In some regions, the remaining natural flood plains are disappearing at an accelerating rate, primarily as a result of changes in land use and hydrological cycle.
- In the Indian scenario, the two important measures of climate change which have direct and significant impact on the biodiversity are the variation in precipitation and temperature.

ETHICAL ISSUES

‘Ethical issues’, as a phrase, is even worse. Ethical issues are often precisely the ones we prefer to avoid, because they force us to confront the sometimes muddy difference between doing right and doing wrong -- or because we know that in confronting ethical issues generally, we must sometimes confront the ethical deficiencies in our own behavior. But global warming is undeniably an ethical issue, and we must face it as such. That means asking hard questions about responsibility, accountability, and the differences between

¹⁷ Ibid.

actions -- whether political, economic, or wholly personal -- that are right versus those that are wrong.

The world's present institutions have failed to address adequately the threat of climate change. No politician has been willing to sacrifice the short-term economic welfare of his or her country, even while agreeing that sustainability is essential in the long term. Furthermore, the deep social, economic and political divisions within societies and between countries prevent united action in the common interest.

Any action on climate change confronts serious ethical issues of fairness and responsibility across individuals, nations, generations, and the rest of nature.

The main ethical issue might be how to define and differentiate responsibilities between present and future generations, developed and developing countries, and human and nonhuman beings¹⁸.

Ethical issues, by contrast, have to do with the actions that everyone, or at least most reasonable people, agrees to be moral. These agreements usually take the form of principles, such as the famous and widely shared principle of the Golden Rule: Do not do something to someone else that you would not like to have done to you. (Here we might ask: Would we like it if our grandparents had set slow fire to the world, a fire that crested into visibility during our lifetime, and left it to us to deal with the problem? This is what climate change will be like to our descendants.)

ROLE OF JUDICIARY AND LEGAL ISSUES

The judiciary has a role to play in the interpretation, explication and enforcement of laws and regulations. The achievement of ecologically sustainable development depends on the commitment and involvement of all arms of government – the legislature, executive and judiciary – as well as other relevant stakeholders.

As Kaniaru, Kurukulasuriya and Okidi state: "*The judiciary plays a critical role in the enhancement, interpretation of environmental law and the vindication of the public interest in*

¹⁸ "Ethics and Global Climate Change" : Stephen M. Gardiner (Department of Philosophy and Program on Values in Society, University of Washington) & Lauren Hartzell-Nichols (Program on Values in Society and Program on Environment, University of Washington) © 2012 Nature Education Citation: Gardiner, S. M. & Hartzell-Nichols, L. (2012) Ethics and Global Climate Change. Nature Education Knowledge 3(10):5

a healthy and secure environment. Judiciaries have, and will most certainly continue to play a pivotal role both in the development and implementation of legislative and institution regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development will be a major force in strengthening national efforts to realise the goals of environmentally-friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process”¹⁹.

Just because of Climate Change there are several legal issues which arises in relation to real estate law, Immigration Law, violation of Environmental regulations, Refugee Law, Public Trust Laws and several other issues which can be better understood looking at role of judiciary in several countries like US, UK, India, as follows:

1. US (UNITED STATES)

In *American Electric Power Co., Inc. v. Connecticut*²⁰, the Supreme Court read the CAA to bar federal judges from imposing their own limits on GHG emissions from fossil-fuel-fired power plants, separate from those imposed by EPA under that act. More formally, the Court held that the CAA displaces any federal common law of nuisance that might ground a claim seeking judicial abatement of such emissions. However, American Electric Power left open two key questions. First, may those suffering climate-change impacts still assert federal common law of nuisance actions seeking not injunctive relief, as plaintiffs sought in American Electric Power, but rather monetary damages? Second, do state law claims, either common law or statutory, withstand American Electric Power, which addressed only federal common law claims?

These questions were both answered in the negative in *Comer v. Murphy Oil Co.*²¹

There, Mississippi landowners pressed state and federal tort claims (nuisance, trespass, and negligence) against numerous oil, coal, and chemical companies that allegedly emitted substantial GHGs. The landowners' claims were based on property-related harms suffered as the result of Hurricane Katrina—they argued that the defendants, through their GHG emissions

¹⁹ D Kaniaru, L Kurukulasuriya and C Okidi, “UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development”, a paper presented to the Fifth International Conference on Environmental Compliance and Enforcement, Monterey, California, USA, November 1998, p. 22 of conference proceedings.

²⁰ 131 S. Ct. 2527 (2011)

²¹ 839 F. Supp. 2d 849 (S.D. Miss. 2012)

and resulting climate change, had contributed to warmer ocean temperatures that had intensified the hurricane, and to rising sea level that aggravated the hurricane's impacts further. They sought damages. Despite the differences from American Electric Power-state rather than federal claims, monetary rather than injunctive relief-the district court found that decision controlling. Here as in American Electric Power, the court said, the lawsuit called upon the court to determine what level of CO₂ emissions was unreasonable, a determination the Supreme Court explained had been entrusted by Congress to the EPA. Therefore, the court determined that the plaintiffs' "entire lawsuit" is displaced by the CAA, though the ruling is *dictum*.²²

In *Massachusetts v. EPA*, the U.S.²³, Supreme Court upheld the standing of Massachusetts and other states to challenge the failure of the U.S. Environmental Protection Agency (EPA) to regulate greenhouse gas (GHG) emissions from motor vehicles and went on to hold that the Clean Air Act regulates GHGs as air pollutants. As a result of this decision, EPA is moving forward on several fronts to regulate GHG emissions from motor vehicles and stationary sources.

2. UK (UNITED KINGDOM)

The **UK's 2008 Climate Change Act** introduced a world first: a long-term framework for reducing greenhouse gas emissions that is legally binding on Government, and is a centerpiece of our strategy to develop and deliver a low carbon future.

The Act sets a target to reduce UK greenhouse gas emissions by at least 80% by 2050, and puts us on the path to that target by creating a system of binding carbon budgets to cover five-year periods, set up to fifteen years ahead. The first three of these carbon budgets, covering the periods 2008-2012, 2013-17 and 2018-2022, were announced in April 2009 in line with

²² When a court opinion speaks to an issue the resolution of which is not required to decide the case, it is referred to as "dictum." Traditionally, dictum is entitled to less precedential force than a pronouncement of the court essential to disposing of the case-often termed a "holding." In Comer, the American Electric Power discussion described in text above was preceded by not one, but three, different determinations of the court (*res judicata*, absence of standing, and non-justiciable political question) each one of which was fully adequate to support dismissal of the action. That is, the court had no need to resolve the displacement issue and its discussion is, therefore, dictum.

²³ See, e.g., U.S. EPA, Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, Final Rule, 75 Fed. Reg. 17004 (Apr . 2,2010); Prevention of Significant Deterioration and Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010); Endangerment and Cause and Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, 74 Fed . Reg . 66496 Dec . 15, 2009); Mandatory Reporting of Greenhouse Gases, 74 Fed . Reg .56260 (Oct . 30, 2009)

advice from the independent Committee on Climate Change, which the Act created to advise Government. The Committee recommended that the UK should achieve a reduction in emissions of all greenhouse gases of 34% relative to 1990 in the third period (2018-2022), and of 42% once a global deal to reduce emissions is achieved. The Government will tighten the carbon budgets in the light of a global deal.²⁴

The Energy Bill, 2012. Currently awaiting Report Stage in Parliament, this bill includes provisions for a 'Green Deal' on energy efficiency, greater security of energy supplies and more low-carbon electricity. More detailed secondary legislation for the 'Green Deal' will be prepared during 2011 with a formal consultation process recently completed. Secondary legislation will be laid before parliament in early 2012 with the first 'Green Deal' expected to be available in late 2012. This policy will be accompanied by funding for training for up to 1,000 'Green Deal' apprenticeships²⁵.

3. INDIA

The Indian courts have been keen to employ the public trust doctrine for the purpose of environmental conservation. In *M.C. Mehta v. Kamal Nath*,²⁶ a newspaper article alerted the Supreme Court of India that a private company had built a hotel on the bank of River Beas. The land had been leased to the company whilst Kamal Nath, who had links with the company, was the Minister for Environment and Forests. The article claimed that during the construction process, bulldozers were used to create a new channel for the purpose of diverting the river-flow away from the hotel to save it from flooding. The Supreme Court of India was most concerned at the alleged environmental degradation.

The Supreme Court took the opportunity to explore the doctrine of public trust as it applied in Indian law. After discussing the importance of sustainable development and respect for the 'laws of nature',²⁷ the Court discussed the development of the doctrine and observed that:

Our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature

²⁴ <http://www.legislation.gov.uk/ukpga/2008/27/contents>

²⁵ (For further details on the Energy Bill: http://www.decc.gov.uk/en/content/cms/legislation/energy_bill/energy_bill.aspx. For progress of the legislation: <http://services.parliament.uk/bills/2010-11/energyhl.html>)

²⁶ (1997) 1 SCC 388.

²⁷ (1997) 1 SCC 388 at [23].

*meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.*²⁸

In **Indian Council for Enviro-Legal Action v. Union of India**,²⁹ a number of private companies operated chemical factories without the required licenses and had not installed equipment for the treatment of highly toxic effluent which they discharged. The discharge polluted water aquifers and the soil in the area. The Supreme Court of India dealt with the liability of the companies to defray the costs of the remedial measures. One of the ways that the liability of the companies could be viewed was from the ‘polluter pays’ principle.

EFFORTS IN INDIA

1. The M.S. Swaminathan Research Foundation (MSSRF) in cooperation with Development Alternatives, the Watershed Organizations Trust (WOTR), the United Nations Development Programme (UNDP), Swiss Agency for Development and Cooperation (SDC) India / Climate Change and Development (CCD) / Embassy of Switzerland Delhi, International Union for Conservation of Nature (IUCN) organised a series of meetings across India bringing together lessons and voices from the grassroots and experts and practitioners to deliberate on a National Policy Dialogue on Climate Change Actions.

The process of designing, preparing and **National Policy Dialogue on Climate Change Actions (NPDCCA) 2010**, was chaired by Prof. M.S. Swaminathan, Member of the Indian Parliament and Chairman of MSSRF in cooperation with the NPDCCA Steering Group.

The four important consultations and dialogues held in Bundelkhand, Pune, Chennai and New Delhi in 2010 have helped leading stakeholders, ministries of Government of India, national research organizations, NGOs and experts to affirm their commitments to action and to contribute to the national policies and missions relating to climate change actions³⁰.

²⁸ (1997) 1 SCC 388 at [34].

²⁹ IR 1996 SC 1446.

³⁰ <http://www.climatechangeaction.in/NPDCCA> (accessed on 05/09/2013)

2. At the Major Economies Forum on Energy and Climate in Italy in **July 2013**, India joined 16 other countries in declaring that the increase in global average temperature above pre-industrial levels should not exceed 2 degrees Celsius. This goal remains somewhat controversial, however, as there is still no clear agreement on how countries will share the burden for reducing global emissions³¹.
3. At the subsequent Major Economies Forum in Washington, D.C., this September 2013, India proposed that it could submit more detailed and regular information to the international community on its domestic climate change efforts as a step toward greater transparency³².
4. **National Electricity Plan, 2012** deals with initiatives and measures for GHG mitigation, and aims to keep CO2 intensity declining while massively expanding rural access and increasing power generation to meet the demands of a rapidly growing economy.³³
5. Other Major statute working in India to control different kinds of Pollution are Environmental (Protection) Act, 1986, The Water (Prevention and Control of Pollution) Act, 1974, The Air (Prevention and Control of Pollution) Act, 1981, Hazardous wastes (Management and Handling) Amendment Rules, 2000, which aims to provide for the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property.³⁴

SUGGESTIONS

1. To deal with the risks and understand the opportunities, Government shall take following measures:
 - Raise awareness of the potential impact of climate change so that all of us can begin to think about how we need to respond;
 - Prioritize decisions that have long-term effects, for example, investment in new transport, water, energy and communications infrastructure that will have a long life span;

³¹ Published by “Worldwatch Institute: Vision for a Sustainable world” available at: <http://www.worldwatch.org/node/6278> accessed on 05/09/2013

³² Ibid.

³³ Available at: <http://www.rtcc.org/2013/02/19/in-focus-indias-climate-change-laws/> (accessed on 05/09/2013)

³⁴ Bare Act: Universal Publications, New Delhi, 2012 edition, see Preamble of the act.

- Take action early where the benefits clearly outweigh the costs. Some changes which can be made within the space of one or two years – such as changing crops or providing shade in playgrounds need not be done now. However, designing new buildings or refurbishing old ones to make them climate resilient is likely to be more cost-effective than making changes later.
 - Government shall establish a committee on climate change like UK. Committee can advise the Ministry of Finance on the level of carbon budget for each five year period.³⁵
2. There is a need of climate change management curriculum in management institutions, to train the students and make them aware of the growing environmental concerns related to industrial pollution and other environmental issues. It will somewhere help students of management schools in India holding top positions in Industries to take steps and adapt several measures to tackle with the menace of climate change.
 3. The media (electronic and print) and the environmental movement should be focusing more on climate as a global rather than national issue. Not only would this approach be more logical, he said, but it would also be more effective.

CONCLUSION

Thus, this article approaches the concept of taking climate change into account from the judicial perspective. The intent has been to frame this issue more clearly and to provide some judicial options in thinking about how to approach climate-related testimony in court cases and ways to incorporate more adaptive approaches into environmental rights decisions. Finally, the efforts of Indian government should be appreciated in gearing up the activities handling serious issue of climate change. Still a long way to go and much pain are needed to take in order to diminish the pain of our planet.

³⁵ Allan Jolly, “*Managing Climate Change Risk: A Practical Guide For Business*”, see chapter 5 titled Regulatory Control and Legislation, thorogood publishing limited, 2008, (See page no. 45-50.)

SEDITION IN INDIA: SPEECH VERSUS INCITEMENT

Meet A. Shah* & Harpalsinh R. Parmar**

Abstract

Human is considered as highly intellectual species in the world and recognized as social animal. The most important element that distinguishes it from other species is the ability to speak and to make conversation with others. From the ancient time existed dictatorship i.e. autocratic society where the kings have ruled. These monarch are the sole authority in decision making and no subject of the state was permitted to raise against such powerful entities even their interests (right) were clobbered. The human evolution is at significant stage, all the countries in the world is reforming and fostering towards civilized society. In the present era, several countries are claiming themselves as democratic due to which their citizens are entitled to certain rights, one of which is Right to freedom of speech. It varies from country to country relating to its scope and restriction. The government's role is mandatory to ensure protection of these constitutional rights, but what if these power itself are violating the rights? That is causing harassment to its people as an indication to remain silent or to ready for the charges of sedition but that is not what this draconian law of sedition entails. In India during recent times many human rights activist, editors of the newspaper, press reporter, authors of the book, politician, cartoonist etc. are charged for sedition. Section 124A of Indian Penal Code has remained much the same as at its inception, with minor amendments. These action against the common man demands to make amendments in the present law in order to serve the purpose of the democratic country based on the principles of the democracy.

This paper examines the rights of the citizen to express freely and expressing towards criticizing the government.

Keywords: Sedition, public disorder, incitement, Freedom of speech and expression

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“It is far more ignominious to die by justice than by at unjust Sedition”

- Blaise Pascal

INTRODUCTION

Sedition is defined under section 124A of the Indian Penal code. It was originally drafted by the Lord Macaulay which was not inserted in the original draft of the Indian Penal code, 1860 but was later on added in the year 1870 as a means to defy anti-colonial protestors against the colonial government. The offence is Cognizable, Non-bailable, Non-compoundable and trial by a Court of Sessions¹.

According to John Cohan, “A delicate line can be crossed, whereby lawful criticism of government may become seditious speech, where associating with others in robust criticism of Government may become subversive activities punishable by law”².

According to Former Prime Minister of India Shri Jawaharlal Nehru sedition was fundamentally unconstitutional. In his words, he considered sedition as “Now so far as I am concerned (Sec.124A) is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass, the sooner we get rid of it the better” he said in Parliament.

In the uprising events relating to the acts of sedition in the country, it has become controversial element in the recent times. The appreciation goes to media as it plays supportive role in highlighting the incidents at a large scale and the opposition parties waiting for an opportunity to disgrace the government in power every time.

Any seditious act is liable for punishment under the law. But in present era the charge of sedition generally curtails political criticism and serves as a tool for the Government to suppress the class of people who try to advocate the truth, not always in the sense of rebellion, but a protest for the well-being and to highlight the grievances of the common man or towards the governments lethargic approach in the public welfare of the country and has no place in the democratic country of 21st century.

¹ Criminal Procedure code, 1973, Under First schedule

² Cohan, John Alan (2003), Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government 17, St. John's J. Legal Comment, p. 199

The first amendment in the constitution of India was made regarding imposing of reasonable restriction under article 19(2) of the constitution of India “in the interest of public order” to overwhelm the voice of public spirited people against the government, that is all kind of suppression was an effect of such criticism.

Sedition negates the purpose of the democracy by unnecessarily applying such charges where the constitution itself guarantees the freedom of speech. The main point to focus here is that if there is no case of incitement to favors the violence in the speech or writing or an intention to create disorder³, that is the ‘tendency or the intention to create public disorder’ the charge for the sedition remains null because the judges observed that if the sedition law were to be given a wider interpretation, it would not survive the test of constitutionality. A peaceful protest not aimed at violence, mere demonstration towards the demand by the group of people, a speech not hatred or inciting does not come under the ambit of the term sedition.

The offence consists in exciting or attempting to excite in others certain bad feelings towards the government. It is not the exciting or attempting to excite mutiny or rebellion or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial⁴.

In a democratic country every citizen is unrestricted to make its expression in relation to the guaranteed fundamental right (though not absolute in nature) or against overpowering of the government in an unlawful manner as guaranteed under article 19 of the constitution of India. The liability for the offense of sedition can be different in case of speech also in as in terms of action. The concept of sedition will always contradict constitutional right now it is upon the court to analyze the offense based on creation of the circumstances, technicality of the offense, mens rea, involvement in the offense, actus rea.

