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Lex Revolution

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“The nation cannot live on a lie. Courts play a vital institutional role in preserving the rule of law. The judicial process should not be allowed to be utilised to protect the unscrupulous and to preserve the benefits which have accrued to an imposter on the specious plea of equity”

Dr. D. Y. Chandrachud, J.

Food Corporation of India v. Jagdish Balaram Bahira,
(2017) 8 SCC 670, para 56

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Lex Revolution

UGC Approved Periodical Indexed Journal of Social & Legal Studies

Quarterly Published International Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

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

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

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MESSAGE

It is with great pleasure we announce the release of Volume III Issue-4 (2017) of ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

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

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

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

- **Editorial Board**

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BALANCING THE TWO POLES: JUDICIAL REVIEW AND PARLIAMENTARY DEMOCRACY

Dr. Rashmi Khorana Nagpal*

INTRODUCTION

In countries like India and U.S.A, which operate under a Federal system of Government, there is a division of functions between the central Government and the component state government. Such a division of functions is an essential feature in any federal system, and the process of judicial review makes the Courts responsible for enforcing the provisions of the constitution, statute and the Rules of the federal system. This power necessarily includes the authority to declare ultra vires any state legislation or other action of the instrumentality of the state, which infringes on the constitutional authority of the Central government or any other State in the federation. The Supreme Court of India and the U.S.A. have a power to declare the Acts of Parliament and Congress unconstitutional respectively. Courts call this the judicial review over the acts of the Legislative and Executive Departments of the Government. The Courts have the authority to declare actions of the other two wings Invalid as contrary to the Constitutional Law. This system is termed as ‘Judicial supremacy’. This is enjoyed by the Indian and American courts. No such authority resided in the highest courts of England, France, Russia and Switzerland.¹ The principle of judicial review became an essential feature of written Constitutions of many countries. H.M. Seervai in his book Constitutional Law of India noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India, though the doctrine of Separation of Powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another.²

American constitutional writers say it is judicial enforcement alone that makes the provisions of the American Constitution more than mere maxims of political morality. Regarding the

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¹ Sir Alexander and Sir Thomas Cockburn-Campbell By BONNIE HICKS, Available at: [www.parliament.wa.gov.au/parliament/library/MPHistoricalData.nsf/bdcebf6403782d9448257cae002a1d9c/280245f50ad04cb64825773c001477ec/\\$FILE/MP250%20Campbell%20T%20C.pdf](http://www.parliament.wa.gov.au/parliament/library/MPHistoricalData.nsf/bdcebf6403782d9448257cae002a1d9c/280245f50ad04cb64825773c001477ec/$FILE/MP250%20Campbell%20T%20C.pdf) (Accessed on 10/11/2017)

² H M Seervai, Constitution of India, 4th Edition, Universal Law Publication

judicial review in America, it is said: “*The power of judicial review is based on the idea that the constitution created a government of limited powers.*”³ Such is the condition under the Indian Constitution also. In Australia, when the Federal Constitution was going to be established at the Convention of 1891, Justice Cockburn spoke of the necessity of judicial review in Federalism as “*all our experience hitherto has been under the condition of parliamentary sovereignty. Parliament has been the Supreme body. But when we embark on federation, we throw Parliamentary sovereignty overboard, parliament is no longer supreme. When parliamentary sovereignty is dispensed with, instead of there being a High Court of Parliament, you bring into existence a powerful judiciary which towers above all powers, legislative and executive and which is the sole arbiter and interpreter of the Constitution.*”⁴

JUDICIAL PROCEDURE FOR JUDICIAL REVIEW

The power of judicial review has in itself the concept of separation of powers i.e. an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf, by the courts. The methods of judicial scrutiny are still inadequate in India. Though, the constitution makers of India have inserted a specific provision under Article 32 of the constitution to go directly to the Supreme Court regarding legislative lapses concerned with infringement of Fundamental Rights.⁵ Article 32 itself is the fundamental right and according to Dr Ambedkar “*it is the soul of the constitution as without which there would be no meaning of inserting the other fundamental rights in the constitution*”.⁶ But there has been no any specific provision in the constitution to move the Supreme Court direct on the unconstitutionality arising out of the violation of the constitutional mandate relating to distribution of powers or separation of powers or other constitutional restrictions which is equally vital.⁷ If the issue does not involve infringement of

³ Parliament and the Judiciary Background Note for the Conference on Effective Legislatures, Available at: www.prssindia.org/uploads/media/Conference%202016/Parliament%20and%20Judiciary.pdf (Accessed on 10/11/2017)

⁴ Federalism and Judicial Review: An Update Jesse H. Choper, Berkeley Law Scholarship Repository, Available at: www.scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1470&context=facpubs (Accessed on 10/11/2017)

⁵ Available at: <http://www.mcrhrdi.gov.in/crashcourse/presentations/SG%2008%20%20Article%2032%20&%20226.pdf> (Accessed on 10/11/2017)

⁶ Writs In Indian Constitution, Available at: www.legalservicesindia.com/article/article/writs-in-indian-constitution-1997-1.html (Accessed on 10/11/2017)

⁷ Id.

fundamental rights guaranteed under part III of the constitution, the aggrieved party has to move first the High court under article 226 and then only in appeal he can go to the Supreme Court if relief is not given by the High Court.⁸ Such pitfalls deserves rectification by a suitable provision in the constitution so as to enable an aggrieved person to move the Supreme court directly concerning the unconstitutionality relating to the distribution of powers or delegated legislation or other constitutional restriction. This speedy remedy would quicken the conscience of the citizen in a more fruitful manner in protection of his rights. Thus the Power of Judicial Review is incorporated in Articles 226 and 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution, the judiciary in India has come to control by judicial review every aspect of governmental and public functions.⁹

The Judiciary has been assigned a superior position in relation to the legislature, but only in certain respects.¹⁰ The constitution endows the judiciary with the power of declaring the laws as unconstitutional, if that is beyond the competence of the legislature according to the distribution of powers provided by the constitution or if that is in contravention of the constitution.¹¹ Thus, while the basic power of review by the judiciary was recognized and definitely established, significant restrictions were placed on such a power, especially in relation to the fundamental rights concerning freedom, and liberty.¹²

The constituent assembly was evidently keen on preventing judicial review from becoming an instrument of judicial policy-making judicial review from becoming an instrument of judicial policy-making and thereby upsetting governmental balance of power.¹³ Limitations on Court could never hope to equal its American counterpart. It seems that, at 17 times, members were almost haunted by an imaginary ghost of judicial activism transplanted from the far-off America.¹⁴

DEMOCRATIC ELEMENTS IN JUDICIAL REVIEW

⁸ Id.

⁹ Mukherjee, A. K; *The Indian High Courts and the writs of Certiorari and Prohibition*; The Indian Journal of Political Science, Vol. 4, no. 1, 1942, pp. 101–110.

¹⁰ Id.

¹¹ Sharma, J. C; *Fundamental Rights In The Draft Constitution Of India*; The Indian Journal of Political Science, Vol. 10, no. 3, 1949, pp. 32–37.,

¹² Id.

¹³ Kumar, C. Raj; *Legal Education, Globalization, and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India*; Indiana Journal of Global Legal Studies, vol. 20, no. 1, 2013, pp. 221–252.

¹⁴ Id.

The future of democracy in this country will depend upon the preservation and maintains of the Rule of Law. One of the important achievements of democracy is that law must be just for human safety and it must be subservient to the human needs. A federal republican country in order to establish an ideal democratic rule and to create confidence in the mind of the people about democratic federalism must allow Judicial Review to thrive so as to eliminate unjust and unconstitutional laws and to relieve the people from legislative tyranny.¹⁵

We are living in an age of constitutional and limited democracy which imposes limitations on the power of the Government and banks on majority rule to avoid tyranny and arbitrariness. But democracy cannot thrive in the absence of an all pervading justice.¹⁶ The Preamble of the Indian Constitution has promised equality and justice to all citizen of India and has the laws of India liable to be tested judicially. The majority rule, though the best rule is found generally to be addicted to tyranny. That why the existence of some impartial body is essential for the maintenance of democracy.¹⁷

Even Pandit Jawaharlal Nehru, who possessed a very large political and constitutional experience, said: “*With all my admiration and love for democracy, I am not prepared to accept the statement that the largest number of people is always right. The danger of oppression by majority is so obvious that the history of modern democracy is hunted by the ambition of including the minority in the controlling electoral body.*”¹⁸ But this solution of inclusion of minority is not the real solution. It is the judicial review which has tried to relieve political tension and tyranny to a greater degree. The democratic aspect of judicial review has been summarized “If democracy means very simply that the majority is to have whatever it at present hankers after, then judicial review is an intrusive body in democracy. If democracy means that the majority is generally to have its way because human beings are to be respected and the conception of their own interests not disregarded, then the commitment of the majority to limits set by law is of the essence of democracy”.¹⁹

Adrienne Stone shows that constitutional provisions concerned with institutional structures are sometimes just as abstract and vague as those concerning rights; that their interpretation

¹⁵ Shue, Vivienne; *Sovereignty, Rule of Law, and Ideologies of the Nation*; The Journal of Asian Studies, Vol. 68, no. 1, 2009, pp. 101–106

¹⁶ Id.

¹⁷ Id.

¹⁸ Available at: <http://www.celebratingnehru.org/english/quotations-of-nehru.aspx> (Accessed on 10/11/2017)

¹⁹ Id.

can therefore give rise to just as much reasonable and intractable disagreement; and that the resolution of these disagreements may require just as much judicial discretion, based on just as much evaluative judgement.²⁰ I do not dissent from any of this. Nevertheless, I believe that some kinds of structural review are distinguishable from rights review and not susceptible to the objection from democracy.