The provision for sedition encompasses i) publication of seditious libel ii) utterance of seditious words and iii) conspiracy to do an act in furtherance of seditious intention⁵. In the definition of the sedition, it does not clearly distinguishes between the protest (*vidhroh*) and treason (*deshdroh*). Further it tends to include any form of criticism in the form of speech or

³ *Kedarnath v. State of Bihar* (1962) 1962 AIR 955

⁴ *Queen Empress v. Bal Gangadhar Tilak* (1897) the first case to deal with law on sedition under Section 124A in the IPC was explained. Strachey J. (ILR1898(22)BOM112)

⁵ SEDITION LAWS & THE DEATH OF FREE SPEECH IN INDIA, Centre for the Study of Social Exclusion and Inclusive Policy, National Law School of India University, Bangalore & Alternative Law Forum, Bangalore. https://www.nls.ac.in/resources/csseip/Files/SeditionLaws_cover_Final.pdf

in writing unless it turns into violence and causes public disorder, which will call for the State in the interest of the public welfare and security of the state to take necessary steps to turndown such act and prosecute the offenders.

Section 124A- Sedition under IPC has been defined as follows:

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

Explanation 1- The expression ‘disaffection’ includes disloyalty and all feelings of enmity.

Explanation 2- Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3- Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

HISTORY

Initially the provision of sedition was enacted by Macaulay in his draft penal code 1837-39. The framer of Indian Penal code had not inserted the said clause in 1860. The provision of sedition was introduced by British government in 1870 by inserting section 124A. On the Conviction of Mahatma Gandhi under section 124A of IPC he described this undemocratic law as ‘prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen’.⁶

According to common law for seditious libel includes words as well as action and it should be between the government and the citizens as well as between the communities of person⁷. During the end of the 18th century immediately after the enactment of the Indian penal code, 1860 and addition of the sedition as one of the offense, the colonial government started

⁶ A.G., Noorani Indian Political Trials: 1775-1947, New Delhi: OUP, 2009, p. 235.

⁷ Op. cit. W.R. Donogh at p. 4

prosecuting the editors of the newspaper in which severe criticism of the government rules were mentioned. One of such case is of Jogendra Chandra Bose in 1891⁸, where he wrote an article against the policies of the government and later on he was acquitted on the apology in the proceedings before the judge as there was no mention of rebellion.

During the draft of the constitution sedition was proposed as means of restriction under article 19 of constitution of India but was deliberately removed by the drafters of the Constitution in consideration with the liberty of the citizens to enjoy as a fundamental right of freedom of speech from the draconian provision of law but later on two judgments by the supreme court in *Romesh Thappar v. The State Of Madras*⁹ a weekly journal in English, *Cross Roads* published by Romesh Thappar was banned for publishing critical views on Nehruvian policy as it is its threat to public safety or public order was not supported by the constitutional scheme since the exceptions to 19(1)(a) were much more specific and had to entail a danger to the security of the state.

JUDICIAL PRONOUNCEMENT ON SEDITION

The jurists have interpreted section 124A of IPC from time to time. This part of paper is divided into three categories in order to understand and analyze those pronouncements in detail. Those are:

- A. Pre-Independence
- B. Post-Independence
- C. Recent Pronouncement

A. *Pre-Independence Pronouncement:*

Bal Ganngadhar Tilak (1898)

Once the charges were framed Queen Empress vs. BalGanngadhar Tilak and Keshav mahadevbal¹⁰, the British government asked Justice James Strachey, who was known for his anti-native bias. He held

1. That the term ‘feelings of disaffection’ meant simply absence of affection,

⁸ *Queen Empress v. Jogendra Chandra Bose* (1892) ILR 19 Cal 35.

⁹ 1950 SCR 594

¹⁰ *Empress v. Bal Ganngadhar Tilak & Keshav Mahadevbal*, Bombay series XXII, P.146, [ILR 1898 (22) BOM 112]

2. That it meant ‘hatred’, ‘enmity’, ‘dislike’, ‘hostility’, ‘contempt’ and every form of ill will to the government.
3. That disloyalty perhaps the best general term and that it comprehended every possible form of bad feeling to the government.
4. That a man must not make or try to make other feel enmity of any kind of against the government.
5. That the word government meant British rule or its representative or administrator.

Justice Strachey interpreted the term disaffection in the said case as it meant ‘hatred’, ‘enmity’, ‘dislike’, ‘hostility’, ‘contempt’ and every form of ill will to the government and disaffection to disloyalty, and held that the ‘explanation’ that followed the main section which made allowance for acts of disapprobation, would not apply to “any writing which consists not merely of comments upon government measures, but of attacks upon the government itself, its existence, its essential characteristics, its motives, or its feelings towards people.” It is known as “The Strachey Law”. In 1898, section 124A was amended to reflect Strachey’s interpretation. The British included the terms ‘hatred’ and ‘contempt’ along with disaffection.

Annie Besant (1918)

In case of *Annie Besant v Advocate General of Madras*¹¹, was tried for the publication of the newspaper New India of material that had a tendency to provoke hatred against His majesty’s Government. Besant, an English feminists and activist, was a staunch proponent of Indian home rule. In 1916 she published a number of articles critical of the Government. Justice Strachey ordered that the deposit of her printing press be confiscated under S 4 (1) of the Indian Press Act 1910.

Mohandas Gandhi (1922)

In the year of 1922, Mohandas Gandhi was held guilty under Section 124A, along with Shankerlal Bunker and was sentenced for six years of imprisonment for writing and publishing of three articles namely “Tampering with Loyalty”, “The Puzzle and its Solution” and “Shaking the Manes”, which were published in the newspaper, Young India¹².

¹¹ AIR 1918 Mad 2010

¹² Op. cit. A.G. Noorani at 235

The clause of Sedition has been defined under various Statutes in various forms.

- A. Section 124A of Indian Penal Code, 1860 it extends to the hatred speech against government.
- B. Section 95 of Criminal Procedure Code, 1973 it empowers Government to declare any Publication or Newspaper or Book or any other Document which amounts to seditious material¹³to forfeit and issue search warrant against such said documents.¹⁴
- C. Section 2(o) of Unlawful Activities (Prevention) Act, 1967 states that any individual or association who intends to brings cession or secession in the territory of India¹⁵.
- D. Section 05 of Prevention of Seditious Meeting Act, 1911 says that any meeting which might cause sedition or public disorder can be punished¹⁶.

B. Post-Independence Pronouncement

Tara Singh Gopichand (1951)

In the another land mark case of *Tara Singh Gopichand v The State*¹⁷, Chief Justice Eric Weston explained the irrelevance of 124A, in the contemporary political setting. Where he says,

¹³ Subject to Section 124 A of Indian Penal Code, 1860

¹⁴ Power to declare certain publications forfeited and to issue search warrants for the same- Where-(a) any newspaper, or book, or (b) any document, wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorize any police officer not below the rank of sub- inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

¹⁵ “unlawful activity”, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),- (I) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India;

¹⁶ Power to prohibit public meetings - The District Magistrate or the Commissioner of Police, as the case may be, may at any time, by order in writing, of which public notice shall forthwith be given, prohibit any public meeting in a proclaimed area if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquility.

“India is now a sovereign democratic state. Governments may go and be caused to go without the foundations of the state being impaired. A law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change, which has come about”.

Kedarnath Singh v State of Bihar (1962)

In the landmark case of *Kedarnath Singh v State of Bihar*¹⁸, The Supreme Court ruled out regarding the interpretation of Section 124 A of Indian Penal Code, 1860 and established two principles that are:

- A) A distinction was drawn between the “the Government established at law” and “persons for the time being engaged in carrying on the administration”
- B) In aforesaid case, the Judges moved towards understanding sedition in terms of its tendency to create disorder or incitement to violence. The article in this case was finally read in respect of its effect rather than of the feelings incited or intended.

Balwant Singh v. State of Punjab (1995)

In landmark case of *Balwant Singh v. State of Punjab*¹⁹, the Supreme Court overturned the convictions for (124A, IPC) and promoting enmity between different groups on grounds of religion, race and acquitted persons who had shouted - “*Khalistan zindabaad, Raj Karega Khalsa,*” and, “*Hinduan Nun Punjab Chon Kadh Ke Chhadange, Hun Mauka Aya Hai Raj Kayam Karan Da*”, i.e. a few hours after Indira Gandhi’s assassination – outside a cinema in a market frequented by Hindus and Sikhs in Chandigarh. The Supreme Court acquitted Balawant Singh on the ground that mere words and phrases by themselves, no matter how distasteful, do not amount to a criminal offence unless it is being used for creating public disorder and to incite public.

Recent Pronouncement:

In *Indra Das v. State of Assam*²⁰ and *Arup Bhuyan v. State of Assam*²¹, the Supreme Court reiterated the same fact relying upon *State of Maharashtra & Ors. v. Bhauraao Punjabrao*

¹⁷ 1951 CriLJ 449

¹⁸ Supra note 3

¹⁹ 1995 (1) SCR 411

²⁰ (2011) 3 SCC 380

*Gawande*²², the honorable court observed that “Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government.”, thus in the former mentioned case it was held that only speech that amounts to “incitement to imminent lawless action” can be prosecuted and thus punished.

The Supreme Court held that only “incitement” and not the “advocacy” can be punished in case of section 66 A²³ of Information Technology Act, 2000. In the said case *Shreya Singhal v. Union of India*²⁴, the apex court has struck down the Section 66A of IT Act, 2000; being unconstitutional as restricting right to freedom of speech. There are some other cases where the Supreme Court has taken aforesaid principle into consideration i.e. JNU Case, Arundhati Roy Case, Aseem Trivedi Case.

There are some countries where the law of Sedition is prevail such as Australia, United Kingdom, United states of America, New Zealand, Nigeria and Malaysia²⁵.

CONCLUSION

The laws relating of sedition has the same effect as it was 146 years ago. In today’s era muting the citizens is completely inappropriate, if such laws are not turned down or made necessary amendments the supremacy of the governments will prevail but at the cost of death of free speech in India which is not acceptable in the modern times. It is still an unfortunate moment for the free Indian citizens that the law enacted by the British rulers more than a

²¹ (2011) 3 SCC 377

²² (2008) 3 SCC 613 para 23

²³ 66A Punishment for sending offensive messages through communication service, etc. -Any person who sends, by means of a computer resource or a communication device,- (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine. Explanation -For the purpose of this section, terms “electronic mail” and “electronic mail message” means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

²⁴ AIR 2015 SC 1523

²⁵ Sedition Module; Available at: http://jmi.ac.in/upload/menuupload/12_ccmg_Sedition.pdf (Accessed on 28/7/2016 at 16:26)

century ago for the purpose muting the Indian protestors against the colonial powers still exists in the Independent India. In the recent years there is frequent invocation of sedition to deal with free speech and expression. The judiciary in its several pronouncements has interpreted this impugned section, on the other hand the executive government failed to comply with it. The following are the suggestion in dealing with the present law of sedition which is as follows:

1. Amend section 124A of the IPC to include term *Public disorder* and to be prosecuted only in case of public disorder or attempt to cause public disorder.
2. Amend Section 95 of the Code of Criminal Procedure, 1973, and remove references to section 124A
3. Amend Section 2(o) (iii) of the Unlawful Activities (Prevention) Act, 1967 to remove references to ‘disaffection’.
4. Repeal Prevention of Seditious Meeting Act, 1911

SOCIAL MEDIA: SYNCHRONIZING THE DEMOCRACY

Agampreet Singh* & Lakhan Mittal**

Abstract

The present time orates the command of “media”, ceding to the polity of a democratic nation like India. Tagged as being the 4th pillar of democracy, its regulation is indispensable. Its regulatory history can be traced back to the colonial experience. The onset of 1835 saw the promulgation of the Press Act, mostly containing repressive features. Further, legislations like, the Press and Registration of Books Act, the Newspapers (Incitement to offences) Act, authorized the Government to clamp down on the publication of writings deemed to constitute an incitement to rebellion. Coming to the point of its vitiating the judicial process, the Hon’ble Supreme Court in 2012 laid down a constitutional principle under which the aggrieved parties can seek postponement of publication of court hearings. It also clarified that this was preventive in nature, perhaps, to avert the substantial risk of prejudicing the trial.

If seen other side of the coin, the Apex Court, to ensure the Freedom of Speech and Expression, enshrined under Article 19(1)(a) of the Indian Constitution, struck down Section 66A and of the Information Technology Act, 2000 in one of its landmark judgment. So, time and again the Apex Court has tried to balance the regulatory standards for the social media.

Further, there are certain issues like the cyber bullying, hacking etc., which need serious attention. Also, the world has been stormed with loads of revolutions from censorship to free media but incidents like that of the whistleblower Snowden have shown the true state of affairs. Now, the need of hour is to work upon the basic ideals of freedom of media for which many revolutionists have laid even their lives on.

Hence, this paper aims to disseminate research on various regulatory mechanisms and if it really upholds the democratic values by extending its regulatory regime.

Keywords: democracy, social media, cyber bullying, cyber stalking.

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INTRODUCTION

“One of the objects of media is to understand the popular feeling and give expression to it, another is to arouse among the people certain desirable sentiments, and the third is the fearlessness to expose popular defects.”

– Mahatma Gandhi

Advancements in media laws are now becoming the calibration marks for history's major paradigmatic shifts. As the present time orates the command of “media”, ceding to the polity of a democratic nation like India.

The word medium comes from the Latin word ‘medius’ (middle). ‘Media’ the popular term inter-alia used as ‘Press’ denotes the print & electronic information carriers –the News Papers & Magazines, Radio, Television and currently includes Internet as the latest entrant to the family of Media. Awarded as the ‘Fourth Estate’, media is the watchdog of the public affairs, informing the society and vice versa, acts as the forum to advocate the views of the society at large to those at the helm of public affairs.

The media scene in India today, primarily due to television, is so fluid that it requires of advertisers and agencies the ability to anticipate and to adapt to rapid change. TV attempts to reduce the country to a single media solution, but in reality each market has to be viewed on its own and then meshed into the larger national context.

The new addition ‘social media’ is a phrase being tossed around a lot these days, but it can sometimes be difficult to answer the question of what is social media. Generally, social media is the collective of online communication channels dedicated to community-based input, interaction, content- sharing and collaboration.¹

HISTORICAL PERSPECTIVE OF MASS MEDIA LAWS

The freedom of speech and expression has been characterized as ‘the very life of civil liberty’ by the Constituent Assembly Debates. The freedom of the press, while not recognized as a separate freedom under Fundamental Rights, is folded into the freedom of speech and expression. The Supreme Court has described this freedom as the “***ark of the covenant of democracy***”.

¹ <http://whatis.techtarget.com/definition/social-media> (Last accessed on 15/7/2015 @10.12 pm)

Mass Media laws in India have a long history and India had its first brush with media legislation under country's colonial experience under British rule. The earliest regulatory measures being traced back to 1799 when Lord Wellesley promulgated the Press Regulations, which had the effect of imposing pre-censorship on an infant newspaper publishing industry. The onset of 1835 saw the promulgation of the Press Act, mostly imposing repressive features. Thereafter on 18th June 1857, the government passed the 'Gagging Act' its head point being introduction of compulsory licensing for the owning or running of printing presses; prohibit the publication or circulation of any newspaper, book or other printed material and banning the publication or dissemination of statements or news stories which had a tendency to cause a uproar against the government, thereby weakening its authority.

Then followed the 'Press and Registration of Books Act' in 1867 and which continues to remain in force till date. Governor General Lord Lytton promulgated the 'Vernacular Press Act' of 1878 allowing the government to clamp down on the publication of writings deemed seditious and to impose punitive sanctions on printers and publishers who failed to fall in line. In 1908, Lord Minto proclaimed the 'Newspapers (Incitement to Offences) Act, 1908 which authorized local authorities to take action against the editor of any newspaper that published matter deemed to constitute an incitement to rebellion.

However, the most significant day in the history of Media Regulations was the 26th of January 1950 - the day on which the Constitution was brought into force. The colonial experience of the Indians made them realize the crucial significance of the 'Freedom of Press'. Such freedom was therefore incorporated in the Constitution; to empower the Press to disseminate knowledge to the masses and the Constituent Assembly thus, decided to safeguard this 'Freedom of Press' as a fundamental right. Although, the Indian Constitution does not expressly mention the liberty of the press, it is evident that the liberty of the press is included in the freedom of speech and expression under Article 19(1) (a). It is however pertinent to mention that, such freedom is not absolute but is qualified by certain clearly defined limitations under Article 19(2) in the interests of the public.

India is an over-legislated nation with about 34800+ laws enacted to keep checks and seizures on the conduct of people. Some of the legislations in backing to media being- The Press and Registration of Books Act, 1867, The Newspaper (Prices and Pages) Act, 1956, The Press Council Act, 1978, The Right to Information Act, 2005, The Telecom Regulatory Authority of India, Law Relating to Official Secrets etc.

PRESENT SCENARIO

In almost all the democratic countries, the Press enjoys a crucial role so far as dissemination of news is concerned. Media and their wide-ranging effects have been around ever since humanity has been conglomerating into tribes and nations and developing methods of communication --- ways of extending the scope of one's naked voice beyond hearing range, and giving form and substance to one's thoughts.

Shifting our view to the Indian perspective and its system of Parliamentary Democracy, it is true that, the Press is free but subject to certain reasonable restrictions imposed by the Constitution of India, 1950, as amended. The Indian Parliament has used a transmuted strategy while providing for the cybercrimes under the cyber law of India i.e. The Information Technology Act, 2000. Before the impact of globalization was felt, the mass media was wholly controlled by the government, which let the media project only what the government wanted the public to see and in a way in which it wanted the public to see it. However, with the onset of globalization and privatization, the situation has undergone a humongous change.

Before the invention of communication satellites, communication was mainly in the form of national media, both public and private, in India and abroad. Then came 'transnational media' with the progress of communication technologies like Satellite delivery and ISDN (Integrated Services Digital Network), the outcome: local TV, global films and global information systems.

Hence, in such an era of media upsurge, it becomes an absolute necessity to impose certain legal checks and bounds on transmission and communication. In the due course of this paper, we would discuss the various aspects of media and the relevant legal checks and bounds governing them.²

LEGAL FRAMEWORK

The media evolves its right from the right to freedom of speech and expression available to the citizen. Thus the media has the corresponding right – no more and no less than any individual to write, publish, circulate or broadcast. In the case of *Channing Arnold v.*

² <http://www.legalserviceindia.com/articles/media.htm> (accessed on 21.09.2015)

*Emperor*³ which arose in pre-independent India, the Privy Council emphasizing on the importance of media held:

"The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, apart from the statute law, his privilege is no other and no other and no higher...No privilege attaches to his position."