EXTENT OF JUDICIAL REVIEW IN INDIA

The initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection. Being steeped in the British tradition of limited judicial review, the Court generally adopted a pro-legislature stance. This is evident from the rulings such as A.K. Gopalan, but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament. The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision reaffirming the earlier position, and so on.²¹ The struggle between the two wings of government continued on other issues such as the power of amending the Constitution. During this era, the Legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court.²² At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian Supreme Court had held a mere one hundred Union and State laws, in whole or in part, to be unconstitutional.²³

The Supreme Court's interpretation of legislative acts to maintain the supremacy of the constitution, under the constitution of India, the scope of judicial review has been extremely widened. Unlike the U.S.A., the constitution of India has made express provision for judicial review. The scope of judicial review is present in several articles of the constitution, such as, 13, 32, 131-136, 143, 226 and 246. Thus, the doctrine of judicial review is firmly rooted in India and in this sense it is on a more solid footing than it is in America. Judicial review in India is based on the assumption that the constitution is the supreme law of the land and all

²⁰ Jeffrey Goldsworthy, Structural Judicial Review and the Objection from Democracy, *The University of Toronto Law Journal*, Vol. 60, No. 1, The Role of the Courts in Constitutional Law (Winter, 2010), pp. 137-154

²¹ *A.K.Gopalan v State of Madras*, AIR 1950 SC 27

²² Id.

²³ Id.

the governmental organs, which owe their origin to the constitution and derive their powers from its provisions, must function within the framework of the constitution. Under the Indian constitution there is a specific provision in Article 13(2) that “*the state shall not make any law which takes away or abridges the rights conferred by Part III of the constitution containing fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void*”. The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to any constitutional provisions. It can be appreciated that the protection of the judicial review is crucially inter-connected with that of protection of Fundamental Rights, for depriving the court of its power of judicial review would be tantamount to making Fundamental Rights non-enforceable ‘a mere paper provision’ as they will become rights without remedy. The following cases vividly demonstrate the nature, extent and importance of the role played by the Supreme Court of the Indian Union in protecting the supremacy of the constitution. The Supreme Court in *State of Madras v. Row*²⁴ stated that the constitution contains express provisions for judicial review of legislation as to its conformity with the constitution. The court further observed “while the court naturally attaches great weight to the legislative judgments, it cannot desert its own duty to determine finally the constitutionality of an impugned statute”. In *A.K.Gopalan v. State of Madras*²⁵ the court held that “*In India it is the constitution that is supreme and that a statue law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not*”.²⁶ Justifying judicial review, in *S.S. Bola v. B. D. Sharma*²⁷, Justice Ramaswami held “*The founding fathers very wisely, incorporated in the constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, a ailment and enjoyment of equality, liberty*”. In *Subhash Sharma v. Union of India*²⁸, the court observed that judicial review is a basic and essential feature of the constitutional policy and held that the Chief justice of India should play the primary role in the appointment of judges of High court and Supreme Court and not the Executive.²⁹ Justice Bhagwati in *Sampath Kumar v. Union of India*³⁰ held that

²⁴ AIR 1951 Mad 147

²⁵ *Supra* note 21

²⁶ Id.

²⁷ AIR 1997 SC 3127, 3170

²⁸ AIR 1991 SC 631

²⁹ Id.

*“Judicial Review is essential feature of the constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the constitution will cease to be what it is”.*³¹ In Minerva Mills case, Chandrachud, C.J speaking on behalf of majority observed “It is the function of the judges, nay their duty, to pronounce the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will become uncontrolled”. In the same case, Bhagwati, J observed “it is for the judiciary to uphold the constitutional values and to enforce the constitutional limitation. That is the essence of the rule of law, which inter alia requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the constitution and the law. The power of judicial review is an integral part of our constitutional system and without it there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our constitution which, more than any other is basic and fundamental to the maintenance of democracy and

Democratic objections to judicial review imply that even when legislatures make the wrong decision about the rights we have, they have one enormous advantage over judiciaries, even when the latter make the right decision: that they are legitimate in ways that the latter are not. This legitimacy resides in the fact that they have been elected by citizens based on the egalitarian principle of one person one vote, and thus majority decision to resolve disputes; and because legislators are themselves bound to resolve their disagreements about rights by making decisions based on one person one vote and majority decision.

“The rule of law, it is the power of judicial review and it is unquestionable, to my mind, part of the basic structure of the constitution”. Ahmadi, C.J in *Chandra Kumar v. Union of India*³² has observed *“The judges of the Supreme Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limits”*. After the period of emergency the judiciary was on the receiving end for having delivered a series of judgments which were perceived by

³⁰ AIR 1987 SC 386

³¹ Id.

³² AIR 1997 SC 1125

many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen. Judicial review extends to every governmental or executive action - from high policy matters like the President's power to issue a proclamation on failure of constitutional machinery in the States like in *S.R. Bommai v. Union of India*³³ case, to the highly discretionary exercise of the prerogative of pardon like in *Kehar Singh v. Union of India*³⁴ case or the right to go abroad as in *Satwant Singh v. Assistant Passport Officer, New Delhi*³⁵ case. Judicial review knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case. In *Maneka Gandhi v. Union of India*³⁶, the judicial review has acquired the same or even wider dimensions as in the United States. Now 'procedure established by law' in Article 21 does not mean any procedure lay down by the legislature but it means a fair, just and reasonable procedure. A general principal of reasonableness has also been evolved which gives power to the court to look into the reasonableness of all legislative and executive actions.

Recent Judgment of Supreme Court dated 11.01.2007 rendered in the case in *I R Coelho (Dead) by LRs v. State of Tamil Nadu & Others*³⁷ is a master stroke of the judiciary. Prima facie, it is laudable for the reason, that it is a unanimous judgment of nine judges Constitution Bench of the Supreme Court, unlike fractured earlier judgments on the point. In *Keshavananda Bharati v. State of Kerala*³⁸ which is said to have first propounded the Doctrine of basic structure of the Constitution, the Hon'ble 13 Judge Constitution Bench of Supreme Court delivered 11 truncated judgments. Since 24th April 1973, the date of the judgment of the *Keshavananda Bharati* case, the debate is, what is the ratio decidendi, viz., the point of law laid down in the said judgment.³⁹ Fortunately, the present judgment of Supreme Court by providing unanimous verdict saved the Nation from such turmoil of searching for the ratio decidendi with magnified glasses.⁴⁰ Fractured Judgments pains the Nation a lot to understand what is the Law and much time and energy of legal fraternity is

³³ AIR 1994 SC 1918

³⁴ AIR 1989 SC 653

³⁵ AIR 1967 SC 1836

³⁶ AIR 1978 SC 597

³⁷ AIR 2007 SC 861

³⁸ AIR 1973 SC 1461

³⁹ Id.

⁴⁰ Id.

spent on debating, interpreting and searching laws from such truncated judgments.⁴¹ The whole of the present judgment is devoted to understand and lots of pains have been taken to impress that Doctrine of Basic Structure was propounded in *Keshvananda Bharati* case. Much effort is made to highlight and explain Justice Khanna's views in Keshavananda Bharti's case and as clarified by Justice Khanna in *Indira Gandhi* case, since Justice Khanna's vote in favor of Basic Structure Doctrine will give the much needed majority in its favor in Keshavananda Bharti's case. However the propriety and validity of the clarifications provided by Justice Khanna in Indira Gandhi case, whether the same clarification can be read into Keshavananda Bharati case, is a question to be answered. Now a day, it is a welcome feature that most of the landmark judgments are unanimous.

The role played by the Supreme Court to implement the obligation of the state for social safety, the obligation of the state for social safety is the mandate of the sovereign people. Such responsibility and obligation are not merely moral, but are enjoined by the constitution. The people cannot lead a peaceful life if there be no social safety. The Supreme Court has played a very important role by interpreting the legislations and has not hesitated to strike down if it is going unconstitutional. For instances section 63 of the Madhya bharat Panchayat Act of 1949 provided that no legal practitioner had right to defend any party in the dispute, case or proceeding pending before the Nyaya Panchayat.⁴² The constitutionality of this provision of law was challenged under Article 22(1) and it was declared unconstitutional by the majority decision of the Supreme Court. Again in UP Police Regulations under 236(b) which authorized "domiciliary visits" was declared unconstitutional by the Supreme Court as violative of Article 21 of the constitution.⁴³ By "Domiciliary Visits", the police Authorities were authorized to enter the premises of the suspect, knock the door and have it opened and search it for the purpose of ascertaining his presence in the house. Regulation 236(b) was struck down by the majority decision. The Supreme Court held that the entire police Regulation 236 was unconstitutional as it violated article 19(1)(d) And article 21 of the constitution.⁴⁴

ROLE OF JUDICIAL REVIEW IN DEVELOPING SOCIAL JUSTICE

⁴¹ Id.

⁴² Madhya Bharat Panchayat Act, 1949

⁴³ Available at: https://uppolice.gov.in/writereaddata/uploaded-content/Web_Page/14_8_2014_10_43_8_police_regulation_2.pdf (Accessed on 12/11/2017)

⁴⁴ *Kharak Singh v. State of U. P.*, 1964 SCR (1) 332

Social justice has received a great importance for last 62 years than before. No doubt the Supreme Court through its innumerable decisions has defined clarified and widens the fundamental principles underlying the concept of social justice in India. For instances, section 25 FFF of the Industrial Disputes Act 1947, was challenged as unconstitutional.⁴⁵ The section lays down that where an undertaking is closed down for any reason, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure, shall subject to the provisions of sub-section (2) be entitled to notice and compensation in accordance with the provisions of section 25 of the act, as if the workman has been retrenched. The Apex court held the validity of the said section and observed that “Closure of an industrial undertaking involves termination of employment of many employees, and throws them into the ranks of the unemployed, and it is in the interest of the general public that misery resulting from unemployment should be redressed. In *Jalan Trading Co. v. Mill Mazdoor Sabha*⁴⁶, the validity of Payment of Bonus act, 1965 was challenged by the plaintiff companion the ground that the Act is fraud on the Constitution or is a colourable exercise of the legislative power. The Supreme Court upheld the validity of the Act and ruled that the validity of the law authorizing deprivation of the property can be challenged on following three grounds:

1. *Incompetence of the Legislature to frame the law.*
2. *Infringement of Fundamental Rights guaranteed in part III of the Constitution and*
3. *Violation of any other express provision of the Constitution.*

AN INVISIBLE AMENDMENT TO THE CONSTITUTION

Since 1951, questions have been raised about the scope of the constitutional amending process contained in Article 368. The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any fundamental right through constitutional amendment? Since 1951, a number of amendments have been effectuated in the Fundamental rights. The constitutionality of these has been challenged for number of times before the Supreme Court.