In a democratic set up, the citizens enjoy certain rights and the right of freedom and speech is one such right which is the prized possession and has a pious value for the citizen. Article 19(1)(a) of the Indian Constitution protects and guarantees right of freedom of speech and expression to all the citizens, subject to the reasonable restrictions which are defined time to time. Moreover, Liberty of thought and expression is one such objective contained in the Preamble of the Constitution. To upkeep this objective, India made its first attempt to keep misuse of digital world in legal sphere with the enactment of the Information Technology Act, in the year 2000.

In the words of Justice A. N. Sen, these rights are instinctive and natural rights of every individual. According to him, "This freedom of expression, which is indeed a natural right as is expressed in different ways under different circumstances, varies in its nature. The freedom of expression is the birth right of every living creature and is indeed a gift of nature⁴." Also, it cannot be over-emphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme⁵.

The basis of a democratic process of a country, which is the freedom of thought and expression, receives substantial importance in a society which allows active participation of citizens. Holding in high spirits, the Supreme Court in the *Re Ramlila Maidan Incident*⁶ observed, "The freedom of Speech is the bulwark of democratic Government and is regarded as the first condition of Liberty...it is the mother of all Liberties...Belief occupies a place higher than thought and expression. Attainment of the Preambular liberties is internally connected to the liberty of expression."

³ AIR 1914 PC 116

⁴ Justice A. N. Sen, "Freedom of expression", Press Council of India Report, January 1989, p.4

⁵ The Indian Express, 25th March, 2015

⁶ (2012) 5 SCC 1

MEDIA TRIALS: VITIATING JUDICIAL PROCESS

Coming to the point of its vitiating the judicial process, the Hon'ble Supreme Court in 2012 laid down a constitutional principle under which the aggrieved parties can seek postponement of publication of court hearings. It also clarified that this was preventive in nature, perhaps, to avert the substantial risk of prejudicing the trial. The Court viewed it as necessary because to maintain a balance between freedom of speech and fair trial for proper administration of justice. Although the guidelines regarding the same were not framed by the Bench, but there is growing tendencies in the judiciary as well as executive to curb free speech. Such view of the Supreme Court was also reiterated in its earlier observations.

In the case of *Sidhartha Vashist v. State NCT of Delhi*⁷ the Apex Court cautioned that Article 19(1) (a) did not permit the media interfering in the administration of justice in matter sub-judice. Recognizing the significance of both print and electronic media in the contemporary world, the Supreme Court pointed out to the danger of serious risk of prejudice of the media, exercising unrestricted freedom in holding the suspect or the accused guilty even before such an order was passed by the Court. The Court further maintained that trial by media not only hampered fair investigation but also amounted to travesty of justice. A trial by media or by public agitation is the very antithesis of the rule of law⁸.

If seen on the other side of the coin, the high-profile accused in the Jessica Lall murder case had secured a ban on media coverage, deficiencies in prosecution and underhand tactics used to subvert the process of justice would have probably gone unnoticed and justice might not have been delivered⁹.

Arrest, bail, interrogation, search, so- called confessional statements are some matters in which media conducts connate proceedings in complicity with the police or other stakeholders, so that there shall be increased circulation or influence on the course of justice. This in turn puts a ponderous load on the court which has a constitutional duty to minimize the effects of prejudicial publicity.

So, it cannot be said that the judicial process is wholly vitiated through such media trials, but there requires the balance to be struck down between the judicial processes and the media

⁷ AIR 2010 SC 2352

⁸ Dr. Sukanta K. Nanda, " Media Law", p.24-25

⁹ The Tribune, 13th September, 2012

coverage, rather than fully curtailing the openness of the media trials. Although the five judge bench laid down the Rule of Postponement, but they refrained from making any guidelines on the same, and this is evident that the Apex Court, keeping in mind their independence, are also in favour of freedom of openness of ideas under the Freedom of Thought and Expression, of which the result is that the Hon'ble Court in the case of *Shreya Jindal v. Union of India*¹⁰ struck down Section 66 A of the Information Technology Act, 2000, which provided for punishment for sending offensive messages through communication service, etc., as being violative of Article 19 of the Indian Constitution. He Supreme Court clarified that although something may be coarsely offensive and may be inconvenient to somebody, without at all affecting his reputation. Further, the written words propagated on the internet may be purely in the domain of discussion point of view rather than incitement to an offence.

Also, in point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such was the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total¹¹.

Citing the importance of free flow of opinions in its earlier decisions, the Supreme Court in the case of *S. Khushboo v. Kanniamal & Anr*¹² said, “This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is pre-condition for meaningful governance, the culture of open dialogue is generally of great social importance.”

Also, the concept of ‘marketplace of ideas’ has been transfused under the American Law, which had been put forward in the congenial words of Justice Holmes in his famous dissent in *Abrams v. United States*¹³, “But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”

¹⁰ (2013) 12 SCC 73

¹¹ *Supra* 5

¹² (2010) 5 SCC 600

¹³ 250 US 616 (1919)

Also, the observations of Justice Jackson in *American Communications Association v. Douds*¹⁴ are opposite of the above," Thought control is a copyright of totalitarianism, and we have no claim to it t. it is not the function of our Government to keep the citizens from falling into error; it is the function of the citizens to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

Taking all the above mentioned case laws into consideration, the Supreme Court gave the landmark judgment of the Shreya Singhal's case, thus upholding the essence of Article 19(1) of the Indian Constitution.

OUTRAGE OF CYBER CRIMES

Giving absolute freedom of thought and expression, although practically not absolute but subject to certain restrictions, does not mean that it would be for the good only, yet there are chances of one being a victim of harassment on the social media. It may be harassment in different forms like some of the unpalatable comments (written or spoken) or conduct which violates an individual's dignity; and/or creates a degrading, humiliating or offensive environment. According to the reports of ASSOCHAM- Mahindra, the number of cybercrimes in India may touch an alarming figure of around 3 lakh till the end of the year 2015, which is almost double the level of last year creating havoc in the financial space, security establishment and social fabric. Phishing attacks of online banking account or cloning of ATM/Debit cards are common episode. It's important here to discuss some of the cybercrimes. Issues like cyber bullying, cyber stalking, phishing, hacking, squatting, etc. All these crimes are one or the other form of fazing or posting cruel online posts or obscene digital pictures, to online threats, negative comments, gaining unauthorized access to data, stalking through emails, social networks etc.

Although the legal protection has been granted to such crimes but aftermath also, there were series of demands that will make sure that the Act provided for restricting the imminence of cybercrime. A major amendment was made to the Act with effect from 6 February 2003 consequent to the passage of a related legislation called Negotiable Instruments Amendment Act 2002. The amendment to Negotiable Instruments Act, 2002 for the first time recognized a cheque in electronic form. These changes notwithstanding, Indian government realizing the

¹⁴ 339 U.S. 382 (1950)

changing terrain of online interactions, formed an expert committee under Ministry of IT to suggest amendments to act to keep it relevant. The committee pointing out several lacunas in the enactment proposed amendments to it in the report it tendered to the ministry of information technology. The result was the Information Technology Amendment Bill, 2006 based on the report submitted by the expert committee¹⁵. Further the Amendment Act of 2008 novated the Act with the introduction of few more things such as introduction of electronic signatures, addition of important definitions of ‘communication device’, ‘intermediary’, and ‘critical information infrastructure’, greater emphasis on the legality of electronic documents, increased role of adjudicating officers, composition of Cyber Appellate Tribunal, introduction of new cybercrimes such as receiving stolen computer resource, identity theft, introduction of Section 67C for its significant role in cybercrimes prosecutions etc.

CONCLUSIONS

So, when an economy develops into a conditioned one, the use of computers becomes more quotidian. It is incumbent that our laws are contemporize with changing scenario. The amended Information Technology Act, if seen from overall perspective has introduced a remarkable position with easy facilitation of the effective enforcement of cyber law in India. The significance of date protection finds its place under sections 43, 43A, 66, 72 of the IT Act, 2000. Empowering the Adjudicating officers by conferring powers of execution is at par with the civil court, which is also a landmark step. Further, introduction of new cybercrimes under Chapter XI are a welcome step to combat the growing kinds of new crimes. There is need to train the police force with forensic knowledge and cyber laws for their effective investigation. Along with this, the concept of Examiner of Electronic evidence needs to be introduced for analysis of digital evidence as pointed out by one of the researcher¹⁶.

Moreover, we have only one Government recognized forensic laboratory at Hyderabad. We require more such labs to effectual handling the rising cases of cybercrime. Al last, there is also need for trained personnel at state and national level. Hence, for effective implementation of the laws there is a need for global alliance.

¹⁵ Sanjay Pandey, “Curbing Cyber Crime: A Critique of Information technology Act 2000 and IT Act Amendment 2008”, (accessed through ‘www.softcell.com/pdf/IT-Act-Paper.pdf’, on 24/9/2015)

¹⁶ Karnika Seth, “IT Act 2000 vs. 2008- Implementation, Challenges, and the Role of Adjudicating Officers”, (accessed from http://catindia.gov.in/writereaddata/ev_rvnrbv111912012.pdf on 24/9/2015)

MULTICULTURALISM AND GLOBALIZATION: WAYS TOWARDS SOCIAL SOLIDARITY IN INDIA

Prakash Chandra Kasera*

Abstract

Indian multiculturalism is meant to ensure that all citizens can keep their identities, can take pride in their ancestry and have a sense of belonging. It is an environment enhanced if individuals are allowed and encouraged to live as they would value living. To nurture multiculturalism, India has been following some ground ways since earlier times such as Tolerance and Acceptance of Foreign Views, Application of the Principles of Charity and Trust, The Respect for the Individual, The Open Attitude to Science, Joint Family Structure etc. In the era of technology, for India, there is need of globalization to nurture multiculturalism. Banks (2004) argues that, “Citizens in a diverse democratic society should be reflective, moral, and active citizens in an interconnected global world ... should have the knowledge, skills and commitment needed to change the world to make it more just and democratic”. The components of globalization are Use of English language, Studying Abroad, Media and ICT.

To preserve Indian multiculturalism, there is need to take some initiatives such as situational approach i.e. to create feelings of togetherness, Glocalization, Corporatist strategy i.e. combination of liberalism and pluralism, Glolocalization, Supporting Critical Multiculturalism, Globalism, McDonaldization, Indianisation, Globality, Modernization and Policy of Patent. Achieving social solidarity requires two intercultural strategic frameworks namely assimilation and acculturation. A “solitarist” approach/monoculture view to human identity (to national, religious, ethnic partition of the population) which sees human beings as members of exactly one group can be dangerous. Conscious of the composite and fragile nature of its own multicultural identity, India must today show exemplary responsibility where its own multicultural heritage is concerned, and with regards to its present day and future cultural life. This responsibility must involve a greater sensitivity in its contacts with other cultures.

Keywords: Multiculturalism, Globalization, Social Solidarity, Monoculture

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INTRODUCTION

Multiculturalism is a system of beliefs and behaviours that recognizes and respects the presence of all diverse groups in an organization or society, acknowledges and values their socio-cultural differences, and encourages and enables their continued contribution within an inclusive cultural context which empowers all within the organization or society. Multiculturalism as a social doctrine distinguishes itself as a positive alternative for policies of assimilation connoting a politics of recognition of the citizenship rights and cultural identities of ethnic minority groups and, more generally, an affirmation of the value of cultural diversity. It meant to ensure that all citizens can keep their identities, can take pride in their ancestry and have a sense of belonging. It is an environment enhanced if individuals are allowed and encouraged to live as they would value living. The freedom to pursue ethnically diverse lifestyles, for example, in food habits or in music, can make a society more culturally diverse precisely as result of the exercise of cultural liberty.

GROUND WAYS OF NURTURING MULTICULTURALISM IN INDIA

To nurture multiculturalism, India has been following some ground ways since earlier times such as *Tolerance and Acceptance of Foreign Views, Application of the Principles of Charity and Trust, Co-existence of Various Ages, The Respect for the Individual, The Open Attitude to Science, Recognition of the Rich Diversity, Nationalism, Secularism, Constitutional Protection, Universalism, Affirmative Action Programme* i.e. the policies designed to increase opportunities in employment, education and legislatures for lower castes. In India social inequality goes beyond caste-based discrimination; it revolves around three main axes, which include caste and tribal status, religion and gender. Apart from this *Joint Family Structure* also nurture multiculturalism. In India joint family's strength is now giving way to the nuclear families of the West. Grandparents are a good support system because they have time. ... it is ideal. Grandparents have the children to spend time with. Children have the wisdom of the grandparents which, sometimes the parents could not provide because they are busy with either making the home or the professional career. *Moral Values* which includes the value of sitting together and sharing that certainly enhance unity among various multiple identities of India. *Sports* are also the means of nurturing multiculturalism in India. For example Chess is commonly believed to have originated in northwestern India during the Gupta empire (Murray, 1913), where its early form in the 6th century was known as *chaturanga*. Other games which originated in India and continue to remain popular in wide parts of northern

India include Kabaddi, Gilli-danda, and Kho kho. Traditional southern Indian games include Snake boat race and Kuttiyum kolum. In these games, people of various sections participate and it ensures unity among various cultures.

GLOBALIZATION: A WAY TOWARDS NOURISHING MULTICULTURALISM

The concept of ‘multiple identities’ contains the idea that we have a number of cultural facets to our personal identities and, more importantly, loyalties. Yet this now taken-for-granted concept is in danger of lacking meaning in practice. Are multiple identities something that people ‘naturally’ have, that they acquire, or that they try to have? It is significant that only one or two people are needed to fan the fires of hostility and begin a conflict, but in order to achieve peace and security, very broad and strong bandings of people are needed who are comfortable with notions of multiple identities, and who have enough in common to work together. These groups will have found ways to work with diversity and the solution of this lies in keeping pace with changing era. As Banks (2004) argues that, “Citizens in a diverse democratic society should be reflective, moral, and active citizens in an interconnected global world ... should have the knowledge, skills and commitment needed to change the world to make it more just and democratic” (p. 298) so it is clear from this discussion that India must not be in isolation from globalization and as a component of globalization *English language* serves as a medium to compete internationally. In this view English is no more the killer language; rather it is a means of international communication which enhances cultural dynamics among speakers of different languages without threatening minority languages. *Studying abroad* also serves as a ‘thinking device’ that allows students to question their understanding of identity from a de-centered position and so achieve (a) reflexive understanding of the identity marker “global citizen”, and (b) intellectual and experiential understanding of intercultural identity as a form of social practice. *Media* acts in an opposite way by increasing our sense of belonging to a particular place. Apart from these *ICT* now plays a vital role in determining the parameters of culture.

PRESERVING MULTICULTURALISM

To preserve this multiculturalism of India, some strategies can be implemented such as *Situational Approach* i.e. to develop feelings of togetherness, expressing ‘Indianness’ (as is the case of Indians), which is shared by all Indian communities and which helps form an Indian Diaspora that has transnational affinities. There emerges a psychological feeling,

translated into words such as, ‘They are like us and belong to the same country from where I come’. *Globalization* i.e. to empower local communities, linking them to global resources and facilitating initiatives of peace and development, *Corporatist strategy*, in which different communities had autonomous status and ran the state as a partnership, *Glocalization* i.e. the ability of a culture when it encounters other strong cultures to resist those things that are truly alien and to compartmentalize those things that, while different, can nevertheless be enjoyed and celebrated as different, *Critical multiculturalism* in India which sees diversity itself as a goal, but rather argues that diversity must be affirmed within a politics of cultural criticism and a commitment to social justice, *McDonaldization* as, the convergence of global cultural thesis”. That is, the resemblance of life styles, cultural systems and transnational mode of behaviour(Beck, 2000:42), *Indianisation* is a situation in which immigrants are integrated in to Indian society, *Policy of Patent to preserve multiple identities of India* because in India the community leaders and the practitioners of the traditional arts and crafts are ignorant of dangers of their products being hijacked so there is necessity to protect the rights over their traditional products, and a proper initiative must be taken.

ACHIEVING SOCIAL SOLIDARITY IN INDIA

The Indian multiculturalist vision of how to live in plural societies incorporates two basic social processes. The first is the acceptance of the value of *cultural diversity* for a society by all constituent cultural communities and the second is the promotion of *equitable participation* by all groups in the larger society. In order to accomplish these two goals, multiculturalism involves *social change* to meet the needs of all the groups living together in the plural society.

MONOCULTURE: A MENACE TO THE ADVANCEMENT OF A NATION

Of course, the sense of belonging to a group and having a group identity is a source not merely of pride and joy, but also of strength and confidence. And yet, a “solitarist” approach/monoculture view to human identity (to national, religious, ethnic partition of the population) which sees human beings as members of exactly one group can be dangerous for example the mobilizations of Sangh Parivar (family of Hindutva organizations) to create a national-religious singular identity in India is damaging the plural and multicultural nature of co-existence.

THE ROAD AHEAD – WHAT INDIA CAN AND SHOULD DO

Conscious of the composite and fragile nature of its own multicultural identity, India must today show exemplary responsibility where its own multicultural heritage is concerned, and with regards to its present day and future cultural life. This responsibility must involve a greater sensitivity in its contacts with other cultures. So ultimately it can be concluded in the context of India that the future of India not only depends of globalization but on the multiculturalist vision as the Chairperson of Education Commission i.e. Kothari Commission (1964-66) D.S. Kothari says after presenting report of the year 1964-66 that the title of report in present scenario should be Education for Character Development rather than Education and National Development because the pride of being Indian not lies in only being economically developed but to be morally developed and the character formation cannot take place in isolation. It requires a multiculturalist society and it is the unique feature of India that still in such a technological era, all educational commissions in India always focus on moral development in educational system of India.

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PRESENT STATUS OF VICTIMS IN INDIA: IMPLEMENTATION OF POLICY AND LAW

S. Aruna Sri* & Prof. A. Subrahmanyam**

INTRODUCTION

Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. The operative principle is fair trial and justice to both, the accused and the victim of crime. Application of this principle involves a delicate judicial balancing of competing interests of the accused, the public and the victim. Where an offence is committed, the State apprehends the accused and brings him to trial. He is convicted and sentenced to undergo punishment, if found guilty. Does this complete the wheel of criminal justice? What about the crime victims? Traditionally, it may have been sufficient that the criminal is caught and punished. But, the modern approach is to also focus on the victims of crime. It is all very well that the accused is given a fair and just trial; that the guilty are punished; that the convicts and prisoners are given a humane treatment; that jail conditions are improved and the erstwhile criminals are rehabilitated, but what about the crime victims? What is the status of crime victims in the Criminal Justice system? While the accused is protected with all the resources available at the expenditure of the State, the victim is left to fend for himself with little or no support from the State machinery.