⁴⁵ The Industrial Disputes Act, 1947

⁴⁶ AIR 1967 SC 691

In *Shankari Prasad v. Union of India*⁴⁷, the 1st amendment which inserted Article 31-A and 31-b of the constitution challenged.⁴⁸ The amendment was challenged on the ground that it takes away the rights conferred in Part III of the constitution.⁴⁹ However the Supreme Court held that the power to amend the constitution including the fundamental right contained in article 368 of the constitution. Again in *Sajjan Singh v. state of Rajasthan*⁵⁰, the validity of the constitution 17th amendment was challenged. The Supreme Court approved the majority judgment given in Shankari Prasad's case and held that the words 'amendments to the constitution' means amendment of all the provisions of the constitution. But these two landmarks decisions were overruled by the Supreme Court in *Golaknath v. State of Punjab*⁵¹ where certain state acts in Ninth schedule were again challenged.⁵² The Supreme Court by a majority decision prospectively overruled its earlier decisions of Shankari Prasad and Sajjan Singh cases and held that Parliament have no power from this date of the decision to amend Part III of the Constitution so as to take away the fundamental rights.⁵³ In *Keshvananda Bharati v. state of Kerala*⁵⁴, the Supreme Court overruled the Golaknath case, which denied parliament the power to amend fundamental rights of citizens. The Court observed that 24th amendment does not enlarge the amending power of the Parliament. The parliament is having unlimited power to amend the constitution but it should not destroy the basic structure of the Constitution. In *Indira Gandhi v. Rajnarayan*⁵⁵ the Supreme Court struck down the clause inserted by the amendment which said once elected Prime Minister and Speaker of Loksabha are not answerable to any court against violation of Right to equality in the Constitution.⁵⁶ In *Waman Rao v. Union of India*⁵⁷ the Supreme Court held that all amendment to the Constitution which was made before *Keshavananda Bharti*'s case including those by which the Ninth Schedule to the Constitution was amended from time to time were valid and constitutional.⁵⁸ But amendments to the Constitution made on or after that date by which the Ninth Schedule was amendment were left open to challenge on the ground that they were

⁴⁷ AIR 1951 SC 455

⁴⁸ Id.

⁴⁹ Case Analysis : *Shankari Prasad v. Union of India* (AIR 1951 SC 455), Available at: <https://lawlex.org/lex-bulletin/case-analysis-shankari-prasad-vs-union-of-india-air-1951-sc-455/9758> (Accessed on 08/11/2017)

⁵⁰ AIR 1965 SC 845

⁵¹ AIR 1971 SC1643

⁵² Id.

⁵³ *Supra* note 4

⁵⁴ AIR 1973 SC 1461

⁵⁵ AIR 1975 SC 2299

⁵⁶ Id.

⁵⁷ AIR 1981 SC 271

⁵⁸ Id.

beyond the Constituent power of parliament because they damaged the basic structure of the Constitution.⁵⁹

Since *AK Gopalan* case up to this date and has brought out the development of judicial construction of the Constitution and the Doctrine of Basic Structure. 24th April 1973, the date of Judgment of *Keshavananda Bharati* is made the cutoff date to test the legislative action on the touch stone of Basic Structure Theory.⁶⁰ All Laws passed; even if they are kept in IX Schedule of the Constitution has to pass through the Basic Structure Doctrine.⁶¹ By making 24th April 1973 as the cutoff date, the Supreme Court has admitted that they have propounded the said Doctrine of Basic Structure from the said date. Its impact and its repercussions are very serious to the Nation and it tells a lot on the amending powers of the Constitution by the Judiciary itself. We find no written letters Basic Structure in the whole of the Constitution and it is undoubtedly a judicial invention.⁶²

Article 32 of the Constitution confers the power on the Supreme Court, for the enforcement of any of the rights conferred by this part viz. Part III of the Constitution and not beyond the same. No doubt, the said power is apart from the powers conferred under Part V, chapter IV of the Constitution. If there is a violation of fundamental rights in state action, including legislative action, the same can be struck down under Article 32 of the Constitution. The touchstone could only be the Constitution and more specifically Part III of the same. Fundamental rights are enshrined in the Constitution at the time of its adoption itself. By making 24th April 1973 as cutoff date, judiciary admits introduction of a new Chapter called Basic Structure to the Constitution, to be a touchstone, to test the state action and it is in the nature of an invisible amendment without inserting any letter to the Constitution. Certainly, judiciary does not have powers to amend the Constitution, but by propounding the Basic structure doctrine as touchstone to test the legislative actions and by evolving the same from *Keshavananda Bharati* case to the present case and making the same as an enforceable doctrine, the judiciary had exceeded its delineated powers.⁶³ While holding on one hand that the Parliament, while exercising constitutional amending power under Article 368, cannot amend the Basic structure of the Constitution, the judiciary has exactly done the same by

⁵⁹ *Supra* note 54

⁶⁰ *Supra* note 54

⁶¹ The case that saved Indian democracy Arvind P. Datar, Available at: www.thehindu.com/opinion/ed/the-case-that-saved-indian-democracy/article4647800.ece (Accessed on 10/11/2017)

⁶² Id.

⁶³ An analysis of discrepancy between Judiciary and legislature over sharing of power under Indian constitution, www.lexpress.in/wp-content/uploads/2014/12/Kesavanand_bharati_case.pdf (Accessed on 11/11/2017)

usurping to amend the Constitution by inserting the Basic Structure Doctrine in the Constitutional Arena, without having even semblance of power to amend the Constitution.⁶⁴

Basic Structure Doctrine is certainly an invisible amendment to the Constitution or otherwise the date 24th April 1973 is irrelevant. The Judiciary can have the Constitution as touchstone and not the doctrines, theories, propounded later by the judiciary. The doctrines and theories can only serve as tools to understand or to interpret the constitution. But they themselves cannot be touchstones and replace the constitution. The judiciary possibly, unconsciously made a theory, laid it as a touchstone and put a cutoff date, everything without introducing a word in the constitution. Again, the big question is who can review the power of judiciary to make such invisible amendments to the constitution. There is no provision or mechanism spelt out in the Constitution to review the judicial action by any independent organ, similar to judicial review of legislative action read into Article 32 of the Constitution. At times, legislature and the executive could only be helpless spectators of judicial action. If the Supreme Court in the present case does not restrict the date as 24th April 1973 things could have been possibly different. The Supreme Court should have continued to have part III of the Constitution as touchstone and not beyond. Supreme Court in the present case has proclaimed at Para 78 that this Court being bound by all the provisions of the Constitution and also by the Basic Structure doctrine has necessarily to scrutinize the Ninth Schedule Laws. By such assertion, the Supreme Court openly admitted that they are bound by not only provisions of the Constitution but also Basic Structure Doctrine and it evidences that Basic Structure Doctrine is apart from the Constitution and not part of the Constitution.⁶⁵

CONCLUSION

Judicial review and parliamentary democracy have an interesting equation. They may appear to be two swords at loggerheads with each other but in reality they supplement and complement each other. All modern democracies whether it be India or USA are an edifice to that. It may appear a bit overreaching but the truth is that democracies function on popular support and sometimes in order to garner political support, the politics may turn ugly. The real danger in such scenarios is that majoritarianism will like to force its way and thus rule of law and equality before law will take a backseat. Judicial review ensures that parliamentary democracy is constrained within its bounds and never condescends any group of people.

⁶⁴ Id.

⁶⁵ *Supra* note 11

History bears witness that US Supreme Court in *Brown v. Board of Education of Topeka*⁶⁶ has held that Separate but equal is acceptable in respect to racially segregated schools. Similarly in ADM Jabalpur case, Indian Judiciary too failed to rise up to the occasion. Therefore it is imperative that for smooth functioning of countries both are needed. In countries like USA where appointment of judges are political it will not be wrong to suggest that it is the parliamentary democracy which acts as a check on the judiciary. If there would not be a strong opposition in the US congress, then there is danger that US president in connivance with his selected leaning of Supreme Court judges would affect such laws which can easily mold the US polity.

Hence it comes not as a surprise that democracy all over the world whether it is common law countries or civil law countries have reposed their faith in judicial review. Experts all over the globe would agree that if democracy is like a car then doctrine of judicial review is the brake which acts as a stopping force should the car approach a danger or even when the car goes out of control. The legacy of Indian Supreme Court in form of Justice Bhagwati, Justice Iyer and Justice Chinappa Reddy is a living edifice to this fact.

⁶⁶ 347 US 483

LAW AS A SUBSYSTEM OF SOCIETY

Dr. Ritu Agarwal*

Abstract

It is common knowledge that the legal system is a sub-system of a larger social system and there are innumerable ways, some direct and some indirect, in which the society effects the legal system and legal system influences the society. Today, particularly in the developing societies governed by the rule of law, the interaction between legal and social processes is so pronounced that the behavioral and policy dimensions of legal norms and processes cannot be ignored. The challenge of socially relevant legal education today is to find ways and means to enable the future lawyers to enlarge the base of his expertise with those developed by behavioral scientists so that they can fully and completely perform the social mission of law as designated by the Constitutions of states and International declarations. The first step towards this is to get acquainted with the knowledge about society and social issues which is now available from the study of social sciences. The analytical skill of the lawyer about the society, social prospects, social issues and problems would help him to be a critical consumer of such knowledge in his task of social engineering and social control.

Keywords: Legal system, society, subsystem, legal and social processes

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INTRODUCTION

It is common knowledge that the legal system is a sub-system of a larger social system and there are innumerable ways, some direct and some indirect, in which the society effects the legal system and legal system influences the society. Today, particularly in the developing societies governed by the rule of law, the interaction between legal and social processes is so pronounced that the behavioral and policy dimensions of legal norms and processes cannot be ignored.

RELATIONSHIP BETWEEN SOCIAL AND LEGAL SYSTEM

As is rightly pointed out, law is indeed a behavioral science par excellence and lawyer, more than anything else, is a ‘social engineer’ trained in ordering and facilitating change in a manner that creates the minimum friction and maximum happiness for the maximum number of people. The objective is the same whether he operates at the local level, state level, national or international levels. The challenge of socially relevant legal education today is to find ways and means to enable the future lawyers to enlarge the base of his expertise with those developed by behavioral scientists so that they can fully and completely perform the social mission of law as designated by the Constitutions of States and International declarations.

The first step towards the above goal is to get acquainted with the knowledge about society and social issues which is now available from the study of social sciences especially from sociology. As this knowledge are the result of certain frame of reference somewhat different from that of conventional legal scholarship, it is necessary for the law students to appreciate the concepts, theories and methodologies these social sciences have evolved to develop the respective knowledge. Looked at from these perspectives and approaches, the analytical skill of the lawyer would help him to be a critical consumer of such knowledge in his task of social engineering and social control.

HUMAN SOCIETY AND LAW

Nearly all human societies, tribal, peasant or industrial, have laws or legal rules whose scope is coextensive with human life. In other words, human activity, be it economic, social or political, is controlled by laws or procedures of various types. Basically, however, the function of law is to protect, preserve and defend the members of society against internal disorder or external threat. In order to have effective laws they have to have the moral sanction of society and be enforced on the people by power of the State. Those who deviate

from the law are usually given punishment of various kinds such as fines, imprisonment, exile or even death. However, the State which is an embodiment of the law may itself become arbitrary or tyrannical. When a gap occurs between law and justice, human spirits are often rebelled in the society. Men of great moral stature such as Socrates, Jesus, Gandhi ji have been regarded as rebels against the State. At the same time the persistent question among jurists has been, "*should law be concerned with what is, or what ought to be?*"

In preliterate societies, laws have been orally transmitted and often are inseparable from customs. Extensive data from Africa, Asia and Australia have shown that tribes were well regulated by taboos, customs and even formal laws. The normative control was maintained by the strict observance of taboos which were laws as well as being the basic fabric of society. Legal control in preliterate societies was exercised primarily by kinship units called lineages, clans, moieties etc. In complex, ancient civilizations such as Babylonia, Egypt, Israel, India and Rome the laws are usually based on customs, religious principles and decrees of monarchs or head of States. The laws were recorded in detail on clay tablets, parchment or palm texts for the benefit of posterity. As the societies have grown from simple to complex, there has been an extensive growth of legal rules.

SOME SOCIOLOGICAL APPROACHES TO LAW

Some of the eminent social thinkers namely Durkheim, Karl Max and Weber have made significant observations on law. Durkheim's sociology of law was tied up with the wider context of transition from simple to complex society. While the law in simple society was based on the principle of stringent punishment, in the complex society it was based on compensatory principal. Karl Marx regarded the legal system of his times as the outcome of certain dominant and vested interests. Law enabled the dominant groups to preserve their privilege and impose their will on rest of the society. Hence, in the communist society, where the private interests are replaced by collective goals, both state and law would be unnecessary. Max Weber's theory of law derives from his notion of Rational-Legal Authority. In the study of historical jurisprudence, he described the gradual ascendancy of the rational- legal principals. The modern formal organizations State, Judiciary etc. are guided in principal by rational-legal norms. In sum, sociological theories of law emphasize the significance of social factors in the study of law.

RELATIONSHIPS OF SOCIAL FACTORS WITH LAW

The study of legal institutions and their operation in society is not only important but also advantageous for the society. In this regard one may look at the role of judiciary in the modern legal system, the working of trial courts, the role of lawyers, judges, police, prosecutors and bureaucrats. One may study and empirically verify the capacity and limits of law in regulating behaviour and effectuating policies whether it is in the area of family relations, labour relations or land holding. The relationships of social factors with law may enable one to understand law as a product of social change, law as a source of medium of social change and the dynamics of law in development.

RECIPROCAL RELATIONSHIP BETWEEN SOCIAL AND LEGAL CHANGES

Law is rooted in social institutions, in socio-economic network. These social factors influence the course of law or the direction of legal changes. Besides, the sociological view also highlights the differences between formal (normative) and substantive (operative) aspects of law. What is written into statute books is not always followed in practice. This is the outcome of personal and social interactions which are variable and often unpredictable. At the same time, law may itself change social norms in various ways. For example in free India, legal abolition of untouchability is an attempt to change a long-standing social norm. Yet it has not succeeded much due to inadequate social support. At the same time the law on the practice of untouchability has lent recognition to those who protest against it. For instance, while in isolated cases individuals have suffered, the organized protest by the deprived groups has reduced the extent of oppression. The activities of Dalit Panthers in Maharashtra bring about this point clearly. Thus, although law cannot bring about change without social support, it can create certain preconditions for social change. Thus there is a reciprocal relationship between social changes and legal changes.

SOCIAL ORDER AND LAW: THE INTERPLAY BETWEEN VALUES OR NORMS AND THE LAW

Laws are essential to maintain social order in society. Orderly social life is a goal desired by human society. Stable social life enables the pursuit of the individuals' vocation peacefully. If there is anarchy, it not only leads to disruption of social life but also makes human behaviour unpredictable. Hence, socialization of children is the first step to inculcate the norms of social control. The later adult socialization reinforces conformity to the laws of society.

However, the really outstanding problem in Indian society is the crisis in legalism. There is a widespread adoption of dual standards in law. The rich and powerful sections, politicians, top

government functionaries, private businessman are the ones who flout law because of their privileged position. Tax evasions, manipulation of licenses, acceptance of illegal gratification are few examples of the deviance of law by privileged people. Most of these deviant acts are done covertly and even if exposed by judicial enquiry, little follow-up action is taken against corrupt politicians and bureaucrats. It is ironical that often these people pose as the guardians of morality in public life. It is this crisis in legal values that the nation must overcome in attempting to implement the Constitutional provisions in spirit as well as the letter of the law and for doing this in depth sociological study and analysis of above mentioned social problems should be done by the people concerned with law so as to find foolproof legal solutions to these problems.

SOCIAL CONTROL AND LAW

Laws are the means of social control and they are operational both at the micro as well as the macro level. Traditionally in India, Laws were enforced through the Village Panchayats, Nyaya Panchayats, Caste Councils, Lok Adalats and Tribal Councils in the Tribal Judicial System. In the post-independence period after the Republic of India adopted the Constitution in the year 1950, jurisdiction was recognized. The Supreme Court of India became the apex appellate body supported by the State level courts such as High courts, District courts etc. Besides, statutory tribunals were established for revenue, labour and other matters. The Law Commission of India was established to suggest and recommend appropriate legal measures. It has been entrusted with comprehensive terms of reference. These include not only the traditional sphere of law such as Company Law, Civil and Criminal Procedure, Contract Act, Stamp Act etc. but also the laws oriented to social change such as those related to the implementation of Directive Principles, especially economic items such as cooperative credit, agricultural wages, tenancy etc. Besides, the LIC has been expected to reform the existing social legislations or usher in new laws especially with regard to weaker sections, bonded and contract labour, juvenile delinquents, mentally ill and physically disabled.

SOCIAL DEVELOPMENT AND LAW

Neither law nor social science is value free. They do not operate independently. They do share the common concern for development which is the result of constant interaction of individuals in society. Law attempts to regulate that interaction through institutions, norms and processes evolved on certain assumptions of human nature and behaviour. Whether it is contract law or criminal law, tax law or labour law, the aim is to influence individual decision

making in such a way as to advance social policies and values. Whether it actually does so, if not, why not, and how best policies can be adapted to advance individual and social development are questions which concern the lawyer more than anyone else. In other words, development provides a perspective and a reference to the legal scholar in his use of social science material and method.

SOCIAL PROCESSES AND LEGAL DEVELOPMENT

The study of various social institutions such as family, marriage, divorce etc. helps lawyers in many ways. The study of institution of family in historical and comparative perspective emphasizing the customary and regional variations in Indian society helps the law person concerned in dealing with organizing family relations and in understanding established notions and inherited principals of marriage, divorce and inheritance.

Central to the Indian social organization is the concept of caste and reluctant stratification of society. Caste permeates all aspects of life and there has been a great deal of legislation to put down the evil manifestations of caste and class. No student of law can understand social change in India without understanding the caste- class ramifications and their impact in legislative opinion and interpretations.

Intelligent understanding of legal developments demands careful study of political power centers and power relationships in society. This, of course, is a major concern of public law as well. Legal institutions which actualize and support the Constitutional power structure may camouflage the reality if legal knowledge is divorced from social science.

Law, the Civil Service and the professions in relation to social organization and change are discussed with a view to understand the process of modernization of Indian society. In the teaching of labour law, administrative law, and Constitutional law the knowledge available from sociological studies of the occupations, the professions and formal organizations can be both revealing and instructive. Equally important is the role being played by religion and language in Indian society. In the context of Indian commitment for “unity in diversity” and secularism, it will be interesting to look at sociological insights in the use of law for social ordering and social progress. Attempts in evolving uniform civil code or adopting a national language throughout the country provide instances which compel the lawyer to look at law-society interaction in its myriad forms, shades and relationships.

A few segments of Indian society like women, children and tribal population commands great priority in recent times. The legal system is replete with instances of special treatment, some

favorable and some not so favorable, accorded to these sections who constitute the vast majority of Indian population. Yet in reality, their conditions are claimed to be bad as ever. The gap between law in the books and law in action is quite pronounced in this regard. Why, how and where did law fail to fulfill its promises? The answer lies embedded in social science knowledge which has to penetrate the corridors of power, especially the legislature, the courts, the Law Commissions and the administrative offices.

RELATIONSHIP BETWEEN SOCIOLOGY, CRIMINOLOGY AND LAW

The challenge of crime has already influenced legal thought and action to such an extent that there is no other department of law in which law and sociology have interacted so intimately as in control of deviance. The study of crime is especially a concern of sociology. The criminal behaviour is interdicted by society and government. It is forbidden behaviour and incurs wrath of society and is punishable under law. The criminal behaviour, however, is included in social behaviour. What we call a social or anti-social behaviour is nonetheless social in character. A criminal is not born but is a by-product of social factors. Hence, the study of anti-social behaviour is studied in sociology.

As the scope and area of sociology widened, the various branches of it have grown into new disciplines on their own. Today, criminology is an independent discipline though it was at one time a part of sociology. However, the science of criminology continues to make use of sociological methods and techniques in the investigation of its subject-matter. It tries to find out with the help of sociological techniques causes and remedies of criminal behaviour. Thus two are closely related. Perhaps it will continue to be the major partnership between lawyers and social scientists for quite some time in future as well. Understanding behaviour and directing change intelligently and imaginatively can prevent the problem of deviance going out of hands. This is where the legal inputs in planned development have to assume greater attention and responsibility.