PRESENT STATUS OF VICTIMS IN INDIA

Since last several years, some amendments have been made in criminal laws in India giving some rights to crime victims at different stages of criminal justice system but so far as status of crime victims in criminal justice system in India is concerned, it is inadequate and requires legislative attention. A crime victim has right to oppose the release of accused on bail but he has no right or status to be informed if bail is filed. Except in few matters, he is not a necessary party in criminal revisions, appeals or writs filed by accused. His evidence is necessary for recording conviction of accused but he need not be informed for hearing on the

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point of sentence. He is entitled to get compensation but before determination of compensation, he has no vested right to be heard. A victim has no status to watch the trial. There are definite places for judge, prosecutor, defence lawyer, accused and staff of court in court room but no place has been assigned to victim in a court room to watch the progress of trial.

INTERNATIONAL APPROACH

Even definition of the word ‘victim’ in section 2 (wa)¹ inserted by Criminal Laws (Amendment) Act 2008 in Cr.P.C is quite narrower than that of international approach in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly in its resolution no. 40/34 dated 29th November, 1985 which provides, ‘victims of crime’ are persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws prescribing criminal abuse of power.

Identification of offender and his prosecution has been purposely avoided to be used in this definition in order make it wider and beneficial to victims. It may be noted that Criminal Injuries Compensation Act, 1995 passed in UK provides that the Secretary of State shall make arrangements for the payment of compensation to or in respect of persons who have sustained criminal injury. Section 9(4) of the Act stipulates that sums required for the payment of compensation in accordance with the Scheme shall be provided by the Secretary of State out of money provided by Parliament. So, the funding is by the State and not by the offender. Consequently, The Criminal Injuries Compensation Scheme (2001) was framed in U.K which, inter alia, specifies the standard amount of compensation payable in respect of each type of injury and compensation is payable irrespective of the criminal being apprehended or not and independent of the trial of the accused.

THEORY OF STATE COMPENSATION

History of payment of compensation by state may be traced in the Hammurabi Code of

¹ Section 2 (Wa) CrPC- “victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir”.

ancient Babylonian² which makes the earliest reference to state compensation for victims of crime. It provides, if the robber is not caught, then shall he who was robbed claim under oath the amount of his loss; then shall the community, on whose ground and territory and in whose domain it was, compensate him for the goods stolen. If persons are stolen, then shall the community pay one mina of silver to their relatives?³

This principle was well accepted in England in the Anglo-Saxon period of the seventh century.⁴ The Kentish laws of Ethel best contained specified amounts of compensation for a large number of crimes ranging from murder to adultery. In the early Common Law of Middle England, if a man was murdered, the victim's family was entitled to a wergild of four pounds. However when the criminal justice system was separated from the civil system with growing principle of sovereign immunity in criminal law, the offences like murder, robbery and rape did not remain within the category of tort to be settled by compensation but were regarded as crimes against society and were punishable as such. Hence, state compensation disappeared and the state played a punitive role, imposing punishment for not only the harm done to individual victims but also harm done to the king or feudal lord. But the doctrine of state compensation to victim again attracted attention of sociologists and jurists. Jeremy Bentham⁵, has said that due to the presence of the social contract between the state and the citizen, victims of crime should be compensated when their property or person was violated. It is the role of the state to prevent crime and protect people and property. If the state is unable to prevent a crime it falls upon the state to support the victim. Thus modern approach of victimology acknowledge that a crime victim has right to be adequately compensated, rehabilitated and repaired irrespective of identification and prosecution of offender and the

² “An eye for an eye ...” is a paraphrase of Hammurabi's Code, a collection of 282 laws inscribed on an upright stone pillar. The code was found by French archaeologists in 1901 while excavating the ancient city of Susa, which is in modern-day Iran. Hammurabi is the best known and most celebrated of all Mesopotamian kings. He ruled the Babylonian Empire from 1792-50 B.C.E. Although he was concerned with keeping order in his kingdom, this was not his only reason for compiling the list of laws. When he began ruling the city-state of Babylon, he had control of no more than 50 square miles of territory. As he conquered other city-states and his empire grew, he saw the need to unify the various groups he controlled.

³ The Code of Hammurabi ; Translated by L. W. Kin

⁴ Anglo-Saxon England refers to the period of the history of the part of Britain that became known as England, lasting from the end of Roman occupation and establishment of Anglo-Saxon kingdoms in the 5th century until the Norman Conquest of England in 1066 by William the Conqueror. Anglo-Saxon England did not have a professional standing law enforcement body like our modern police. In general, if a crime was committed then there was a victim, and it was up to the victim - or the victim's family - to seek justice.

⁵ Jeremy Bentham (15 February 1748 – 6 June 1832) was a British philosopher, jurist, and social reformer. He is regarded as the founder of modern utilitarianism.

payment of such compensation should be made by state.

APPROACH IN INDIA

The international trend was not followed in India. Identification and prosecution of offender has been necessary for giving any relief to crime victim till the amendment in the Cr.P.C. in the year 2008. The reasons are obvious. Internationally, the liability to compensate the crime victim is responsibility of state and hence the focus is about identification of victim and the harm caused to him. But in India, the offender has to compensate the crime victim and hence successful prosecution is necessary. Section 2(wa) of Cr.P.C provides that “victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir. Use of the word “for which the accused person has been charged” in this definition makes the legislative intention clear.

Specific provision for compensation to victim was inserted in Cr.P.C. as section 357 in pursuance of the recommendation of the Law Commission in its Forty-first Report (1969). This provision states, “Court may award compensation to victims of crime at the time of passing of the judgment, if it considers it appropriate in a particular case, in the interest of justice”. A similar provision in the Probation of Offenders Act, 1958 may be found though it is applicable only in cases where offenders are directed to be released on probation. However, awarding compensation under these provisions depends on conviction of accused and we all are aware that rate of conviction in India is quite low, i.e, about 10% only due to various reasons and the convictions are subject to appeals and revisions which is a time taking process. Thus section 357 Cr.P.C or similar provisions in Probation of Offenders Act are quite inadequate and the delay in making it available to the crime victim would itself defeat the purpose. The other statutes in India making provisions for compensation to victims are Works Man Compensation Act, Fatal Accidents Act, Motor Vehicles Act and Domestic Violence Act, which provides that wrong doer or his master, should pay compensation to victims. Insertion of S. 357A in the Cr.P.C. by Amendment Act,2008 w.e.f. from 31/12/09 and the Bihar Victim Compensation Scheme 2011 are welcoming steps where the responsibility of state for compensation and rehabilitation of victim irrespective of identification and prosecution of accused have been acknowledged. I shall discuss the beneficial provisions of this scheme in detail separately at latter part of this address.

RIGHTS & STATUS OF CRIME VICTIMS

In the resolution of UN General Assembly in the year 1985 (as referred earlier), four rights and status of crime victims has been recognized, which are-

- i. Access to justice and fair treatment,
- ii. Restitution,
- iii. Compensation &
- iv. Assistance.

However, the Indian law is mainly focused about payment of compensation to victims of crime as well as rehabilitation and giving some financial assistance to him. The status of crime victims about access to justice and fair treatment may be properly appreciated in relation to the four different stages of criminal justice system, which are:

- 1) Right to mobilize the criminal justice system in action by lodging FIR or complaint,
- 2) Right and status of victim during investigation of a criminal case,
- 3) Right and status of victim during trial and
- 4) Right and status after judgment in criminal case.

Right to mobilize the Criminal Justice System

So far as right to mobilize the criminal justice system is concerned, the crime victim has no special or distinguishable status or privilege and normal rule of law is that any person can set the criminal law in motion. However, in respect of offences relating to marriage, dowry torture and defamation, the victim as aggrieved party has been given exclusive right to file complaint. Some privileges have been given to victims of rape and cognate offences. If such victim is physically or mentally handicap than her statement shall be recorded by lady police officer or lady officer at a place convenient to such victim. It has been further provided that statement of lady as informant or witness during investigation shall be recorded by lady police officer or lady officer. But all such provisions mainly relate to gender justice and protection of the dignity and privacy of ladies. The hardship of general public including crime victim in lodging FIR, vis a vis, harassing attitude of police officers in institution of a case, even after an order u/s-156(3) Cr.P.C. by a Magistrate came to consideration of Hon'ble

Supreme Court in a case *Lalita Kumari v. State of U.P.*⁶ Three interim judgments have been reported so far, in relation to the said case. Due to conflicting opinion in several cases as to whether a police officer has option to do some preliminary inquiry before lodging an FIR, the matter has been referred to larger bench in Hon'ble Supreme Court and clear verdict in that respect is awaited.

While a crime victim is engaged in his treatment or is under shock and terror, some other person may get first opportunity to lodge FIR about an occurrence. In such a situation, the limited status of victim is further curtailed. Sometimes, the real culprit lodges FIR of the occurrence with concocted or different story and it causes hardship to poor victim in institution of FIR of cross case. If the police submit final report after investigation, notice is mostly issued to the informant of the case, and the crime victim, if not informant, remains unaware about the result of the investigation. In criminal revisions, appeals, and writ petitions filed by accused, the informant is mostly impleaded as opposite party. If the law is amended that after receiving any information of occurrence from any person other than crime victim, the officer-in-charge of the police station, shall enter such information in the station diary and proceed to search & take statement of victim of crime also, which may be made the basis of FIR, it will naturally strengthen the status of crime victim in criminal justice system and his right of access to justice and fair treatment may be ensured to some extent.

RIGHT & STATUS OF VICTIM DURING INVESTIGATION

A crime victim has no right or status during investigation of a case. Even the criminal courts have also no right to interfere in investigation. The victim cannot withdraw a case at investigation stage inspite of the fact that the complaint, which was sent to police station u/s 156(3) Cr.P.C. was filed by him. The statement of victim or other witness cannot be recorded u/s 164 Cr.P.C. until it is sponsored by investigation officer. Same is the position about holding T.I. Parade of person or property, forensic examination of any seized article or viscera etc. If post mortem houses are inspected, it will be found packed with samples of viscera which were never collected and sent for forensic examination. The investigation agencies have been given such wide and unbridled powers in investigation. But the experience show that a criminal case mostly fails due to delay and latches in investigation. Recently accused parsons were acquitted in Bathani mascre case due to faulty investigation

⁶ 2012(2) SCC (Cri) 1

and list of such cases is quite long. Hon'ble Courts in various rulings has observed about such lapses in investigation which was proved to be fatal in criminal trial. If the prosecution fails due to faulty investigation, the crime victim never gets justice. If the police have been given such a wide and unfettered discretion in investigation, why not there is a clear provision fixing liability on state to compensate the crime victim if the prosecution fails due to latches in investigation. Moreover, liberty should be given to state to reimburse itself by realizing the amount of compensation from the erring IO.

At this stage, the interpretation of Hon'ble Supreme Court in judgment delivered in *Sakiri Vasu v. State of U.P.*⁷ may be quoted wherein the Apex Court observed that-

The interpretation given in the said ruling need detailed consideration by the Law Commission. Whether the powers of monitoring investigation are available only in respect of cases instituted under orders u/s 156(3) Cr.P.C. or it may be exercised in respect of other investigations also is a moot question for clear interpretation and legal provision. It is high time that Law Commission should carefully examine and recommend incorporation of a clear provision in this respect in Cr.P.C.

The victim may oppose release of an accused on bail or releases of any property seized during investigation, or oppose the prayer of accused in criminal revision, appeal and writs filed, but he has no status to be necessarily informed by court, when such an applications are filed by accused. If the crime victim is not the informant in FIR, he does not get information in above mentioned matters and thus after institution of FIR, the victim has no alternative but to visit court every day to verify as to whether any bail application, release application or criminal revision against any order has been filed by accused. A simple amendment in Cr.P.C. giving right to crime victims to file caveat in such matters may give right of fair treatment to crime victims in criminal justice system.

RIGHTS & STATUS OF VICTIM DURING TRIAL

The status of crime victim in criminal trial is quite limited. He may compromise a compoundable case or withdraw petty cases instituted by him. He may apply for release of property seized in the case and he may appoint a lawyer to assist the prosecution. He is an important witness for successful prosecution. He has right to file criminal revision against an

⁷ 2008(1) SCC (Cri) 440

order passed in criminal trial and right to file appeal, in case of acquittal of an accused or inadequate sentence or compensation. However, a victim of crime has not been assigned any place in the court room to watch the trial even after his evidence is recorded in such trial. Even in complaint cases disclosing commission of session's triable offences, the crime victim has no status in prosecution of the case before the session court and he may only engage a lawyer to assist the prosecutor. He has no right to be informed at the time of hearing on the point of charge or imposition of sentence, after conviction of the accused nor need he be informed at the time of quantifying the compensation to be paid, if any. If right of filing caveat to give opportunity of hearing at such stages bail etc be given to the crime victims, it may be acknowledgement of his right of fair treatment in criminal justice system. The crime victim has also been given right during trial to plea bargain with accused. However disposal of cases as a result of plea bargain in Bihar is not encouraging. One of the reason is that even after paying compensation to the crime victim as a result of plea bargain, the accused has to confess his guilt and he is at the mercy of judge in awarding sentence. Under such circumstances, the accused persons prefer to bargain with the crime victims outside the court and the courts remain unaware as to whether the crime victim has properly been compensated or not. In spite right of privacy, recording of her evidence in camera and non-publication of her name in any manner either by media or in judgment, a victim of rape is mostly threatened by the accused persons to be defamed in her 'Sasural' and resultantly, in most of the cases of rape, the crime victims show reluctance in attending court for giving evidence against accused and if they are compelled, they mostly turn hostile. It is a matter of consideration by legislature to see as to whether the provision of S. 376 of the IPC(not other cognate sections) should be brought within the purview of plea bargaining, because under such circumstances the victim may be at least properly compensated and rehabilitated without there be any threat to be defamed. The choice will always remain with the victim.

RIGHTS & STATUS OF VICTIM AFTER JUDGMENT

Where the accused is convicted after trial, the victim need not be necessarily heard on the point of sentence. If he is present, the court may hear him also. The historical position in India was much better where the victim was given right to opt the final punishment to be awarded to accused. The most recent reference of such right of victim may be found in autobiography of M. Hidayatullah, the Former chief Justice of India published as "My Own

Boswell”⁸. In the chapter ‘my ancestors’, His Lordship has mentioned, that his uncle, from 2nd wife of his grandfather was murdered and subsequently the assailant was caught, tried and convicted. The punishment was either decapitation or imprisonment for life. The family of deceased had the option to claim either of the punishment for accused. Although, His Lordship has not mentioned the year when such an important right of victim’s family was prevalent but it must be after 1958 because his lordship grandfather shifted from Banaras to Bhopal in year 1958. No such right is available to victim at present nor there do such option in cases of death penalty because the victim mostly opts in retaliation. To my mind, the provision of plea bargain should be applicable after conviction with reasonable condition irrespective of punishment, of the offence in which the accused has been found guilty and the process of plea bargain must be reduced in writing.

There are two important rights of victim, after pronouncement of judgment. He may file a criminal appeal against the judgment of acquittal and also against inadequate sentence or compensation and he has right to get compensation. I have already referred earlier that payment of compensation in India u/s 357 CrPC or under the provisions of Probation of offenders Act is subject to conviction of accused and as per interpretation; the amount of such compensation should be dependent on the capacity of accused to pay. With due respect to such interpretation, I am tempted to say that an amount paid to a victim in reference to capacity of accused and without considering the actual harm suffered by crime victim may be a financial assistance and not compensation. The amount of compensation should be in proportion to the harm and sufferings of victim and must be paid by state immediately. Liberty may be given to state to reimburse itself from the estate of offender. Necessity in this respect, though quite late, was realized by parliament and by the code of criminal Procedure (Amendment) Act 2008, a very important and long awaited provision was inserted in Cr.P.C. as section 357A⁹. The newly added section provides about creating victim compensation fund

⁸ Memoirs M. Hidayatullah, *My Own Boswell*, Universal Law Publishing Co New Delhi

⁹ Section 357A:

- 1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
- 2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).
- 3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

for the purpose of compensation to the victim or his dependents loss or injury as a result of the crime and who, require rehabilitation and District Legal Service Authority has been given responsibility to decide the quantum of compensation to be awarded. The section further provides about awarding compensation irrespective of acquittal or discharge of accused and even in such cases where the offender is not traced or identified but the victim is identified.

THE BIHAR VICTIM COMPENSATION SCHEME, 2011

The Bihar Victims Compensation Scheme 2011 framed by Bihar government in the light of section-357A Cr.P.C. in this respect is a progressive step to be welcomed wherein the provision has been made for payment compensation or financial assistance for rehabilitation of the crime victim by the state, irrespective of the fact that the offender is traced or identified. Section 3 of scheme provides for creation of victim compensation fund at Legal Services Authority and also at Police Station level so that quick and immediate financial assurance may be given to victim in distress. The state government has to make necessary fund available by a separate budget. Section 5(6) in another appreciable provision which provides that in fixing the quantum of compensation, regard must be had to the minimum wages and the schedule to the Motor Vehicles Act 1988.

The approach in the scheme is quite reasonable and in accordance with international approach about victim compensation. However there appears to be some gray area in scheme which is likely to create confusion. The definition of word victim u/s 2(d) of the said Scheme restricts its payment and provides that-

“Victim means a person who himself has suffered loss or injury as a result of crime causing substantial loss to the income of the family making it difficult to meet their both ends without the financial aid or has to spend beyond his means or medical treatment of Mental/Physical injury and require rehabilitation.”

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- 4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
 - 5) On receipt of such recommendations or on the application under sub-section(4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.
 - 6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.”

Use of words ‘substantial loss’, ‘beyond his means’, ‘difficult to meet their both ends without the financial aid’ and ‘require rehabilitation’ may caution the authority to enter into inquiry and demand proof of such requirements from a person claiming himself to be victim. Section 5(6) providing consideration of minimum wages and the schedule to the Motor Vehicles Act 1988 gets restricted by section 5(4) of the scheme which refers the own schedule of scheme in fixing quantum of compensation to be awarded. Although section 4(a) waives the necessity of offender being traced or identified but section 6 provides that copy of the order of compensation passed under this scheme shall be mandatory placed on record of the trial court. Section 357A of CrPC is naturally governed by the definition of victim in section 2(wa) of the code but the scheme framed under section 357A has provided a different definition of the word victim. It would be better that Bihar Government should rectify such conflicting provisions to make the scheme quick and beneficial. The victim compensation fund must be readily and reasonably made available. Recently the face and body of a school going girl in Siwan was disfigured by throwing acid and demand of District Legal Services Authority for reasonable fund of Rs 35000 so that she may be given financial assistance for medical treatment.