In the end it can be said that the application of social sciences especially sociology to legal phenomenon helps to develop an appreciation of the possibilities, difficulties and limitations of law in social ordering and social change. It is surely a task of all concerned with the social realities and aspirations of our times.

STUDY OF LEGAL IMPERATIVES OF EUTHANASIA: NATIONAL AND INTERNATIONAL IMPERATIVES

Dr. Meena Ketan Sahu*

Abstract

Death is inevitable for everyone, so it doesn't make sense for death to be a right that can be violated. What the 'right to die' really means is a demand for a right to choose the time and method of death. 'Right to die' is in direct conflict with the right to life. The right to life is so central to all other rights that it is both inviolable and inalienable. This means that not only can no one take it from you, but you also cannot give it away. So, a person who chooses to die is essentially violating their own right to live. It is pertinent to mention here that 'right to die' implies that the only qualification for euthanasia is simply to ask for it. This raises various problems. 'Right to die' is problematic because euthanasia is more complicated than simply choosing to die. Most jurisdictions have removed suicide from criminal law. This means that individuals will not be charged for attempting suicide. However, to assist a suicide or to kill someone, even on their request, is quite a different matter. Voluntary euthanasia, as proposed by advocates, is vastly different from suicide because it is really the doctor who decides whether the patient's life will be ended. It does indeed become a 'doctor's right to kill' rather than a patient's 'right to die'. In the present paper, the author has made an attempt to discuss the concept of euthanasia elaborately with special reference to types of euthanasia. The author has further endeavored to highlight the international perspective in nutshell. An attempt is made by the author to discuss the concept in Indian context with special reference to judicial precedent. The author has also suggested some measures to avoid the complex controversies surrounding euthanasia and must at least attempt to provide for adequate guidelines and legal safeguards.

Keywords: Euthanasia, Right, Life, Die, Law, Voluntary etc.

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INTRODUCTION

Life is precious and gift of God. Protection of life has been considered as the basis of civilized society. Sometimes, right to die is a concept which is debatable. Even moral theorists, legal experts, academics, medical personalities and human rights activists have contributed to an abundance of literature that discusses various aspects of right to die, euthanasia and assisted suicide. Public attitudes concerning right to die have changed considerably in recent decades not only in developed countries like United States of America but also in developing countries like India. In developed and developing nations, numbers of societies viz. The Right to Die Society of Canada, Dying with Dignity etc. have been established. These societies are dedicated to the demand put forth by some people for the right to die. The right to die principle has been given recognition by living will legislation, case law and various social movements.

Development of medical technology has enabled the medical profession to prolong life, using life-sustaining treatment, to an extent that has never before been possible. Modern medicine has made significant progress in saving and extending lives of the people suffering with diseases like cancer. Nevertheless, medical advances have decided their lives have no prospects for improvement and are no longer worth living. When life-sustaining treatment is the only means by which one is kept alive, the individual confronts a choice between continuing to live through the use of life-support and allowing a natural death to occur.

CONCEPTUAL ANALYSIS

Euthanasia comes from the Greek word EU (good) and Thanatos (death) which means “Good Death”, “Gentle and Easy Death”. This word has come to be used for “Mercy Killing”. In this sense, euthanasia means the active death of a patient, or inactive in the case of dehydration and starvation. There is no doubt that euthanasia is intentional killing. It can be done by a direct act, such as a lethal injection or a deliberately lethal dosage of drugs; this is known as active euthanasia. It can be done by the denial of ‘reasonable care’, including the basic needs of food and water. This is known as euthanasia by omission or neglect, where the patient dies of starvation or dehydration, or by being denied something else which should reasonably be provided to them.

TYPES OF EUTHANASIA

Euthanasia is generally classified as either ‘active’ or ‘passive’ and as either ‘voluntary’ or ‘involuntary’. Similar to euthanasia is ‘assisted suicide’.

Active versus Passive

‘Passive euthanasia’ is usually defined as withdrawing medical treatment with the deliberate intention of causing the patient’s death. For example, if a patient requires kidney dialysis to survive, and the doctor’s disconnect the dialysis machine, the patient will presumably die fairly soon. Perhaps, the classical example of passive euthanasia is a “*do not resuscitate order*”. Normally, if a patient has a heart attack or similar sudden interruption in life functions, medical staff will attempt to revive them. If they make no such effort but simply stand and watch as the patient dies, this is passive euthanasia.

‘Active euthanasia’ is taking specific steps to cause the patient’s death, such as injecting the patient with poison. In practice, this is usually an overdose of pain-killers or sleeping pills.

In other words, the difference between ‘active’ and ‘passive’ is that in active euthanasia, something is done to end the patient’s life, in passive euthanasia, something is not done that would have preserved the patient’s life.

An important idea behind this distinction is that in ‘passive euthanasia’ the doctors are not actively killing anyone; they are simply not saving him. While we would usually applaud someone who saves another person’s life, we do not normally condemn someone for failing to do so.

Voluntary versus Involuntary

Voluntary euthanasia is, when the patient requests that action be taken to end his life, or that life-saving treatment be stopped, with full knowledge that this willed to his death.

Involuntary euthanasia is, when a patient’s life is ended without the patient’s knowledge and consent. This may mean that the patient is kicking and screaming and begging for life, but in practice today it usually means that the patient is unconscious, unable to communicate, or is too sick and weak to be aware of what is happening or to take any action on his own behalf.

While this distinction appears clear—the patient willing agreed to euthanasia or he did not, it too is often made ambiguous in court cases and some public debate.

It is not uncommon for Courts to declare someone legally incompetent. This does not mean that the person is stupid, but rather that the court believes that he is unable to make informed decisions and/or to communicate them to others. The judge then appoints a guardian to make decisions for this person. Usually, this will be a close relative, like a spouse, parents, or children. But if no such person is available, or if the judge believes that none of the relatives have this person's interests at heart, then someone else may be appointed such as a social worker, a lawyer, etc. Children are routinely considered legally incompetent, and their parents are expected to make decisions for them. No one asks a two-year old whether or not he wants to go to the dentist. This decision is normally made for him by his parents. A judge may conclude that a person is senile, mentally retarded, suffering from delusions, or has some other psychological problem that makes it impossible for him to make truly informed, rational decisions. If someone is in a coma or is otherwise so sick that she is unable to communicate, then even if she is capable of making informed decisions, there is no way for anyone else to know what her decisions are. When Courts declare someone legally incompetent and appoint a guardian, any decisions that the guardian makes are, for legal purposes, considered to be decisions of the incompetent person. A little thought will show that this must be so for the system to work. There would be little point in saying that you are authorized to make decisions for this comatose person except that you do not have the authority to sign anything that would otherwise require his signature. That would exclude all important decisions. But it can also lead to legal sentiments that are very misleading.¹

Assisted Suicide

In 'assisted suicide', doctor provides a patient with the means to end his own life, but the doctor does not administer it, for example, if a doctor gives you an injection of morphine sufficient to cause your death, this is euthanasia. But if the doctor puts the hypodermic needle beside your bed, explains to you what it is, and leaves, and you later inject yourself, this is considered assisted suicide.²

INTERNATIONAL PERSPECTIVE

The world medical community considers both euthanasia and assisted suicide to be in conflict with basic ethical principles of medical practice. The World Medical Association, with

¹ Available at: www.pregnantpause.org/euth/types.html, (Accessed on 5/10/2017 at 7:55 pm)

² Amit Mishra, *Euthanasia as Right to Life in India*, Indian Journal of Socio Legal Studies, Vol. V, Issue-1, Jan-June, 2016, p.196

members representing medical associations including the American Medical Association from 82 countries, has adopted strong resolutions condemning both practices and urging all national medical associations and physicians to refrain from participating in them even if national law allows or decriminalizes the practices.³

“Euthanasia, that is the act of deliberately ending the life of a patient, even at the patient’s own request or at the request of close relatives, is unethical. This does not prevent the physician from respecting the desire of a patient to allow the natural process of death to follow its course in the terminal phase of sickness.”⁴

Physician-assisted suicide, like euthanasia is unethical and must be condemned by the medical profession. Sometimes, the physician is intentionally and deliberately directed in enabling an individual to end his or her own life, the physician acts unethically. However, the right to decline medical treatment is a basic right of the patient and the physician does not act unethically even if respecting such a wish results in the death of the patient.⁵

Furthermore, in deciding an assisted-suicide case, the European Court of Human Rights found that its prohibition on the use of lethal force or other conduct that might lead to the death of a human being did not confer any claim on an individual to require a State to permit or facilitate his or her death.⁶ The European Court judges described the prohibition as a measure intended to protect the weak and the vulnerable. Following definitions of euthanasia have been given to enumerate its basic perspective.

- Euthanasia- It is intentional killing by act or omission of a dependent human being for his or her alleged benefit. The key word here is “intentional”. If death is not intended, it is not an act of euthanasia.
- Voluntary euthanasia- When the person who is killed has requested to be killed.
- Non-voluntary- When the person who is killed made no request and gave no consent.
- Involuntary euthanasia-When the person who is killed made an expressed wish to the contrary.

³ World Medical Association Policy, *The World Medical Resolution on Euthanasia*, Adopted by the WMA General Assembly, Washington, 2002.

⁴ Ibid.

⁵ Pretty v. United Kingdom, No. 2346/02, Eur. Ct. H.R.

⁶ Northern Territory Government (1995), Rights of the Terminally Ill Act, 1995, Northern Territory of Australia, Darwin: Government Publisher.

- Assisted suicide- Someone provides an individual with the information, guidance, and means to take his or her own life with the intention that they will be used for this purpose. When it is a doctor who helps another person to kill themselves it is called physician assisted suicide.
- Euthanasia by Action-Intentionally causing a person's death by performing an action such as by giving a lethal injection.
- Euthanasia by Omission- Intentionally causing death by not providing necessary and ordinary (usual and customary) care or food and water.

There are various instances which show efforts made by the State to safeguard the interest of natural justice and right of human dignity.⁷ One of the examples of England is recently quoted by the scholars as- “*Diane Pretty, who suffers from motor neurone disease, unsuccessfully appealed to the British courts to allow her to seek assistance to die. Specifically, she sought immunity for her husband, whose assistance she wanted to commit suicide. The House of Lords also ruled against here claim of a ‘right to die’ in November, 2001.*”⁸

In late April 2002, the European Court of Human Rights ruled that there was no ‘right to die’ and that the British government was not subjecting her to ‘inhuman or degrading treatment’ by forbidding assisted suicide. People who support euthanasia often say that it is already considered permissible to take human life under some circumstances such as self defence but they miss the point that when one kills for self defence they are saving innocent life- either their own or someone else’s. With euthanasia no one’s life is being saved-life is only taken.⁹ One can argue that these efforts are in right direction in view of the facts that if no one can provide life to other or sustain one or other pretext, one cannot be permitted to die. However, this opens area for further research particularly in legal perspective.

⁷ Hiroeh U. Appleby I, et al, *Death by homicide, suicide and other unnatural causes in people with mental illness: a population-based study*, The Lancet, Vol. 358, December 22/29, 2001, pp. 2110-12.

⁸ Van Der Maas P.J, Van der Wal G, et al, *Euthanasia, physician-assisted suicide, and other medical practices involving the end of life in the Netherlands, 1990-1995*, New England Journal of Medicine, Vol. 335 (22), November 29, 1996, pp. 1699-1705.

⁹ Physicians for Compassionate Care, Media Release, March 21, 2002, See also, Diane Coleman, President of Not Dead Yet (cited in ProLife Infonet, “Ashcroft defends motion against Oregon’s assisted suicide law”, February 21, 2002, Statistics from Fourth Annual Report on Oregon’s assisted suicide law”, Feder “Assisted Suicide-The Death of Decency”, Creators Syndicate, April 10, 2002; Prolife. February 21, 2002, Statistics from Fourth Annual Report on Oregon’s assisted suicide law”, Feder “Assisted Suicide-The Death of Decency”, Creators Syndicate, April 10, 2002; Prolife.

RIGHT TO LIFE

Right to life is the ultimate right. This makes sense for many reasons, one of them being the fact that if you have no life, you can have no other rights. The most important reason, however, is that if some are allowed to give up their right to life, then the capacity for the State to impartially protect the right to life of others, especially the weak and vulnerable, is gravely compromised. Some people criticize this concept of the right to life, suggesting it is simply a ploy of the pro-life lobby, and suggesting that it is a violation of people's rights to 'choose'.

Intention is what you intend to achieve. Motive is the reason behind your intention to achieve this. This difference is important for both the doctor and patient. The motives of people who ask to be killed must be considered. "Many people with incurable diseases who ask a health-care provider to end their lives do so more as an expression of fear, helplessness or hopelessness than as a serious request for euthanasia.¹⁰ Very frequently, it is reassurance of their continuing worth as a person that is the real reason for patients suggesting that they would be better off dead.

RIGHT TO DIE

In *Maruti Sripati Dubal v. State of Maharashtra*¹¹ the Bombay High Court has struck down Section 309 I.P.C which provides punishment for attempt to commit suicide by a person as unconstitutional on the ground that it is violative of Article 21 of the Constitution.

The Court held that the right to live guaranteed by Article 21 includes also a right to die. The judges felt that the desire to die is not unnatural but merely abnormal and uncommon. They listed several circumstances in which people may wish to end their lives, including disease, cruel or unbearable condition of life, a sense of shame or disenchantment with life. They held that everyone should have the freedom to dispose of his life as and when he desires. In this case, a Bombay Police Constable who was mentally deranged was refused permission to set up a shop and earn a living. Out of frustration he tried to set himself fire in the corporation's office room.

¹⁰ Collen Burher, *Women shown as typical mercy killing targets*, The Collegian, 25/10/2001

¹¹ (1986) 88 BOMLR 589

The liberal approach of the Bombay High Court on suicide although will help many, but will raise many strange issues. Firstly, in traditional societies in which individual decision matters little it will open some women to barbaric and inhuman pressure for becoming ‘Sati’. Secondly, in cases where people go on hunger strike the police will not be able to arrest and prosecute them. Suicide owing to frustration love, examinations or failure to get a job or even good job or promotions in service will raise many social problems. Is individual capable of taking decisions to end his life? Does he not owe a responsibility towards the society to overcome these human frailties and live for it?

In another landmark judgment in *P. Rathinam v. Union of India*,¹² seeking to humanize the criminal law, the Supreme Court has held that a person has a right to die and declared unconstitutional. Section 309 of the Indian Penal Code which makes “attempt to commit suicide” a penal offence. The right to life in Art 21 of the Constitution includes the right not to live, i.e right to die or to terminate one’s life. In the present case, the petitioners have challenged the validity of Section 309 on the ground that it was violative of Arts. 14 and 21 of the Constitution and prayed for quashing the proceedings initiated against the petitioner (Nagbhusan) under Section 309 pending in the Sub-Judge Court, Gunupur in the District of Koraput, Orissa for attempting to commit suicide.

A Division Bench comprising Mr. Justice R. M. Shai and Mr. Justice Hansaria held that Section 309 of the I.P.C violates Art. 21 i.e rights to life and personal liberty of the constitution and so it is void. A person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking. The court held while striking down Section 309 of the I.P.C saying that it was a cruel and irrational provision. The court held that right to life which Art. 21 of the Constitution speaks of can be said to bring in its bail the right not to live a forced life.

The Court observed that:

“Section 309 I.P.C deserves to be effaced from the Statute Book to humanize our penal laws. It is a cruel and irrational provision and may result in punishing a person again (Doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide.”

¹² (1994) 3 SCC 394

The Court made it clear that an act of suicide could not be said to be against religion morally or public policy and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others and therefore the State's interference in the personal liberty of the concerned person is not called for.

However, the Court rejected the plea that 'euthanasia (mercy killing) should be permitted by law. The Judges said that they would not decide this point as firstly it is beyond the scope of the present petition and secondly also because in euthanasia a third person is either actively or passively involved about whom it may say that he aids or abets the killing of another person. There is a distinction between an attempt of a person to take his life and action of some others to bring to an end the life of a third person such a distinction can be made on principle and is conceptually permissible.

Suicide is a psycho-socio problem and not a manifestation of criminal instinct. The Court therefore, suggested that this needs to be socially and medically tackled. The need is to take care of suicide prone persons through counselling and other measures which will make them realise that life is worth living. There can be a justification to prosecute such sacrifices or their lives. Suicide is really a 'call for help' not a 'call for punishment'. Similar approach has to be adopted towards students who jump into well after having failed in examination, but survives.¹³

CONSTITUTIONAL VALIDITY OF RIGHT TO DIE

Here, the question arises whether right to life under Article 21 includes right to die or not. This question came for consideration for first time before the High Court of Bombay in *Maruti Sripati Dubal v. State of Maharashtra*¹⁴ In this case the Bombay High Court held that the right to life guaranteed under Article includes right to die, and the Hon'ble High Court struck down Section 309 of I.P.C which provides punishment for attempt to commit suicide by a person as unconstitutional. In *P.Rathinam v. Union of India*,¹⁵ a Division Bench of the Supreme Court supporting the decision of the High Court of Bombay in Maruti Sripati Dubal case held that under Article 21 right to life also include right to die laid down that Section 309 of Indian Penal Code which deals with 'attempt to commit suicide is a penal offence' unconstitutional.

¹³ Dr. J. N. Pandey, Constitutional Law of India, 28th Edition, 1995, Central Law Agency, Allahabad, p.180

¹⁴ *Supra* note 11

¹⁵ *Supra* note 12

This issue again raised the court in *Gian Kaur v. State of Punjab*.¹⁶ In this case a five judge constitutional Bench of the Supreme Court overruled the P. Rathinam's case and held that Right to Life under Constitution does not include *Right to Die* or *Right to be killed* and there is no ground to hold that the Section 309, IPC is constitutionally invalid. To true meaning of the word "life" in Article 21 means life with human dignity. The 'Right to Die' if any, is inherently inconsistent with the "Right to Life" as is "death" with "Life".

Further, a question also arise in case of a dying man, who is, seriously ill or has been suffering from virulent and incurable form of disease he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of Right to die with dignity as a part of life with dignity. According to the court, these are not cases of extinguishing life but only of accelerating the process of natural death which has already commenced.

RIGHT TO DIE: NEW CHALLENGES

In Aruna Shanbaug's case, the Apex Court allowed 'passive euthanasia' of withdrawing life support to patients in permanently vegetative state (PVS) but rejected out rightly active euthanasia of ending life through administration of lethal substances.

The Supreme Court of India in its landmark judgment pronounced passive euthanasia as permissible under Section 309 of the Indian Penal Code. The main ground for adjudication before the Apex Court was whether a person who advertently refuses to accept lifesaving treatments or food in order to die, commits a crime under IPC under Section 309 which speaks regarding attempt to suicide. This landmark judgment was pronounced in relation to a journalist writer Pinki Virani's plea to allow passive euthanasia for Aruna Shanbaug.

As far as the brief fact of the case is concerned, Aruna Shanbaug hailing from Haldipur town of Utter Kannada district in Karnataka, was a junior nurse, at King Edward Memorial Hospital in Mumbai and was planning to get married to a medic in the hospital. On the night of 27 November, 1973, Shanbaug was sexually assaulted by Sohanlal Bhartha Valmiki, a ward boy at the King Edward Memorial Hospital. Valmiki was motivated partly by resentment for being ordered about and castigated by Shanbaug. Valmiki attacked her while she was changing clothes in the hospital basement. He choked here with a dog chain and

¹⁶ (1996) 2 SCC 648

sodomized her. The asphyxiation cut off oxygen supply to her brain, resulting in brain stem contusion injury and cervical cord injury apart from leaving her cortically blind. The police case was registered as a case of robbery and attempted murder on account of the concealment of anal rape by the doctors under the instructions of the Dean of KEM Hospital. Valmiki was caught and convicted, and served two concurrent seven years sentences for assault and robbery, neither for rape or sexual molestation, nor for the unnatural sexual offence.