RESTITUTION

The criminal law in India is also silent on the restitution of crime victim to its original status. Restitution of crime victim may be done at least in cases of criminal trespass by making provision of re-entry, loss of limb by providing artificial limb, rectification of disfigurement by cosmetic surgery.

OTHER VICTIMS, WHO NEED ATTENTION OF CRIMINAL LAW

Before concluding, I may mention that criminal law in India only recognizes, direct victims of crime and his dependents for payment of compensation, financial assistance and reparation. However, there are other crime victims also whose rights and status are yet to be considered. Imagine the plight and suffering of a child who is born as a result of rape with his biological mother or who is thrown in dust bin or orphan home after birth by his biological parents or mother. Merely conferring some limited civil rights of legitimacy and maintenance is not sufficient enough for the whole life sufferings of such child. He has no right to search and prosecute his biological father or mother or both. We have recently witnessed the long legal battle of one of such a person to prove him to be biological son of a famous politician.

Whether he can be criminally prosecute his biological father who not only criminally exploited his mother but had left him to live with stigma whole life. Such persons are consequential victims of crimes who have been given no status or right in criminal justice system. Also imagine the sufferings and loss of a patient or pregnant mother who is way laid while going to hospital in urgent need of medical help or a student, who could not give examination or a person who could not attend an interview due to blockage of road as a result of happening of some crime or due to damage to a bridge or road in terrorist activities. Outburst of public after happening of some occurrence sometimes results in destruction of property or physical injury of innocent persons. A person assisting the victim in distress or assisting police in apprehending a criminal sometimes suffers harm. An accused is punished as a result of evidences of so many witnesses out of whom, the direct victim may get compensation. But what about the other witnesses who are intimidated or harmed in revenge and suffers. These persons are incidental victims of crimes whose interests, rights and status have not been acknowledged in criminal law in India as yet.

Hence, it could be concluded that although some rights have been granted to victims in criminal justice system but still more is required, to give such crime victims a fair and respectable status.

NATIONAL AND INTERNATIONAL INITIATIVES IN INDIA TOWARDS ADR

Aparajita Kumari*

INTRODUCTION

In India, ADR has an important place, because of historical reasons. In regard to the global perspective, the international business community realised that court cases was not only time consuming but also very expensive. Various methods were adopted to solve the disputes. They are arbitration, conciliation, mediation, negotiation and the Lok Adalats¹.

Alternative Dispute Resolution is today being increasingly acknowledged in the field of law as well as in the commercial sector.² The very reasons for origin of Alternative Dispute Resolution are the tiresome processes of litigation, costs and inadequacy of the court system. It broke through the resistance of the vested interests because of its ability to provide cheap and quick relief. In the last quarter of the previous century, there was the phenomenal growth in science and technology. It made a great impact on commercial life by increasing competition throughout the world. It also generated a concern for consumers for protection of their rights.

The purpose of ADR is to resolve the conflict in a more cost effective and expedited manner, while fostering long term relationships. ADR is in fact a less adverse means, of settling disputes that may not involve courts. ADR involves finding other ways (apart from regular litigation) which act as a substitute for litigation and resolve civil disputes. These procedure are widely recommended to reduce the number of cases and provide cheaper and less adverse form of justice, which is a lesser formal and complicated system. Off late even Judges have started recommending ADR to avoid court cases.³

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¹ Dutta Advocate, 'Origin of Alternate Dispute Resolution in India', available at http://www.academia.edu/4371674/ORIGIN_OF_ALTERNATIVE_DISPUTE_RESOLUTION_SYSTEM_IN_INDIA (Accessed on 02.08.16)

² Meena Ajatshatu B.S. 'Perspective of Alternate Dispute Resolution', Legal Service India, available at <http://www.legalserviceindia.com/article/l167-Alternate-Dispute-Resolution.html> (accessed on 02.08.16).

³ Rout Chintamani, 'Alternative Dispute Resolution System In Justice Delivery System; Its Advantages In Disposing Of Civil Cases' International Journal of Political Science, Law and International Relations (IJPSLR), Vol.2, Issue 2, Sep 2012 -11, ISSN 2278-8832

The history of Alternative Dispute Resolution forum at international level can be traced back from the period of Renaissance, when Catholic Popes acted as arbitrators in conflicts between European countries. Many international initiatives are taken towards alternative dispute resolution. The growth of international trade is bound to give rise to international disputes which transcend national frontiers and geographical boundaries.⁴ ADR has given fruitful results not only in international political arena but also in international business world in settling commercial disputes among many co-operative houses. It is now a growing and accepted tool of reform in dispute management in American and European commercial communities. This can be considered as a co-operative problem-solving system. The biggest stepping stone in the field of international ADR is the adoption of UNCITRAL (United Nations Commission on International Trade Law) model on international commercial arbitration.⁵ An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application. General Assembly of UN also recommended its member countries to adopt this model in view to have uniform laws for ADR mechanism.⁶ Many international treaties and conventions have been enacted for establishing ADR worldwide. Some of the important international conventions on arbitration are:

- The Geneva Protocol on Arbitration clauses of 1923.
- The Geneva Convention on the execution of foreign award, 1927.
- The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award.

In India, Part III of Arbitration and Conciliation Act, 1996 provides for International Commercial Arbitration. Another step in strengthening the international commercial arbitration is the establishment of various institutions and organizations such as:

⁴ Justice Verma Jagdish Sharan, 'Defining the Proper Limits of Judicial Intervention in and Assistance for the Arbitral Process; How A-National Can an International Arbitration Be?', WIPO, Biennial IFCAI Conference, October 24, 1997, Geneva, Switzerland.

⁵ Dr. Padma. T., 'Utilise ADR Mechanism to the Possible Extent–For Reduction of Pending Cases And Litigations', April 4, 2013; Available at <http://businessandmanagementarticlesofkpcrao.blogspot.in/2013/04/utilise-adr-mechanism-to-possible.html>.

⁶ Mr. Hasurkar Bhargava, 'ADR- The Need of The Hour', Manupatra; Available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=314a9bc7-686d-4d8d8e8f357562cc7cce&txtsearch=Subject:%20Arbitration/>

- International Court of Arbitration of the International Chamber of Commerce (ICC).
- Arbitration and Mediation Centre of World Intellectual Property Organization.
- American Arbitration Association (AAA).
- Tehran Regional Arbitration Centre (TRAC).
- International Centre for Dispute Resolution (ICDR).
- Organization of American States (OAS), etc.

The alternative modes of disputes resolution include- Arbitration, Negotiation, Mediation, Conciliation, Lok Adalat, National and State Legal Authority. ADR strategies which facilitate the development of consensual solution by the disputing parties are therefore considered a viable alternative.⁷ ADR methods such as mediation, negotiation and arbitration along with many sub-strategies are increasingly being employed world over in a wide range of conflict situations, ranging from family and marital disputes, business and commercial conflicts, personal injury suits, employment matters, medical care disputes, construction disputes to more complex disputes of a public dimension such as environmental disputes, criminal prosecutions, professional disciplinary proceedings, inter-state or international boundary and water disputes.

The establishment of the International Centre for Alternative Dispute Resolution (ICADR), an independent non-profit making body, in New Delhi on May 1995 is a significant event in the matter of promotion of ADR movement in India.⁸ Lastly, to make arbitration and conciliation a success story in India, three things are needed:

- 1) A good law that is responsive to both domestic and international requirements.
- 2) Honest and competent arbitrators and conciliators without whom any law or arbitration or conciliation can succeed.
- 3) Availability of modern facilities and services such as meeting rooms, communication facilities, administrative and secretariat services.

⁷ Mr. Chandrachud Abhinav, ‘Alternative Dispute Resolution: Is It Always an Alternative’, Manupatra Articles; Available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=116c966f-2c9d-432e-be91-d5b1ea5fae50&txtsearch=Subject:%20Arbitration> .

⁸ Annual Report 2012-2013, The International centre for Alternative Dispute Resolution New Delhi, Available at <http://icadr.nic.in/file.php?123?12:1393479972>

The Apex Court in the case of *Food Corporation of India v. Joginder Pal*,⁹ also laid emphases on ADR system of adjudication through arbitration, mediation and conciliation as a modern innovation into the arena of the legal system and it has brought revolutionary changes in the administration of justice. It can provide a better solution to a dispute more expeditiously and at a lesser cost than in regular litigation.

The Supreme Court realized the scope of ADR in procedural as well in family law in *Jag Raj Singh v. Bripal Kaur*,¹⁰ the Court affirmed and observed that the approach of a court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. The Court also said that matrimonial matters must be considered by the courts with human angle and sensitivity and to make every endeavour to bring about reconciliation between the parties.

In India, to reduce the burden of the already overburdened courts the Alternative Dispute Resolution Mechanism has been put into practice and is gaining its popularity as days are passing by. The best example of the same is the use of **Online Dispute Resolution (ODR)** for resolving these disputes and misunderstandings. Online Alternative Dispute Resolution (OADR) or ADR online, refers to the use of internet technology, wholly or partially, as a medium by which to conduct the proceedings of ADR in order to resolve commercial disputes that arise from the use of the Internet. Neutral private bodies operate those proceedings under published rules of procedure. Thus ADR emerged as a powerful weapon for resolution of disputes at domestic as well as international level. It is developing as a separate and independent branch of legal discipline.

The judgment of the Supreme Court in *State of Maharashtra v. Dr. Praful B. Desai*¹¹ is a landmark judgment as it has the potential to seek help of those witnesses who are crucial for rendering the complete justice but who cannot come due to “territorial distances” or even due to fear, expenses, old age, etc. The Courts in India have the power to maintain anonymity of the witnesses to protect them from threats and harm and the use of information technology is the safest bet for the same. The testimony of a witness can be recorded electronically, the access to which can be legitimately and lawfully denied by the Courts to meet the ends of justice.

⁹ AIR 1989 SC 1263

¹⁰ AIR 2007 2 SCC 564

¹¹ AIR 2003 4 SCC 601

The judiciary in India is not only aware of the advantages of information technology but is actively and positively using it in the administration of justice, particularly the criminal justice. Thus, it can be safely concluded that the '*E-justice system*' has found its existence in India. It is not at all absurd to suggest that Online Dispute Resolution Mechanism (hereinafter referred as, ODRM) will also find its place in the Indian legal system very soon.

In court system, time zones and physical locations are obstacles to justice. It is very expensive as well as time consuming. Whereas, in ODRM all the procedures is carried over through online and so the matter is solved or rather settled within a few days or which may take a week or so, but shall not extend to months or year after years. With the help of this mechanism a wide range of disputes are solved in a very short time, where disputes includes inter-personal disputes i.e. consumer to consumer, business to business, business to consumer; marital separation; court disputes and inter-state disputes.

CONSTITUTIONAL BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION

"It is settled law that free legal aid to the indigent persons who cannot defend themselves in a Court of law is a Constitutional mandate under Article 39-A and 21 of the Indian Constitution. The right to life is guaranteed by Article 21."¹² The law has to help the poor who do not have means i.e. economic means, to fight their causes.

Indian civilisation put at about 6000 years back, at the dawn of civilisation (i.e. the age of the Vedas), when habitation was growing at river banks, was devoid of urbanization, where the Creator was presumed to be the head of humanity. With the dawn of industrialization, man was walking into orderly society, State and nation, dependence on law for orderly conduct gained momentum. With Indian Courts piling up cases for millennium (in the place of indigenous system which was cheap and quick), alternative dispute systems had to be found. Thus this system took birth. Once the dispute was resolved, there was no further challenge.¹³

The Constitutional mandate rescue operation began with *Justice V.R Krishna Iyer* and *Justice P.N. Bhagawati's Committees' Report*; weaker section thus became enabled to approach law courts, right from Munsiff Courts to the Supreme Court. Committee for the Implementation

¹² Ramaswamy K, J while delivering his key note address at Law Ministers' Conference, at Hyderabad on Sat. 25-11-1975, Para 6

¹³ Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition (2006), p. 397

of Legal Aid Services (CILAS) also came on to the scene and initiated methods of solving civil disputes in non-legal and non-formal fora.¹⁴

Based on this, States adopted (through State Legal Aid and Advice Boards) Lok Adalats and Legal Aid Camps, Family Courts, Village Courts, Mediation Centres, Commercial arbitration, Women Centres, Consumer Protection Forums, etc. which are the various facets of effective Alternative Dispute Resolution systems.¹⁵

The soul of good Government is justice to people. Our Constitution, therefore, highlights triple aspects of Economic Justice, Political Justice and Social Justice. This requires the creation of an ultra-modern disseminating infrastructure and man-power; sympathetic and planned; need for new technology and models; and remedy-oriented jurisprudence.¹⁶

LEGISLATIVE RECOGNITION OF ALTERNATIVE DISPUTE REDRESSAL

In India, laws relating to resolution of disputes have been amended from time to time to facilitate speedy dispute resolution. The Judiciary has also encouraged out of court settlements to alleviate the increasing backlog of cases pending in the courts. To effectively implement the ADR mechanism, organizations like ICA, ICADR were established, Consumer Redressal forums and Lok Adalats revived. The Arbitration Act, 1940 was repealed and a new and effective arbitration system was introduced by the enactment of the Arbitration and Conciliation Act, 1996. This law is based on the United Nations Commission on International Trade Law (UNCITRAL) model law on International Commercial Arbitration.

In *Sitanna v. Viranna*¹⁷, the Privy Council affirmed the decision of the Panchayat and Sir John Wallis observed that the reference to a village panchayat is the time-honoured method of deciding disputes. It avoids protracted litigation and is based on the ground realities verified in person by the adjudicators and the award is fair and honest settlement of doubtful claims based on legal and moral grounds.¹⁸ The legislative sensitivity towards providing a

¹⁴ *Ibid.* Para. 8

¹⁵ Supra Note 13 at p. 399

¹⁶ *Ibid*

¹⁷ AIR 1934 P.C. 105

¹⁸ Supra Note 3

speedy and efficacious justice in India is mainly reflected in two enactments. The first one is the Arbitration and Conciliation Act, 1996 and the second one is the incorporation of section 89 in the traditional Code of Civil Procedure (CPC).¹⁹

The adoption of the liberalized economic policy by India in 1991 has paved way for integration of Indian economy with global economy. This resulted in the enactment of the Arbitration and Conciliation Act, 1996 (new Act) by the legislature as India had to comply with well-accepted International norms. It superseded the obsolete and cumbersome Arbitration Act, 1940. The new Act has made radical and uplifting changes in the law of arbitration and has introduced new concepts like conciliation to curb delays and bring about speedier settlement of commercial disputes. The new Act has been codified on the lines of the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). One of the most commendable objects of the new Act is to minimize the role of the courts in the arbitration process. The Arbitration and Conciliation Act, 1996 laid down the minimum standards, which are required for an effective Alternative Dispute Resolution Mechanism. ADR was at one point of time considered to be a voluntary act on the part of the parties which has obtained statutory recognition in terms of *Civil Procedure Code (Amendment) Act, 1999; Arbitration and Conciliation Act, 1996; Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002*. The access to justice is a human right and fair trial is also a human right. In India, it is a Constitutional obligation in terms of Art.14 and 21. Recourse to ADR as a means to have access to justice may, therefore, have to be considered as a human right problem, considered in that context the judiciary will have an important role to play.²⁰

The Supreme Court of India has also suggested making ADR as 'a part of a package system designed to meet the needs of the consumers of justice'.²¹ The pressure on the judiciary due to large number of pending cases has always been a matter of concern as that being an obvious cause of delay. The culture of establishment of special courts and tribunals has been pointed out by the Hon'ble Supreme Court of India in number of cases. The rationale for such

¹⁹ Supra Note 13 at pp. 394- 395

²⁰ Justice Sinha. S. B., 'ADR: Mechanism and Effective Implementation', Available at <http://mediationbhc.gov.in/PDF/ADR.pdf>

²¹ See Justice R.C. Lahoti, Keynote address delivered at the Valedictory Session of two days Conference on "ADR, Conciliation, Mediation and Case Management" organised by the Law Commission of India, Available at: http://www.lawcommissionofindia.nic.in/adr_conf/Justice_Lahoti_Address.pdf

an establishment ostensibly was speedy and efficacious disposal of certain types of offences.²²

Shri M.C. Setalvad, former Attorney General of India has observed: “....*equality is the basis of all modern systems of jurisprudence and administration of justice... in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal, ... Unless some provision is made for assisting the poor men for the payment of Court fees and lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice.*”

RECENT DEVELOPMENTS

- **London Court of International Arbitration (the “LCIA”) in India Goes Alive**

In April 2009 the LCIA launched its first independent subsidiary in New Delhi. The LCIA is one of the longest-established arbitral institutions in the world and the LCIA in India offers all the services offered by the LCIA in the UK and is expected to extend the same care to ensure the expeditious, cost effective and totally neutral administration of arbitration and other forms of alternate dispute resolutions (ADR). Disputes can be resolved according to LCIA India's own rules, or the UNCITRAL rules, or any other procedures agreed by the parties. The LCIA published the LCIA India Arbitration Rules and the LCIA India Mediation Rules (both adopted to take effect for arbitrations/mediations commencing on or after 17 April 2010) rendering the LCIA India operational with this. Currently the following options are available to resolve disputes in India: the Indian court system, which is well-known to be a lengthy process; ad hoc arbitration in India, also subject to delays, expense and excessive judicial intervention; and arbitration using an offshore institution, notably the LCIA, ICC and SIAC in Singapore. The effectiveness of the LCIA in India will go a long way in allaying the fear of litigation delays in India and will help reduce litigation costs for the parties.

- **New Dispute Resolution Opportunities Offered By Investment Treaties**

²² Dutta Advocate, 'Origin of Alternate Dispute Resolution in India', p. 11, Available at http://www.academia.edu/4371674/ORIGIN_OF_ALTERNATIVE_DISPUTE_RESOLUTION_SYSTEM_IN_INDIA (Accessed on 02.08.16)

India has entered into bilateral investment treaties with a number of countries including Australia, France, Japan, Korea, the UK, Germany, Russian Federation, The Netherlands, Malaysia, Denmark and OPIC of the U.S. Each agreement makes provision for settlement of disputes between an investor of one contracting party and an investor of the other contracting party through negotiation, conciliation and arbitration. India is a party to the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), which provides for settlement of disputes between parties of members states under the Convention and the MIGA through negotiation, conciliation and arbitration. Under Indian law, the following types of differences cannot be settled by arbitration, but must be settled only through civil suits: matters of public rights; proceedings under the Foreign Exchange Management Act, 1999 which are quasi-criminal in nature; validity of IPR granted by statutory authorities; Taxation matters beyond the will of the parties; winding up under the Companies Act, 1956; and disputes involving insolvency proceedings.

- **Mandatory Submission to Alternate Dispute Resolution Mechanism**

Since arbitration in India is expensive and time consuming given the delays and lack of arbitrators, businesses are resorting to innovative methods of resolving disputes. It has now become imperative to resort to ADRM as contemplated by Section 89 of the Code of Civil Procedure 1908. There is a requirement that the parties to the suit must indicate the form of ADR, which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Act will apply and that will go outside the stream of the court. (*Shree Subhlaxmi Fabrics Pvt. Ltd. v. Chand Mal Baradia*, Civil appeal no: 7653 of 2004). The popularity and use of ADRM is increasing but it can achieve its best only if the same is integrated with the information technology. The ADR techniques are extra-judicial in character. ADRM is not proposed to displace in total the long-established means of resolving disputes by means of litigation. “It Only Offers Alternatives To Litigation”. Constitutional law and criminal law are areas, where ADR cannot surrogate courts - one has to take route of the existing traditional modes of dispute resolution.

- **Online Dispute Resolution in India (ODRM)**

Section 16 of the Act provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or authority of the arbitration agreement. Thus, the base provided by the Act is sufficient to accommodate the mandates of

ODRM. The ADR system can be efficiently used to settle online disputes by modifying it as per the requirement. It is time effective and cost efficient. It can also conquer the geographical obstacles. A complete techno-legal support is recognized and is being geared up beforehand.

- **Dispute Resolution Panel Gets Life in India to Settle Transfer Pricing Disputes**

Speedy resolution of tax disputes and certainty in tax aspects has been a long-standing demand of foreign companies doing business with/in India. The Indian Government finally reacted to this demand and announced ADRM in the form of a Dispute Resolution Panel (DRP) in the last budget. The DRP mechanism applies to Indian companies where the tax authorities have proposed to make an adjustment to the arm's length price in relation to their transactions with overseas affiliates. It also applies to all foreign companies who are assessed to tax in India. However, it does not apply to withholding tax orders passed by the tax authorities. The DRP as an ADRM would be welcomed by MNCs who either are reeling under the cumbersome, time consuming and expensive tax litigation process or have heard about India's reputation as a notorious tax jurisdiction. If the government can iron out procedural lacunas and provide sufficient capacity and competent officers to the DRP, it will finally be walking the talk on an ADRM.

- **Consultation Paper on Changes to the Indian Arbitration Act, 1966**

In April this year, the Indian Ministry of Law and Justice tabled a consultation paper on changes to the Indian Arbitration Act, 1966. The consultation paper acknowledges that in certain cases the Arbitration Act has been interpreted in ways that "defeated the main object" and also recognizes issues in the current law. In view of this several amendments have been proposed and some important changes are listed below:

- A clearer definition of 'public policy' as a ground for refusing enforcement of a foreign arbitral award. This will be a welcome change as an earlier Supreme Court decision had been viewed as authorising greater judicial interference in foreign awards;
- stricter timelines in arbitration; and

- Mandatory institutional arbitration in disputes of over Rs 5 crore (US\$1.11 million) unless expressly excluded by the parties in writing.

CONCLUSION

The business world has rightly recognised the advantages that the ADR in one form or the other is a right solution. It is felt that it is less costly, less adversarial and thus more conducive to the preservation of business relationships which is of vital importance in the business world. The use of ADR has grown tremendously in the international including tremendous expansion of international commerce and the recognition of global economy. Many governments around the world have supported the demand for ADR as an efficacious way of handling international commercial disputes. Many experts in this field are of the strong opinion that the impact of ADR on international commerce is great and will continue to expand. Numbers of ADR institutions are being established. In this background, the number for setting up the International Centre for Alternative Dispute Resolution, though was felt sometime, came to be true by the inauguration of the International Centre in India.²³

Even in international commercial arbitration with the risk of enforcement of the awards being held up indefinitely in the courts of the country where the award is sought to be executed, there is an increasing awareness of the utility of conciliation.²⁴

In the Far East, in particular in Japan and China, conciliation has long since been a preferred method for resolving disputes- this applies also to commercial disputes.

It is generally accepted that *res judicata* doctrine is also applied in the context of international arbitration, such that a final award has *res judicata* effect. *Res judicata* has been identified as a legally binding principle. There are four pre-conditions for the doctrine of *res judicata* to apply in international law, they are-

- i. Proceedings must have been conducted before courts or tribunals in the international legal order.
- ii. Involve the same relief.

²³ Rao, P.C & Sheffield William, ‘Alternative Dispute Resolution- What it is and how it works?’ Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011; Reddy Jayachandra K. ‘Alternative Dispute Resolution’, pp. 79-80

²⁴ Ibid at pp. 53-54

iii. Involve the same grounds.

iv. Between the same parties.²⁵

Res judicata in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal.

The ICJ has recognised and applied the principle of *res judicata* in various cases. Few cases are as such: In 1960, *Honduras v. Nicaragua*²⁶ arbitral award case concerning the arbitral award made by the King of Spain.

In its most recent practice the ICJ has relied on the res judicata principles in a matter of course fashion in the request for interpretation of the judgement of 11th June, 1998 in the Land and Maritime Boundary case between Cameroon and Nigeria and in the boundary dispute between Qatar and Bahrain case.

²⁵ Malhotra, Indu; ‘Res judicata in Arbitration’, NYAYA DEEP, Vol. V, Issue 01, Oct. 2004, p. 117

²⁶ (1986) ICJ 14

THE CONCEPT OF SOCIAL JUSTICE & DISTRIBUTIVE JUSTICE UNDER INDIAN CONSTITUTION

Mayuri Gupta*

INTRODUCTION

In 1947, India was an old nation but a new country. Poverty, illiteracy, ignorance and prejudices were in abundance in the country when we got freedom from British colonial rule. The transition of India from a feudal to a democratic order and from colonial bondage to a free society needed to protect individual's life, liberty and property by making it the primary responsibility of the state to maintain law and order so that the citizens can enjoy peace and security and of equality of status and opportunity. Hence, protecting the interest of the poorer section of the society was made the constitutional goal. The Indian Constitution has provided a well-knit provision of civil and political as well socio-economic rights for its citizens. The making of our Constitution had the blessings of an international environment of according respect to individual rights through proclamation of the Universal Declaration of Human Rights. Both part-III and part-IV of the Constitution were immensely benefited by the UDHR. It fine-tuned the concept of giving rights to the people. No other Constitution was benefitted in the manner the Indian Constitution was benefitted by the Declaration.¹

Granville Austin says, Indian Constitution is first and foremost a social document.² Its founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society.³ The new society was to be achieved through a socioeconomic revolution pursued with a democratic spirit using constitutional, democratic institution. Thus unity, social revolution, and democracy, were goals, which were mutually dependent and had to be sought together and not separately.⁴

PREAMBULAR RECOGNITION

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¹ Dr. Surya Narayan Misra, '*Constitutional Democracy, Judiciary and Social Justice in India*', Odisha Review, Jan- 2013

² Granville Austin, 'Indian Constitution: The Cornerstone of a Nation', New Delhi, Oxford University Press 2007, p.50; Also see, *Minerva Mills Ltd. v. Union of India* AIR 1980 SC 1789 at pp. 1805-1810

³ Ibid.

⁴ Ibid.

Social Justice is an expression which has found its way in the words of the Constitution and has become a part of the Constitutional expression. The Constituent Assembly even before it set out to fulfill its task of framing a Constitution for India declared in the Objectives resolution passed by it that social justice is one of the goals to be achieved. The Constituent Assembly declared its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution wherein shall be guaranteed and secured to all the people of India, justice, social, economic and political. It became the vision of the people of India and a promise of the Constitution speaking through its preamble and some of the enacting provisions that there shall be secured to all the citizens, social justice.⁵

The Preamble to the Constitution summarizes the aims and objectives of the Constitution.⁶ It is a genuine aid in the interpretation of the constitution. It put socialism in the Constitution as its guiding principle. Law of course, is not static, backward looking or a tradition bound.⁷ The preamble of the Constitution of India speaks of justice, social, economic and political and of equality of status and opportunity.

The makers of our constitution were highly influenced by the feeling of social equality and social justice. For the same reason, they incorporated certain provisions in the Constitution of India which reflects its form as a ‘social welfare state’. In fact the Preamble to the Constitution, which is based on the objectives resolution of Pandit Jawaharlal Nehru,⁸ asserts that ‘We the people’ of India, through this Constitution, aim at establishing a Sovereign, Socialist⁹, Secular, Democratic, Republic of India and to secure to all its citizens, JUSTICE-social, economic and political. The Constitution for this purpose has put across certain fundamental policy choices in the Constitution, in the form of Parts III and IV.

⁵ Srinath Sahay J., ‘SOCIAL JUSTICE’, Chairman, State Law Commission, Uttar Pradesh, JTRI Journal - Second Year, Issue 4 & 5, March, 1996.

⁶ Section-2 deals with Amendment of the preamble. In the preamble to the constitution: for the words “SOVERIGN” DEMOCRATIC, REPUBLIC, the words “SOVEREIGN” SOCIALIST SECULAR DEMOCRATIC, REPUBLIC shall be substituted. Be it enacted by Parliament in the Twenty Seventh Year of the Republic of India. The Constitution(Forty Second Amendment) 1976.s

⁷ Chitkar M.G and Mehatha P.L, ‘ *Lok Adalat And The Poor*’, p. 104.

⁸ Constituent Assembly Debates, Vol. 1, New Delhi, Parliament Secretariat, p.57; Also see, Rao B. Shiva (Ed). *The Framing of India’s Constitution*, Select Documents, 2 [Delhi, Universal Law Publishing Co. Pvt. Ltd.], 2006, pp.3-4

⁹ The expression ‘socialist’ was intentionally introduced in the Preamble by the 42nd Constitutional (Amendment) Act, 1976.

'In the preamble, justice, is not just an abstract concept. It conveys (as one of the purpose of the constitution) the removal of injustices to the extent possible, a theme projected by the Nobel Laureate, Professor Amartya Sen, in his *The Idea of Justice*:

...the strong perception of manifest injustice applies to adult human beings. What moves us, reasonably enough, is not the realization that the world falls short of being completely just- which few of us except- but there are clearly remediable injustices around us which we want to eliminate.

This is evident in our day-to-day life, with inequalities or subjugation from which we may suffer and which we have good reasons to resent, but it also applies to more widespread diagnoses of injustices in the wider world in which we live. It is fair to assume that Parisians would not have stormed the Bastille, Gandhi would not have challenged the empire on which the sun used not to set, Martin Luther King would not have fought white supremacy in 'the land of the free and the home of the brave', without their sense of manifest injustices that could be overcome. They were not trying to achieve a perfectly just world (even if they were any agreement on what that would be like), but they did want to remove clear injustices to the extent they could.¹⁰

The fact that 'the State' has been defined in the same manner, in both Parts III and IV, is possibly an indication, that the founding fathers of the Constitution, were of the opinion that the nation's ideals viz, national unity and integrity and a democratic and equitable society, to be achieved through a socio-economic revolution pursued with a democratic spirit using constitutional, democratic institutions.¹¹

The Supreme Court in *Minerva Mills v. Union of India*¹², observed, *There is no doubt that though the courts have always attached very great importance to the preservation of human liberties, no less importance has been attached to some of the Directive Principles of State Policy enunciated in Part IV.... The core of the commitment to the social revolution lies in parts III and IV. These are the conscience of the Constitution.*¹³

¹⁰ In the Preface to *The Idea of Justice*, Penguin Books, New Delhi, 2009, as cited in, Fali S. Nariman, 'The State of the Nation', Hay House India, p. 121.

¹¹ Supra Note 2

¹² AIR 1980 SC 1789

¹³ *Ibid* at pp. 1805-1810

The Court said that, rights enumerated in Part III of the Constitution of India are not an end in themselves, but are the means to an end, the end is specified in Part IV as Directive Principles of State Policy. Together, the two realize the idea of justice, which the Indian State seeks to secure to all its citizens.

SOCIAL JUSTICE AND INDIA

Indian Constitution, the cornerstone of the nation, was intended to promote social transformation in view of Granville Austin.¹⁴ The term ‘social’ is concerned with all human beings within the society and the term ‘justice’ is related with liberty, equality and rights. Thus social justice ensures liberty, equality and maintains their individual rights in the society. In other words, securing the highest possible development of the capabilities of all members of the society may be called social justice.¹⁵ Whenever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. Social justice found useful for everyone in its kind and flexible form. Although social justice is not defined anywhere in the constitution but it is an ideal element of feeling which is a goal of constitution. Feeling of social justice is a form of relative concept which is changeable by the time, circumstances, culture and ambitions of the people.¹⁶

Social Justice is the keystone of Indian Constitution. Indian Constitution makers were well known to the utility and shortcoming of various principles of justice. They wanted to search such form of justice which could fulfill the expectations of whole revolution. Pt. Jawahar Lal Nehru put an idea before the Constituent Assembly '*First work of this assembly is to make India independent by a new constitution through which starving people will get complete meal and cloths, and each Indian will get best option that he can progress himself.*'¹⁷

The Judges of the highest Court of the country has time and again established the ideals of social justice in relation to our constitution: In the words of Justice Vivian Bose¹⁸-

'After all, for whose benefit was the Constitution enacted: what is the point of making all this pother about fundamental rights? I am clear that the Constitution is not for the exclusive

¹⁴ Supra Note 2 at p. 11

¹⁵ Dr. Puneet Pathak, Social Justice Under Indian Constitution, International Journal Of Legal Developments And Allied Issues, p. 33

¹⁶ V.R. Krishna Iyear , Social JusticeSunset or Dawn (1987) p.53

¹⁷ Supra Note 12

¹⁸ Former Judge, The Hon'ble Supreme Court of India

*benefit of governments and States; it is not only for lawyers, politicians and officials, and those highly placed. It also exists for the common man, for the poor and the humble for those who have businesses at stake, for ‘the butcher, the baker, and the candlestick maker’. It lays down for this land a rule of law as understood in the free democracies of the world.*¹⁹

Social inequalities of India expect solution equally. Under Indian Constitution the use of social justice is accepted in wider sense which includes social and economical justice both. According to Chief Justice Gajendragadkar:

*‘In this sense social justice holds the aims of equal opportunity to every citizen in the matter of social & economical activities and to prevent inequalities.*²⁰

The Indian judiciary has taken up the administration of social justice through the judicial activism in the exercise of their writ jurisdiction. The higher judiciary realized that India being a welfare State is committed to the cause of social justice and the courts must respond to the cause keeping in view the needs of the society. The Supreme Court in *S. D. Nakara v. Union of India*²¹ and *Minerva Mills*²² observed that the expression ‘social justice’ in the preamble recognizes the Bentham’s principle of greatest happiness of the greatest number without deprivation of legal rights of persons.

The concept of justice, particularly, Article 46 seeks to protect the weaker sections from social injustice. Similar provisions also exist in Article 15 (4) regarding special provisions for backward classes; Article 16 (4) regarding reservation for backward classes; Article 330 regarding special provisions relating Scheduled Castes and Scheduled Tribes in reserving certain seats of parliament, Article 335 regarding relaxation of minimum qualifying standard for admission to certain professions, e.g., medical engineering etc.

In the case of *Indra Sawhney v. Union of India*,²³ the Supreme Court held that a positive duty is imposed on the State protection of tribals and weaker section of people.

Article 39-A contains a directives for legal aid to poor sections access to justice and law courts. It is on the basis of this provisions that legal aid programmes have been launched by

¹⁹ *Bidi Supply Co. v. Union of India* AIR 1956 SC 479, as cited in, Fali S. Nariman, ‘The State of the Nation’, Hay House India, p. 115.

²⁰ P.B. Gajendragadkar, *Law, Liberty and Social Justice* (1964) pp. 77, 99

²¹ AIR 1983 SC 927

²² AIR 1980 SC 1789

²³ AIR 1993 SC 487

most of the states in India. The Legal Services Authorities Act, 1987 has been enacted in order to achieve the objective enshrined in Article 39-A. For the disposal of cases expeditiously and without much cost, Lok Adalats have been constituted under the Act which are functioning as voluntary and conciliatory agencies.²⁴

The Directive Principles contained in Art 39(a) to (g) further requires the State to remove inequalities of wealth and ensure distributive justice to all alike and ensure fair distribution of material wealth to remove disparity between ‘haves’ and ‘have nots’. Similarly, Art 43 regarding living wages and Art 43-A which was introduced by 42nd Constitutional Amendment, 1976 regarding participation of workers in management of industries are directed towards ensuring social justice for the industrial workers. Moreover, Art 41 regarding public assistance to disabled and aged persons and Art. 42 regarding securing just and humane condition of work etc. are all directed towards the attainment of the object of social justice.

DISTRIBUTIVE JUSTICE

Social justice may be in the form of distributive justice. When it operates at the level of distributive justice, it seeks to ensure a fair distribution of social benefits and burdens among the members of the community. The manifestation of the distributive justice may be found in the concept of wages, bonus, gratuity, family pension, subsidized ration to poor, etc. which are intended to secure minimum standard of living to needy and poor persons.

The concept of distributive justice is by no means new to the jurisprudential thinking. Aristotle, the Greek philosopher of his time, commented: '*Distributive justice exercised in the distribution of wealth, honor and other divisible assets of the community which may be allotted among the members in equal and unequal shares by the legislator according to merit.*'

The essence of distributive justice is to secure a balance or equilibrium among members of the society. The concept has been well recognized under Article 14, 15 and 16 of the Constitution of India. Again, the provisions contained in directive principles of state policy are directed towards attainment of distributive justice²⁵, which is a form of social justice.²⁶

²⁴ Dr. N. V. Paranjape, *Studies in Jusrisprudence and Legal Theory*, Central Law Agency 7th Edition, p. 271

²⁵ Articles 37, 41, 42 etc

Elaborating the concept of Distributive justice as one of the forms of social justice Mr. A.P. Sen in *Lingappa Pochanna v. State of Maharashtra*²⁷ observed:

'Our Constitution permits and even directs to administer what may be termed as distributive justice. The concept of distributive justice in the sphere of law making connotes, inter-alia, the removal of economic inequalities and rectifying the injustice resulting from dealing or transactions between unequal in society, law should be used as an instrument of distributive justice to attain a fair division of wealth among the members of the society based upon the principle from each according to his capacity, to each according to his needs.'