A petition for euthanasia was first filed by Pinki Virani, a journalist and her friend who has written a book on the woman who is being forced to live her life stripped of basic dignity. The Supreme Court praised MMs. Virani's concern, but ruled out her relationship with the patient does not give her this right to file a petition on behalf of Ms. Shanbaug for mercy killing. The only party can appeal for the euthanasia is the staff of KEM hospital where she had served as a nurse. Refusing mercy killing of Aruna Shanbaug, lying in a vegetative state for 37 years in a Mumbai hospital, a two-judge bench of Justices Markandeya Katju and Gyan Sudha Mishra, laid a set of though guidelines under which passive euthanasia can be legalised through High Court monitored mechanism.

Ms. Shanbaug has, however, changed forever India's approach to the contentious issue of euthanasia. The verdict on her case on 7th March 2011 allowed passive euthanasia contingent upon circumstances. So, other Indians can now argue in Court for the right to withhold medical treatment-take a patient off a ventilator, for example, in the case of an irreversible coma. The judgment made it clear that passive euthanasia will "only be allowed in cases where the person is in persistent vegetative state or terminally ill". The Apex Court while framing the guidelines for passive euthanasia asserted that it would now become the law of the land until Parliament enacts a suitable legislation to deal with the issue.

The bench also asked Parliament to delete Section 309 i.e attempt to suicide as it has become anachronistic though it has become constitutionally valid. A person attempts suicide in a depression, and hence he needs help, rather than punishment, Justice Katju writing the judgment said.

The Apex Court said though there is no statutory provision for withdrawing life support system from a person in permanently vegetative state, it was of the view that "passive euthanasia" could be permissible in certain cases for which it laid down guidelines and cast the responsibility on High Courts to take decisions on pleas for mercy killings. "We agree

with senior counsel T.R.Andhyarujina (who assisted the court in the matter) that passive euthanasia should be permitted in our country in certain situations, and we disagree with Attorney General (G.E.Vahanvati) that it should never be permitted,” said the bench.

Thus, in each case, the relevant High Court will evaluate the merits of the case, and refer the case to a medical board before deciding on whether passive euthanasia can apply. And till Parliament introduces new laws on euthanasia, it is Ms. Shanbaug’s case that is to be used as a point of reference by other courts.

ADVANTAGES AND DISADVANTAGES OF EUTHANASIA

Advantages

1. It provides a way to relieve extreme pain.
2. It provides a way of relief when a person’s quality of life is low.
3. Frees up medical funds to help other people.
4. It is another case of freedom of choice.

Disadvantages

1. Euthanasia devalues human life.
2. Euthanasia can become a means of health care cost containment.
3. Physicians and other medical care people should not be involved in directly causing death.
4. There is a ‘slippery slope’ effect that has occurred where euthanasia has been first been legalised for only the terminally ill and later laws are changed to allow it for other people or to be done non-voluntarily.¹⁷

CONCLUDING REMARKS

As far as the abovementioned discussion and deliberation is concerned, it is observed that society cannot avoid the complex controversies surrounding euthanasia and must at least attempt to provide for adequate guidelines and legal safeguards for those who tragically must face such a decision. Passive euthanasia is rarely painless. Active euthanasia is not only painless, but if properly administered it should be a positive experience. Drugs that produce

¹⁷ Available at www.insightsonindia.com/2016/../insights-into-editorial-towards-a-law-on-euthanasia, (Accessed on 8/10/2017 at 8.35am)

pleasurable sensations given before a fatal injection, coupled with a dignified ceremony, are far preferable to an ignominious starvation as an end to life. If feasible, amendment may be made in the existing law for proper administration of active euthanasia. Legal guidelines need to be formulated in this context keeping in view that the right to life won't be violated.

SCOPE OF JUDICIAL POWERS IN A DYNAMIC SOCIETY: JUDICIAL ACTIVISM

Dr. Rashmi Khorana Nagpal*

Abstract

Judicial Activism is a dynamic process of judicial outlook in a changing society. It is a judicial philosophy which motivates judges to depart from traditional precedents in the favor of progress and new social policies. It is an active interpretation of a present statute as to widening its scope for providing relief to the people at large. In case there is an inconsistency in the law enacted by the parliament and the provisions as laid down under the Constitution, the court has a duty to enforce the Constitution and ignore the legislative law, the present action is known as judicial review. Thus concepts of judicial review and judicial activism have similarities. However, there is a slight difference between judicial review and judicial activism. The Judicial Review symbolizes to decide if a statute or any administrative act is consistent with the constitution on the other hand judicial activism is more about the behavior of the judge concerned in the matter. Further, there are certain issues that are unanswered and need to be analyzed 1stly the issue of defining the limit of the power of Judicial Activism and 2ndly the issue of analyzing the point up to which the judiciary has the power under the constitution to actively interpret a defined statute.

Keywords: Judicial activism, Judicial review, Supreme Court, interpretation, interpret

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INTRODUCTION

The term Judicial Activism has no universally accepted definition it has been understood and perceived differently by different authorities in different spheres. It depends upon the individual point of view. Professor Upendra Baxi has accurately pointed that there cannot be a precise definition regarding whether or not the decision is an example of Judicial Activism¹. According to Prof Baxi,

Judges are evaluated as activists by various social groups in terms of their interests, ideologies and value. Quite often, the label is attached to a judge who himself may not consider him as an activist.¹

Judicial Activism is a dynamic process of judicial outlook in a changing society. According to Black's Law dictionary Judicial Activism is a judicial philosophy which motivates judges to depart from traditional precedents in the favour of progress and new social policies.

In case there is an inconsistency in the law enacted by the parliament and the provisions as laid down under the Constitution, the court has a duty to enforce the Constitution and ignore the legislative law, the present action is known as judicial review. Thus concepts of judicial review and judicial activism have similarities.²

However, there is a slight difference between judicial review and judicial activism. The Judicial Review symbolizes to decide if a statute or any administrative act is consistent with the constitution on the other hand judicial activism is more about the behaviour of the judge concerned in the matter. Judicial activism is usually based on the public interest and speedy disposal of pending litigation. Further, with judicial review the court acts as a protector and watcher of the fundamental rights. Therefore the power of judicial review is recognized as part of the constitution. In case of judicial activism, the court actively widens the scope of a present law by looking into the interpretation of the statute and the intent of the drafters.³

Judicial creativeness may present sound outcomes if they originate out of principled activism however, if it is derived by partisanship, it may provide in catastrophic outcomes and

¹ *Courage, craft, & Contention* 3 (1985)

² Justice M.N. Rao, 'Judicial Activism' (Eastern Book Company); Available at: <http://www.ebc-india.com/lawyer/articles/97v8a1.html>, (Accessed on 14/11/2017)

³ R Shunmugasundaram, 'Judicial activism and overreach in India' (Amicus Curiae Issue 72, Winter 2007); Available at: <https://core.ac.uk/download/pdf/112282.pdf>, (Accessed on 14/11/2017)

generate clashes which would result in negative social change. For instance in the year 1857 the American Supreme Court under the supervision of Chief Justice Taney adjudicated in *Dred Scott v. Sandford case*⁴ that coloured people (Negros) cannot be held as equal to the whites people and the fundamental guarantees as under the Constitution could not be provided to them, the decision accelerated the wave of civil war among Northern and Southern States and finally resulting in the abolishment of the concept of slavery and lead to the strengthening of the Union.⁵

HISTORICAL EVOLUTION

Judicial Activism also known as innovative interpretation is not a concept of a recent history. The concept came into being in 1804, in *Marbury v. Madison*⁶ in the present case Marbury who was appointed as Judge by the US Federal Government in accordance with the Judiciary Act of 1789. Although appointment warrant was signed it was not conveyed. Mr. Marbury files a writ of mandamus against the government. When the writ was filed Mr. Marshall was appointed by the outgoing President who lost the election, as the Chief Justice of the Supreme Court. Justice Marshall dealt with imminent prospect of elected Government not abiding the judicial decree if the Mr. Marbury's claim was to be upheld. In an exceptional showcasing of judicial statesmanship emphasizing the Court's power to review the Congress's and the Executive's action, Chief Justice Marshall rejected the issuance of relief based on the reasoning that the Judiciary Act of 1789 under Section 13, which lay the basis for the claim set forward by Mr. Marbury, was in violation of the constitution as it went against the American Constitution, Chief Justice observed that in the US the Constitution is the fundamental and supreme authority of law of the nation and the court gets to say what the law actually is. He further asserted that the scrupulous phraseology present in the United State Constitution verifies and fortifies the rules which are essential for every written Constitution. That a law which goes against the Constitution is void and unacceptable and that all the courts and also the other departments are bound to follow the constitution. In case there is an inconsistency in the law enacted by the parliament and the provisions as laid down under the Constitution, the court has a duty to enforce the Constitution and ignore the legislative law.

⁴ 15 L Ed 691 (1857)

⁵ *Supra* note 2

⁶ 2 L Ed 60 (1803)

The similar concepts of judicial review and judicial activism were thus born.⁷

It is extremely complex to trace out the origin of judicial activism in India. As the independence of judiciary was recognized along with the concept of separation of power from the Government under the Government of India Act of 1935 and thereafter under the Constitution of India in 1949, it would only be fair if the tracing of origin is initiated after the year 1935. However, certain instances are there that occurred even before the said period, when certain judges of High Courts set up under the Indian High Courts Act, 1861 showed certain glimpses of judicial activism. During the year 1893, Justice Mahmood of the Allahabad High Court delivering a dissenting judgment, planted the seed of judicial activism in India. In the highlighted case, which was dealing with an under trial accused who being an indigent person was unable to afford and thereby engage a lawyer. Justice Mahmood in the present case held that the requirement of the right of being heard would only be fulfilled if the person is represented by a legal practitioner on his behalf.⁸

The Hon'ble Supreme Court is the ultimate interpreter of the Constitution and judicial activism being a product of judicial action, thus it will not be wrong in saying that judiciary by itself has the power to decide the limits of power to implement judicial activism. Interestingly since the drafting of the Constitution of India till today, the process of judicial separation keeps on ongoing. The paramount illustration of judicial activism which showed the ongoing process was recognition of the basic structure doctrine starting from the *Shankari Prasad judgment*⁹ to *Sajjan Singh's case*¹⁰ from there to *Golak Nath's case*¹¹ and from there to the *Keshavanand Bharti v. State of Kerala* case¹². Further, advancements in the area of Public Interest Litigations also indicate the valor of confidence and effective adjudication through which the Indian Supreme Court has transformed into the Indians Supreme Court.¹³ The Supreme court's order in *Maneka Gandhi*' case¹⁴ laid down the foundation of a very wide interpretation of Article 21 of the Indian Constitution where the apex court stated that the right to life and liberty includes not only right to live but also write to live with dignity.