The Apex Court in this case held that distributive justice is aimed at lessening of inequalities by differential taxation, imposing ceiling on holdings both agricultural and urban, and regulating contractual transactions so that those who have hitherto been deprived of their fortunes by unconscionable bargaining should be resorted their legitimate dues. Thus, law should take upon itself the task of forced redistribution of wealth so as to achieve a fair division of material resources among the members of society.²⁸

CONCLUSION

The recent trend of public interest litigation has got revolution effect, the whole law relating to writ remedies under the constitutional provisions as provided in Article 32 and Article 226. Now even an ordinary prayer of petition to the Supreme Court under article 32 or to the High Court under Article 226, may be taken up and heard by these courts as writ petition if it is filed on behalf of some group of persons who themselves are unable to move to the Court due to poverty, misery etc. it implies that this is a way to deliver justice at the door-steps of the poor, down-trodden and persons of meager resources. The pro-active approach of judiciary in *People's Democratic Right v. Union of India*,²⁹ *Bandhua Mukti Morcha case*,³⁰ *M. C. Mehta v. Union of India*,³¹ *Olga Tellis v. State of Maharashtra*,³² *Maneka Gandhi v. Union of India*,³³ *Vishakha v. State of Rajasthan*³⁴ are some of the best illustrations to demonstrate the

²⁶ Distributive justice and corrective justice are two forms of social justice.

²⁷ AIR 1986 SC 389

²⁸ Dr. Vinay N. Paranjape, *Dimensions of Reference Making Power of the Government in Industrial Adjudication*, (2004), p. 55

²⁹ AIR 1983 SC 1473

³⁰ AIR 1984 SC 802

³¹ AIR 1987 SC 1086

³² AIR 1986 SC 567

³³ AIR 1978 SC 597

incorporations of the principles of social justice through this new trend of writ jurisdiction. It seeks to remove injustice and ensure social justice to all those who had been hitherto deprived of the access to justice through law courts through all these years.³⁵

³⁴ AIR 1997 SC 3011

³⁵ Supra Note 24 at 273

THE STUDY OF VICTIMOLOGY AND CRIME VICTIMS

S. Aruna Sri* & Prof. A. Subrahmanyam**

INTRODUCTION

Victimology is the scientific study of victimization, including the relationships between victims and offenders, the interactions between victims and the criminal justice system that is, the police and courts, and corrections officials and the connections between victims and other social groups and institutions, such as the media, businesses, and social movements¹. Victimology is however not restricted to the study of victims of crime alone but may cater to other forms of human right violations that are not necessarily crime. It is an important part of the criminal justice system along with criminology and penology. ‘Victimology’ is a subset of the broader field of criminology, which is the study of crime and of criminals. Whereas conventional approaches to criminology focus on understanding categories of criminals, however, for example, rapists and serial and spree murderers, Victimology, as the name suggests, focuses on understanding the victims of crime. Those engaged in the study of Victimology look for patterns among victims of specific types of crime to better understand, and hopefully provide for some level of predictability, what is motivating the criminal. For example, a serial rapist might be focused solely on women who fit certain descriptions or who live in certain types of homes or apartments they may provide easy access for the rapist. When patterns are identified among victims of a specific type of crime, it becomes increasingly possible to conjure an image of the individual or individuals perpetrating the crimes in question. Similarly, by studying the victims of crimes, including any relationships that exist between the victim and the perpetrator, it becomes increasingly more likely that an accurate portrait of the criminal can be drawn.

HISTORICAL OVERVIEW OF VICTIMOLOGY

Victimology as an academic term contains two elements: One is the Latin word ‘Victim’ which translates into ‘victim’. The other is the Greek word ‘logos’ which means a system of

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¹ Andrew Karmen, 2003, Crime Victims: An introduction to Victimology, Wodsworth Publishing

knowledge, the direction of something abstract, and the direction of teaching, science, and a discipline. The concept of a science to study victims and the word ‘Victimology’ had its origin with the early writings of Benjamin Mendelssohn (1937; 1940), these leading to his seminal work where he actually proposed the term ‘Victimology’ in his article “A New Branch of Bio-Psycho-Social Science, Victimology” (1956). It was in this article that he suggested the establishment an international society of Victimology which has come to fruition with the creation of the World Society of Victimology, the establishment of a number of victimological institutes (including the creation here in Japan of the Tokiwa International Victimology Institute); and, the establishment of international journals which are now also a part of this institute. Mendelssohn provided us with his Victimology vision and blueprint; and, Mendelssohn is referred to as *The Father of Victimology*.

The nature and extent of victimization is not adequately understood across the world. Millions of people throughout the world suffer harm as a result of crime, the abuse of power, terrorism and other stark misfortunes. Their rights and needs as victims of this harm have not been adequately recognized. The UN General Assembly adopted the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. This provides a universal benchmark by which progress can be assessed in meeting the needs of victims of crime and abuse of power. Much progress has been made since 1985 primarily by governments in Western Europe, North America and elsewhere. They have implemented programmes and laws to give effect to those basic principles but even in affluent countries much work remains. Additional resources are needed everywhere especially for countries that are developing and in transition. The rights of the victims of crime and abuse of power are still not adequately recognized in any part of the world. Their families, witnesses and others, who aid them, are still unjustly subjected to loss, damage or injury. They too often suffer hardship when assisting in the prosecution of offenders. The recent UN Congress in Bangkok also drew attention to the victims of terrorism. Victims of stark misfortunes such as natural disasters, accidents and diseases share similar trauma, loss and suffering. Services to meet the needs of victims have much in common between victims of crime, abuse of power and stark misfortunes.²

MEANING OF VICTIMOLOGY

² John P.J.Dussich, VICTIMOLOGY – PAST, PRESENT AND FUTURE

According to Schultz (1970) - *Victimology is the study of the degree of and type of participation of the victim in the genesis or development of the offences and an evaluation of what are just and proper for the victim's welfare.*

According to Drapkin and Viano (1974) - *Victimology is the branch of criminology which primarily studies the victims of crime and everything that is connected with such is victim.*

Antilla says, *Victimology studies by logical, Sociological, Psychological criminological aspects about the victims and brings into focus the victim-offender relationship and the role played by the victim in occurrence of the offence.*

In an extended sense, Separovic defined this doctrine, *Victimology is the entire body of knowledge regarding victims, victimization and to preserve the rights of victim ; thus it is composed of knowledge drawn from such fields Asiminology, safety, Law, Medicine, Psychology, Social Work, Education and Public Administration.*

Victimology is science of study of the relationship between victims and violators of law or offenders. Government has recently reinforced this political commitment in the form of funds for the National Association of Victim Support Schemes (NAVSS). In 1964 the United Kingdom became one of the 1st countries to establish a policy commitment to victims of crime in the form of criminal injuries compensation Board. The reports of 1st and 2nd British Crime Surveys have begun to shed some light on the nature of the relationship between victims and offenders. In particular, attention has been paid to the attitude that victims have towards the treatment of offenders.

The United Nations General Assembly has recommended payment of compensation to the victims of crime by the State. Unfortunately, the victims of communal riots, dacoit, arson and rape are not getting compensation in our present justice system. Since the State is under duty of protect the life, liberty and security of its citizens, it is bound to pay compensation to the victims of crime irrespective of whether the accused is convicted or acquitted of the criminal charge. As the government is indifferent to the crying need of the victims, the apex court directed the Government to set up a criminal injuries compensation Board, under the supervision of criminal courts for awarding compensation to victims of all crimes including rape or dacoit, in addition to the directions given to National Commission for women to evolve a proposal for rehabilitation and compensatory justice to raps victims.

Until recently, victims were not studied. They tended to be seen as passive recipients of the criminal's greed or anger, in the wrong place at the wrong time. The study of victims, known as Victimology, has resulted in theoretical and research studies, and an awareness of the victim has grown in the public consciousness. There is now recognition that victims have traditionally not been treated particularly well by the criminal justice system. Victims suffer not only during the crime, but that there are also sometimes physical and psychological complications. Perhaps the first theory to explain victimization was developed by Wolfgang³ in his study of murders in Philadelphia. Victim precipitation theory argues that there are victims who actually initiated the confrontation that led to their injuries and deaths. Although this was the result of the study of only type of crime, the idea was first raised that victims also might play a role in the criminal activity.

The state of the victims in the discipline of Victimology has gone far ahead in the west. The victims have a right to speak and to be heard at all stages of the criminal prosecution bail, release, evidence, sentence and parole. 'Victims impact statements' are recorded and extensively used by the jury and the judge whilst convicting and sentencing respectively and thereafter 'victims impact assessments' are required to be done as a continuous act.

THEORIES OF VICTIMOLOGY

A number of theories have been advanced to explain some of the findings indicated above. Life-style theory, for example, argues that certain life-styles increases one's exposure to criminal offenses and increases risk of victimization, while other life-styles might reduce risk. For example, increased risk would be likely if a person is single, associating with other young men (who are at greater risk for criminal activity), living in urban areas, and going to public places late at night. Reduced risk would be associated with staying home at night, living in a rural area, being married and staying at home, and earning more money. According to this explanation, the probability of crime depends partially on the activities of the victim. Crime is more likely when victims place themselves in jeopardy.

Victimology does not have many theories exclusively from the perspective of victims. However, some of the theoretical explanations from Criminology of crime causation are

³ Dr. Marvin E .Wolfgang (Nov 14, 1924- Apr 12, 1998) was considered to be a pioneer and world leader in quantitative and theoretical criminology. He was one of the world's most cited authors in criminology and his research and critical commentaries appear on homicide, penology, criminal statistics and delinquency criminology.

borrowed by Victimologists to understand crime victimization. One such theory is the Routine Activities Theory (Cohen & Felson, 1979).

The Routine Activities Theory

This theory says that crime occurs whenever three conditions come together: (i) suitable targets; (ii) motivated offenders; and (iii) absence of guardian's assistance from the government, though it is not a right of the victim as it is not a law but only an Executive order of the Government (Chockalingam, 2003).

Psycho-social Coping Theory

Psycho-social coping is a general theoretical model from which any form of victimological phenomena can be explained. The model uses behavioural versus legal concepts. Phenomenology, Control Theory, Stress Theory, Symbolic Interactionism and Behaviourism are the primary roots of this theoretical model. Most part of the literature on coping has evolved from psychology, dealing with just cognitive responses to various forms of stress (Dussich, 1988). According to Pearlin and Schooler (1978), coping refers to things that people do to avoid being harmed by life-strains. To understand how and why some victims are able to overcome life's problems and some others not, a psycho-social coping model was developed in order to comprehensively deal with psychic, social and physical variables.

A psycho-social coping model is an attempt to explain the dynamics of how people deal with problems in their environment. The term 'environment' used in this model is referred to as 'Coping Milieu'. The main term in the Coping Milieu is the Coping Repertoire, which is made up of a person's coping skills and supported by four other interacting resources: (i) time; (ii) social assets; (iii) psychic assets; and (iii) physical assets. The coping process is the dynamic component of the model and is made up of four sequential phases:

The result component of the coping model is concerned with: (i) either the elimination, or (ii) reduction, or (iii) retention of stress. The information obtained from the coping process is fed back to the coping repertoire and in turn the original coping repertoire is altered. The repertoire, problems, coping processes and the products are the key elements of coping (Dussich, 1988; Dussich, 2006). Both social and physical resources help the individuals to deal with stress in specific situations.

CURRENT SITUATION OF VICTIMS OF CRIME AT EACH STAGE OF THE CRIMINAL JUSTICE PROCESS IN INDIA IN COMPARISON TO INTERNATIONAL STANDARDS

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly, 1985), considered the ‘magna carta’ for victims, provides the basic framework of principles which in the last two decades have been vociferously debated and converted as victims’ rights by some of the developed countries. The international standards expected of the countries in the treatment of victims by the CJS agencies at different stages of the criminal process have been elaborately detailed in the UN Handbook on Justice for Victims (United Nations Office for Drugs and Crimes, 1999, chapter III, pp.56-76).

The police play a pivotal role in victim assistance as it is the first agency victims come into contact with after being victimized by a crime. The attitude of the victims towards the entire CJS will be based on the kind of treatment the victims get from the police whom they first encounter. Unfortunately, in India the police are still not oriented to meet the expectations of the victims as per the UN Handbook on Justice for Victims.

The police at the field level who are in actual contact with the victims in day to day crime situations are blissfully ignorant of the international developments in the field of Victimology and the better treatment victims deserve from the police. The treatment of victims by the police also forms the basis for a negative perception of the CJS, more particularly, the police, because the ‘treatment with compassion and respect for their dignity’, emphasized by the UN Declaration, is missing completely. Because of the police behaviour and their attitude in general, the legal community opposes any criminal law reforms which bestow trust on the police and enhance their powers. Even today, Section 25 of the Indian Evidence Act, “*No confession made to a police officer shall be proved as against a person accused of any offence*”, remains in force. But the Government and the Police Academies pursue a policy of sensitizing the police to a better treatment of victims. The Handbook says that “victims have a valid interest in the prosecution of the case and should be involved at all stages of the proceedings”. In practice, the entire court proceedings protect the rights and interest of the accused, neglecting the victims’ interest. Excepting that the victims are summoned to tender evidence in courts, the various services and assistance to be rendered by the prosecution to victims (pp.66-68) are not practiced in the criminal courts in India. In a nutshell, victims are alien to the criminal proceedings as they have no rights excepting to be a witness when

summoned by the court. With regard to the role of the judiciary in justice for victims, judges are by and large sympathetic towards victims, on many of the requirements, such as separate waiting halls, information about the criminal proceedings.

ROLE AND TYPOLOGY OF VICTIMS

Just as certain persons are thought to have a high probability of indulging in criminal behavior, so also some others may have a greater likelihood of being victimized. Von Hentig made the first ever study of the role of victims in crime and found some general characteristics among them which may be summarized as follows.⁴

- i. The poor and ignorant immigrants and those who are requisite or greedy are the victims of offences involving frauds.
- ii. Quite often, the victims of larceny (theft) are intoxicated or sleeping persons.
- iii. The depressed or apathetic person is a victim because he is “deprived of warning posts” and is indifferent to harm or injury “in prospect”
- iv. Wanton or sensual persons may become victim due to situations precipitated by themselves
- v. A lonesome and heartbroken person may become especially vulnerable because of the loss of critical faculties in him.

Among ‘general classes of victims’, Von Hentig includes the young, females, the old, the mentally defective and deranged, the intoxicated, immigrants, members of minority groups and the ‘dull normal’.

Mendelsohn studied victims on the basis of their contribution to crimes and classified them into the following categories,⁵

- i. Completely innocent victims, e.g., children, persons in sleep.
- ii. Victims with minor guilt and victims of ignorance such as pregnant women who go to quacks for procuring abortion.

⁴ The Criminal and His Victim (1948) at p.284

⁵ V. M. Rajan, Victimology in India, at p.10

- iii. Voluntary victims, such as the ones who commit suicide or are killed by euthanasia.
- iv. Victims who are guiltier than the offenders, such as persons who provoke others to commit crimes.
- v. The criminal type of victims who commit offences against others and get killed or hurt by others in self defence.

VICTIMOLOGY AND INDIAN POSITION

The world is full of crime and criminals, tragedy and violence. Crime is a social phenomenon. No society primitive or modern, no country whether under developed or developing or developed is free from its clutches. The by-product of the crime i.e. victim is equally bound to emerge. The focus has mainly and always been on criminal and crime, none on victim. So, the forgotten man in the legal world and society happens to be the “victim” for whose plight remedy we have the whole system. Criminal Law has always discouraged the acts or omissions which in general can affect right in rem and violators have always been punished with strict sanctions but the crime rate is not falling and State is in regular quest to preserve social solidarity and peace in society. The initial focus of criminologists were only on the aspect of punishment but the focus started shifting when they encountered with the fact that the person who is victim of crime is getting nothing out of the whole process of criminal justice system or is getting a so called satisfaction by seeing the offender punished. Therefore jurists, penologist etc in all countries started giving their full attention to the cause of victim in form of compensation and hence the whole debate started about ways, means and extent of compensation.⁶

The evolution of the concept can be traced both historically and theoretically. Historically the concept of victimology in crude sense was not only part of Hammurabi's code but also existed in developed sense in ancient Greek city-states. The concept of compensation was also not new to India and existed in more developed sense than the present. Manu in Chapter VIII, verse 287 clearly says that:

If limb is injured, a wound is caused or blood flows, the assailant shall be made to pay the expense of the cure or the whole.

⁶ Abhishek Anand, Compensation to the Victim of Crime: Assessing Legislative Frame Work and Role of Indian Courts.

He further in verse 288 says that: He who damages the goods of another, be it intentionally or unintentionally, shall give to the owner a kind of fine equal to damage.

The quote regarding the same can be found even in the works of Brihaspati. This is in brief the law relating to compensation to the victim of crime that even existed in ancient civilization of east as well as west. As far as tracing of gradual evolution of the concept is concern the whole era till mid of 1900 can be generally divided in to three parts. In initial year of human civilization when the human started living together especially after stone Age, because of absence of rule of laws and authoritative political institution, right to punish or rather might to punish (in from of eye for eye or money) was with the individual and hence in crude sense the concept of compensation existed at that time even but line of caution that need to be bear in mind is the fact that in primitive society criminal victim relationship was based on brutal mentality of attack being the best defense. Then came the era in which the social control in terms of mechanical solidarity creped in the society and the offence against an individual belongs and from this era, due to advent of concept of collective responsibility clan or tribe started replacing the victim's right. The third stage started with the advent of strong monarch after medieval period. In this stage on one hand criminal law saw far reaching change in all its discipline but on other the hand position of victim right to compensation remained unheard due to advent of more strong institution named state and crystallization of a notion that King/State is parent of his subjects and Crime is breach of peace of King or State. So it was King/State who had the right to punish and get monetary compensation. This position remained as it is even with advent of democracy and the cause of victim remained unnoticed until 1950 and after that a movement stared in U.S. and European countries and the concept again got prominence. Theoretically radical criminologist championed the idea of cause of victim, which was result of reaction against the then criminological thinking that was only concern with criminals and not the victims.⁷

The victim is the forgotten man of our criminal justice system. He sets the criminal law in to motion but then goes into oblivion. Crime affects the individual victims and their families. Many crimes also cause significant financial loss to the victims. The impact of crime on the victims and their families ranges from serious physical and psychological injuries to mild disturbances. The Law Commission of India, 1996

⁷ *Supra Note 1*

The Law Commission in its report in 1996, states, The State should accept the principle of providing assistance to victims out of its own funds, (i) in cases of acquittals; or (ii) where the offender is not traceable, but the victim is identified; and (iii) also in cases when the offence is proved⁸. The Justice V. S. Malimath Committee⁹ has made many recommendations of far-reaching significance to improve the position of victims of crime in the CJS, including the victim's right to participate in cases and to adequate compensation. Some of the significant recommendations include: The victim, and if he is dead, his or her legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years' imprisonment or more; In select cases, with the permission of the court, an approved voluntary organization shall also have the right to implead in court proceedings; The victim has a right to be represented by an advocate and the same shall be provided at the cost of the State if the victim cannot afford a lawyer; The victim's right to participate in criminal trial shall include the right: to produce evidence; to ask questions of the witnesses; to be informed of the status of investigation and to move the court to issue directions for further investigation; to be heard on issues relating to bail and withdrawal of prosecution; and to advance arguments after the submission of the prosecutor's arguments; The right to prefer an appeal against any adverse order of acquittal of the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation; Legal services to victims may be extended to include psychiatric and medical help, interim compensation, and protection against secondary victimization; Victim compensation is a State obligation in all serious crimes. This is to be organized in separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration.¹⁰

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2008 MADE THE FOLLOWING CHANGES IN THE CODE OF CRIMINAL PROCEDURE, 1973 PERTAINING TO THE CRIME VICTIMS AND THEIR RIGHTS

Under Section 2(wa) of the Code of Criminal Procedure 1973, *victim* means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression victim includes his or her guardian or legal heir.

⁸ Law Commission of India Report, 1996

⁹ The Justice Malimath Committee on Reforms of Criminal Justice System (Government of India, 2003)

¹⁰ Kumaravelu Chockalingam, Measures For Crime Victims In The Indian Criminal Justice System

Under Section 24 of the principal Act, in sub-section (8), a proviso was inserted, namely to authorize the Court to permit the victim to engage an advocate of the choice to assist the prosecution.

Under Section 157 of the principal Act, in sub-section (1), after the proviso, a new proviso was inserted to help the victims of rape in preserving her privacy, as follow:

'Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.'

Similarly use of audio/video for recording statements of victims has been provided in section 161 of the principal Act, in sub-section (3), the following provisos was inserted, as follow:

'Provided that statement made under this sub-section may also be recorded by audio video electronic means.' Likewise in section 164 of the principal Act, in sub-section (1), for the proviso, the following provisos was substituted,

'Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence.'

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

Investigations of Child Sex Abuse to be done in time bound under sec. 173 of the principal Act, under the following sub-section which was inserted,

(1A) The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station;

b) In sub-section (2), after clause (g), the following clause was inserted, (h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376B, 376C or 376D of the Indian Penal Code.

In section 275 of the principal Act, in sub-section (1), the following proviso was inserted,

'Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.'

In Camera Trials and identity protection is ensured under Section 327 of the principle Act, (a) in sub-section (2), after the proviso, the following proviso was inserted,

'Provided further that in camera trial shall be conducted as far as practicable by a woman Judge or Magistrate'

(b) in sub-section (3), the following proviso was inserted,

'Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties.' Regarding the victim's right to Compensation, after section 357 of the principal Act, the following section was inserted,

"357A. (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section(1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) *The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.”*

As to the Right to appeal for the Victim against the verdict of the Trial Court, in section 372 of the principal Act, the following proviso was inserted,

‘Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.’

A perusal of the above cited newly added provisions shows that the present CrPC is sensitive to the plight of the victims.

JUDICIAL RESPONSE TO CRIME VICTIMS IN INDIA

The Indian judiciary has invoked the Constitution of India more particularly the Article 21 that guarantees the right to life and personal liberty, apart from the relevant provisions of the Cr.P.C. and other laws to order compensation to the crime victims.¹¹

In *Rudul Sah v. State of Bihar*¹², the petitioner was kept in jail for a period of fourteen years after he was acquitted, on the specious ground that he was insane. He was directed to be released by the Supreme Court in a petition for habeas corpus moved on his behalf. In addition to release, the detenu also claimed compensation on account of the deprivation of his fundamental right guaranteed by Article 21. The question arose whether the Supreme Court has power to award compensation on account of such deprivation in a petition under Article 32? It was answered in the following words by Chandrachud, C.J., speaking for a Bench of three Judges (at p. 1086),

“Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal

¹¹ *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922

¹² AIR 1983 SC 1086

detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation, Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers....”

Accordingly, a total sum of Rs. 35,000/- was awarded by way of compensation.

In Sebastian, *M. Hondray v. Union of India*¹³ a writ of habeas corpus was issued directing the Union of India, secretary, Ministry of Home Affairs, and the 21st Sikh Regiment, Phungrei Camp, to produce two persons who were taken to Phungrei Camp by Jawans of 21st Sikh Regiment on 10.03.1982. The respondents were directed to produce the persons before the Supreme Court on 12.12.1983. They were not produced on the plea that they were not in the custody or control of the said respondents. It was also stated that in spite of extensive search, they could not be traced. The court concluded, on the basis of the material placed before it, that the said two persons must have met an unnatural death, and that prima facie it would be an offence of murder. The Court could not, however, say who was responsible for the offence. The question that faced the Supreme Court was as, what is the relief to be granted in that petition for issuance of a writ of habeas corpus, where the respondents were clearly found guilty of willful disobedience to the writ issued? The Court directed that a measure of exemplary costs as is permissible in such cases, respondents Nos. 1 and 2 shall pay Rs. 1 lakh to each of the aforementioned two women (wives of the missing persons) within a period of four weeks from today. The basis of the said award is, however, not Article 21, but willful disobedience to the process of the Court amounting to contempt of Court. The said amount was awarded as a measure of exemplary costs.

¹³ AIR 1984 SC 1026

In *Bhim Singh v. State of J&K*¹⁴ a Member of the Legislative Assembly was arrested by police officers while he was on his way to Srinagar to attend the Legislative Assembly Session. He moved a writ of habeas corpus and, on an examination of relevant facts; the Supreme Court found that Bhim Singh was deprived of his constitutional rights guaranteed by Articles 21 and 22(2). This is what Chinnappa Reddy, J. said, speaking for the Court (at p. 499):

"The police officers...acted deliberately and mala fide and the Magistrate and the Sub-Judge aided them either by colluding with them or by their casual attitude. We do not have any doubt that Shri Bhim Singh was not produced either before the Magistrate on 11th or before the Sub-Judge on 13th, though he was arrested in the early hours of the morning of 10th. There certainly was a gross violation fo Shri Bhim Singh's constitutional rights under Articles 21 and 22(2),.... We have no doubt that the constitutional rights of Shri Bhim Singh were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs or otherwise is now established by the decisions of the Court in Rudul Sah v. State of Bihar¹⁵, and Sebastian M. Hongray v. Union of India¹⁶. When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs. 50,000/- within two months from today..."

In *State of Gujarat v. Hon'ble High Court of Gujarat*¹⁷, the Supreme Court took cognizance of the rights of crime victims to restorative justice by making the following observations:

One area which is totally overlooked in the above practice is the plight of the victims. It is a recent trend in sentencing policy to listen to the wailings of the victims; rehabilitation of the prisoner need not be by closing the eyes towards the suffering victims of the offence. A

¹⁴ AIR 1986 SC 494

¹⁵ *Supra Note 12*

¹⁶ AIR 1984 SC 1026

¹⁷ AIR 1998 SC 3164 at para 46-49

glimpse at the field of victimology reveals two types of victims. First type consists of direct victims i.e. those who are alive and suffering on account of the harm inflicted by the prisoner while committing the crime. Second type comprises of indirect victims who are dependents of the direct victims of crimes who undergo sufferings due to deprivation of their breadwinner.

Restorative and reparative theories have developed from the aforesaid thinking. In the ‘Oxford Handbook of Criminology’, Andrew Ashworth, Prof, of Oxford University center for Criminological Research has contributed the following instructive passage:

“Restorative and Reparative theories: These are not theories of punishment. Rather, their argument is that sentences should move away from punishment of the offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theories are therefore victim-centered (see e.g. Wright 1991), although in some versions they encompass the notion of reparation to the community for the effects of crime. They envisage less resort to custody, with onerous community-based sanctions requiring offenders to work in order to compensate victims and also contemplating support and counseling for offenders to reintegrate them into the community. Such theories therefore tend to act on a behavioral premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than notions of just punishment on behalf of the State. Legal systems based on a restorative rational are rare, but the increasing tendency to insert victim orientated measures such as compensation orders into sentencing systems structured to impose punishment provides a fine example of Garland’s observation that institutions are the scenes of particular conflicts as well as being means to a variety of ends, so it is no surprise to find that each particular institution combines a number of often incompatible objectives, and organizes the relations of often antagonistic interest groups”.

Section 357 of the Criminal Procedure Code, 1973 provides some reliefs to the victims as the court is empowered to direct payment of compensation to any person for any loss or injury caused by the offence. But in practice the said provision has not proved to be of much effectiveness. Many persons who are sentenced to long term imprisonment do not pay the compensation and instead they choose to continue in jail in default thereof. It is only when fine alone is the sentence that the convicts invariably choose to remit the fine. But those are cases in which the harm inflicted on the victims would have been far less serious. Thus the restorative and reparative theories are not translated into real benefits to the victims.

It is a constructive thinking for the State to make appropriate law for diverting some portion of the income earned by the prisoner when he is in jail to be paid to deserving victims. In the absence of any law for that purpose we are prevented from issuing a direction to set apart any portion of the prisoner's earned wages for payment to the victims because of the interdict contained in Article 300A of the Constitution. Hence we suggest that the State concerned may bring about legislation for the purpose.

In *Delhi Domestic working Womens Forum v. Union of India*¹⁸, public interest litigation invoked the benign provision of Article 32 of the Constitution of India, at the instance of the petitioner Delhi Domestic Working women's Forum to espouse the pathetic plight of four domestic servants who were subject to indecent sexual assault by seven army personnel. The apex court after hearing the victims and their plight made the following observations which are self-explanatory,

*"We have given our careful consideration to the above. It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such cries eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims, For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings."*¹⁹

"We will only point out the defects of the existing system. Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had had to suffer as a result of the rape itself. As stated in Modem Legal Studies Rape and the Legal Process by Jennifer Temkin²⁰, "It would appear that a radical change in the attitude of defence counsel and judges to sexual assault is also required. Continuing

¹⁸ (1995) 1 SCC 14 : JT 1994 (7) 183

¹⁹ Ibid at para 13

²⁰ 1987 Edition, page 7

*education programmes for judges should include re-education about sexual assault. Changes in the substantive law might also be helpful in producing new ways of thinking about this type of crime.*²¹

VICTIM AND CRIMINAL JUSTICE ADMINISTRATION

One important and basic factor in the administration of criminal justice is the victim's decision as to whether he should invoke the judicial process. There are a number of motives and factors responsible for the wide gap between the actual volume of the crime and the reports made to the police about it. Only in the 1940's did scholarly interest in the criminal-victim relationship develop, although the founders of criminology had been aware of how crucial it was *Hans Von Hentig, Benjamin Mendelsohn, and Henry Ellenberger*, the last in his study of the psychological relationship between the criminal and his victims.

A movement for the recognition of the modern victim of crime as deserving more effective remedy than the traditional practice of bringing civil suits was begun by the English penal reformer *Margery Fry* in 1955²². Her call for reform was heeded in New Zealand in 1963, when that country's parliament established the first crime compensation tribunal. This board has discretionary power to award public compensation to the victim or his dependents in the case of certain specified offences. The next year, Great Britain's Tory government announced a similar but non statutory program. In the United States the first jurisdiction to adopt the compensation principle was California; which enacted its programs in 1965 and put it into operation two years later. Since that time, similar or related programs have been established in some thirty states in the United States and in all the Canadian provinces. Financial restitution by the offender to the victim represents another development in the legal handling of the victim, in the United States, at least forty normal restitution programs are in operation.

Section 377(1) of the United States Code is in respect of Crime victims' Rights Act (CVRA). The Rights of Crime Victims are set out thus;

- (a) Rights of Crime Victims, a crime victim has the following rights:

²¹ *Supra Note 18 at para 14*

²² Margery Fry (1874-21 April 1958) was a British prison reformer as well as one of the first women to become a magistrate. After the First World War, she lived with her brother Roger and began the work on prison reform in which she was to be involved until the end of her life. In 1918, she became secretary of the Penal Reform League, which merged with the Howard Association in 1921 to form the Howard League for Penal Reform.

- (1) The right to be reasonably protected from the accused.
- (2) The rights to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony as that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

COMPENSATING THE VICTIM

Following the dictum set out by Justice Benjamin Cardozo²³, “*justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true*”, the Court held that the victim impact statement would not per se be barred under the Eighth Amendment.

Thus, a State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the

²³ *Snyder v. Massachusetts* 291 U.S.97 (1934) Benjamin Nathan Cardozo (May24,1870- July 9, 1938) was an American jurist who served on the New York Court of Appeals and later as an Associate Justice of the Supreme Court. Cardozo is remembered for his significant influence on the development of American common law in the 20th century. His work The Nature of the Judicial Process is recognized as one of the best legal literature in the world.

death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

In the case *Nilabati Behera*²⁴ the Supreme Court enjoined Court to evolve new tools and mould the remedies for harm done variously. In that case death of a son of 22 years in police custody entitled a mother to compensation as an heir of the “victim” by way of monetary amends and redressal by the State since the death constituted violation of the Fundamental Right to Life by the State’s instrumentalities or servants.

Payment of compensation to the victims of crime, for the injury caused to him, has not been institutionalized in the Penal Law of India; or any legal right to be compensated, and has been created in favour of the victim. In case of irreversible injury monetary compensation is the sole effective remedy. In India there is neither a comprehensive legislation nor a statutory scheme providing for compensation by State to offender to victims of crime. The legislative vacuum of a legal right to monetary compensation for violation of human rights has been supplemented by the higher judiciary by developing a parallel constitutional remedy. The Supreme Court for the first time in *Rudal Sah v. State of Bihar*²⁵ made it categorically clear that the higher judiciary has the power to award compensation for violation of fundamental rights through the exercise of writ jurisdiction and evolved the principle of compensatory justice in the annals of human rights jurisprudence²⁶.

By the landmark judgment in Hari Kishan’s case²⁷ Supreme Court not only awarded compensation of Rs. 50,000/- to the victim, but also directed the subordinate criminal courts to exercise the power of awarding compensation to the victims of offences in such a liberal way that the victims may not have to rush to the civil courts for compensation to the victims. Unfortunately, the subordinate judiciary is rarely invoking this provision to award compensation to the victims, where the accused persons are acquitted of the charge on benefit of doubt or on any technicalities of laws. The Court also laid down that the quantum of compensation has to be determined by taking into account the nature of the crime, the justness of the claim made by the victim and the capacity of the accused to pay the same. The

²⁴ *Nilabati Beher (Smt) alias Lalita Behera v. State of Orissa & Others* (1993) 2 SCC 746

²⁵ *Supra Note 12*

²⁶ *Ibid*

²⁷ *Hari Kishan Singh & State of Haryana v. Sukhbir Singh* (1998) 3 SCC (Cri) 541

amount of compensation, according to the Court, must be reasonable and will depend upon the facts and circumstances of each case.

Right of the rape victim to receive compensation flows from art.21 of the Constitution. Every court has jurisdiction to grant compensation not only at the final stage of trial but also to award interim compensation at any interlocutory stage of trial in view of reported judgment in Bodhisattwa Gautam case.²⁸ In *Delhi Domestic Working Women's Forum*²⁹, the Supreme Court indicated a scheme to award compensation to rape victim both at the time of trial i.e., interim compensation to rape victim and at the end of the trial. The Supreme Court suggested the establishment of criminal injuries compensation Board under Art 38(1) of the Constitution of India. The rape victim shall be paid compensation by the Criminal Injuries Compensation Board of the court.

In *D. K. Basu*³⁰, Supreme Court has laid down number of guidelines to prevent custodial violence including rape, and has recognized that custodial rape could be compensated as the same violated Rights of life and personal liberty guaranteed under Article 21 of the Constitution. In *Bodhisattwa Goutham*, Apex Court has held that the Court of Session have every authority to award interim compensation if prime facie case against the accused has been established that a person had sexual relationship with the prosecutrix on false assurance of marriage. Supreme Court has directed the guilty person to pay Rs. 1000/-pm as interim compensation to the prosecutrix during pendency of case. This judgment is a precedent for granting interim compensation to the rape victims. In case of *Madhukar N. Mardikar*³¹ Supreme Court declared that even a prostitute has a right to privacy and no person can rape her just because she is a woman of easy virtue. In fact, these judicial interventions only lead to the amendment to the Criminal Procedure Code, providing a role to the victim also to play a vital part in the criminal justice administration.

VICTIMOLOGY AND VICTIM COMPENSATION: CONCLUSION

The status of victim in criminal proceedings in India is dealt with in a few provisions of the Criminal Procedure Code, which are too insufficient to be considered fair in dispensing equal justice under law (Article 14)

²⁸ *Supra Note 11*

²⁹ *Supra Note 18*

³⁰ *D. K. Basu v. State of West Bengal*, (1997) SCC (Cri) 92

³¹ *State of Maharashtra & Others v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57

If the victim of a cognizable offence gives information to the police, the police are required to reduce the information into writing and read it out to the informant. The informant is required to sign it and receive a copy of the FIR (Section 154 (1) and (2) of the Cr.P.C). If the police refuse to record the information, the victim –informant is allowed to send it in writing and by post to the Superintendent of Police concerned [Section 154(3)]. If the police refuse to investigate the case for whatever reason, the police officer is required to notify the informant of that fact [Section 157 (2)]. Alternatively, victims are enabled by section 190 of the Cr.P.C. to avoid going to the police for redress and directly approach the Magistrate with their complaint.

In the granting and cancellation of bail, victims have substantial interests though not fully recognized by law. Section 439(2) allows a victim to move the Court for cancellation of bail; but the action thereon depends on the stand taken by the Prosecution. Similarly, the prosecution can seek withdrawal at any time during trial without consulting the victim Section 321 CrPC. Of course, the victim may proceed to prosecute the case as a private complainant. However, the victim cannot challenge the prosecution decision to withdraw at the trial stage itself.

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