⁷ Dr. Moreshwar Kothawade, *Need for Judicial Activism* (Laxmi Book Publication, 16/08/2015) p9

⁸ Balkrishna, *Ref. to the Article, When seed for Judicial Activism was sowed*, The Hindustan Times (New Delhi) dated 01-04-96, p.9.

⁹ *Sri Sankari Prasad Singh Deo v. Union of India & State of Bihar*, 1952 SCR 89

¹⁰ *Sajjan Singh v. State of Rajasthan* (1965) 1 SCR 933

¹¹ *L.C. Golak Nath & Ors. State of Punjab & Anr.* (1967) 2 SCR 762

¹² (1973) 4 SCC 225

¹³ M.J.C Vile, *Constitutionalism and Separation of Powers*, (1967)

¹⁴ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

However, there are certain issues that are unanswered and need to be analyzed 1stly the issue of defining the limit of the power of Judicial Activism and 2ndly the issue of analyzing the point up to which the judiciary has the power under the constitution to actively interpret a defined statute.

LIMIT OF THE POWER OF JUDICIAL REVIEW

As rightly pointed out by Justice J.S. Verma that Judicial activism is “*like a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady; not as a Rampuri knife which can kill*”¹⁵

It will be opposed to the idea, purpose and values of the Indian constitution if in a given the judiciary oversteps its boundaries and covers the executive and legislature under a veil by overreaching its limits. Recurrent interventions by the judiciary in the legislative or administrative action will most definitely lead to weakening of the two out of three wings of the constitution. The acceptance of much required this distinction between “judicial activism” and “judicial overreach” is essential for smooth and effective functioning of judicial power without hindering the legislative and administrative body and respecting the constitutional democracy with due regard to the doctrine of separation of powers. The evident cases showing the reality of judicial overreach was seen in the Supreme Court orders for shutting the commercial operations in Delhi which were unauthorized also the order of Hon’ble Supreme Court for demolition of constructions within the city of Chennai which were unauthorized and also the formation of Monitoring Committee for checking the application of the present order. These are the matters concerning the executive and administrative action and the interference of judiciary in the same could lead to public suffering. Further in the *S.R Bommai v. Union of India*¹⁶ the Supreme Court laid down that the Proclamation of the dissolving a State Legislative Assembly by the President can be a subject to judicial action and that in case the proclamation orders are struck down by the Supreme Court, it further has the authority to reinstate the sacked State Government back to its office¹⁷.

Further the order of Supreme Court in the *Arjun Gopal & Others. v. Union of India & Others* case¹⁸ the latest example of judicial overreaching the apex court on November 2016, ordered

¹⁵ Kishan Khanna, *Judicial Systems of the Third World: The Case of India*, (Author House, 2002)

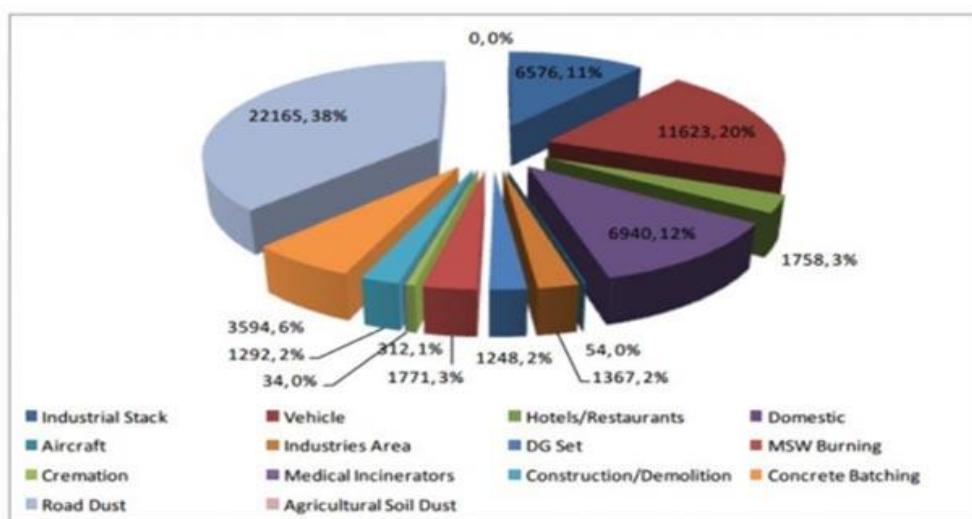
¹⁶ AIR 1994 SC 1918

¹⁷ *Supra* note 3

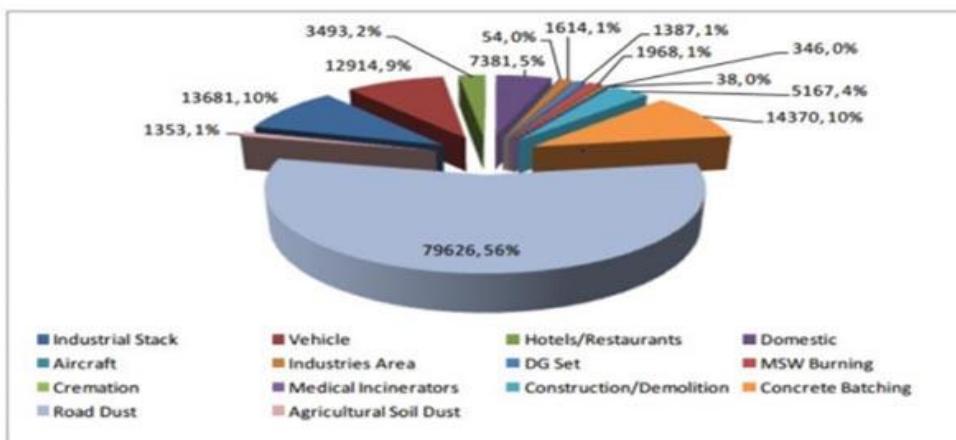
¹⁸ Civil Writ Petition No.728 of 2015

suspensions of license permits to sale firecrackers in form of wholesale and retail, in Delhi National Capital Region. However, in the month of September 2017, the SC in the interim took back its earlier order thereby permitting the sale of crackers for the forthcoming festive season. Another order was given by the Supreme Court on 9th October 2017 again banning the sale of firecrackers in Delhi NCR. The order is deemed to be unjust and resulted into a heavy loss to the shopkeepers, merchants and businessmen, who were investing in the sale and purchase of firecrackers. The orders for ban were declared only three days prior to the diwali festival resulting into an approximate loss of Rs 500 Crore to the festival industry. The orders were opposed by shopkeepers within the NCR and requests were made to government for filing a review petition. The orders resulted to be hurtful to the small traders. The orders where to suppress the environmental harm however by not banning the bursting of firecrackers and only banning the sale of the same raised a legitimate apprehension of black marketing of firecrackers and also resulted into black marketing of firecrackers.

As per the detailed study conducted by IIT-Kanpur in 2016 which examined the most influential causes of air pollution the institute concluded that the air pollution in Delhi is mainly the result of multiple anthropogenic and natural causes. The study further provided for the recommendations that are to be followed to tackle the problems in hand. Road dust, emissions from vehicles, burning of crops and waste burning contributes the most in disturbing the environment within the region. The below provided charts shows the details of causes resulting in composition of Particulate Matter from 2.5 to 10 in Delhi's air:



PM_{2.5} Emission Load of Different Sources in the City Of Delhi



PM₁₀ Emission Load of Different Sources in the City Of Delhi

There is no doubt that Firecrackers results into worsening of the air quality during and massively rises the levels of spiking potassium and sulphur especially during the diwali time. However, the banning firecrackers will only be a very temporary solution to a problem which can only be eradicating by regular check.¹⁹ The aforementioned cases shows clear over judicial overreach such matters are to be best solving through legislative action as judiciary cannot act as an expert on every problem²⁰.

CONCLUSION

Judicial activism has been recognized as a most effective and influential tool to improve and repair any discrepancy in a legislative statute or in any administrative action and also it magnifies the scope of a prevailing law. However it is of the utmost importance that the doctrine of Judicial Activism is used carefully as to provide justice to the people. It should be utilized in a way as to cause justice to the whole of society at minimum cost. Legislative check on the court's power of judicial activism will not be an effective solution as the same will result into hindrance in the doctrine of separation of power. Also the frequent interference by the court in the legislative and administrative action will also lead to the hindrance in application of the said doctrine. The accurate action will be the careful and cautious application of the doctrine. It should not be utilized in a way as to cause harm,

¹⁹ Maitridevi Sisodia, *Supreme Court order to ban firecrackers is a case of Judicial Overreaching*, (Daily O,10 October 2017); Available at: <https://www.dailyo.in/variety/firecracker-ban-supreme-court-delhi-ncr-air-pollution/story/1/19993.html>, (Accessed on 14/11/2017)

²⁰ Geoffrey Robertson QC, Judicial Independence: Some Recent Problems (International Bar Association's Human Rights Institute (IBAHRI) Thematic Papers No 4, June 2014); Available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9f2297b2-5bdf-4c7c-b950-025604a2c363>, (Accessed on 14/11/2017)

however it should work in accordance with the doctrine of utilitarianism.

As rightly pointed out by Justice J.S Verma that “*Judicial activism is like a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady; not as a Rampuri knife which can kill*”²¹

Thus the judicial activism if used casually will lead to more harm than good for the society at large however by effective and well researched adjudication it can lead to great and speedy improvement of the legal structure as the wait for legislative or administrative action could be avoided. The act of judiciary in such a way will strengthen the constitutive values and will heighten the faith in judiciary of the general public.

²¹ *Supra* note 15

INTERNATIONAL CONVENTIONS ON PATENTS

Mrs. Rekha Thakur*

Abstract

A patent is a limited monopoly that is granted in return for the disclosure of technical information. The right of use of such patent invention is granted to the patent owner only. Many attempts have been made for the protection of patents by international associations such as the Paris Convention, Patent Cooperation Treaty, TRIPs agreement and convention on Biological Diversity to make more and more uniformity and harmonisation among national patent system. In the history, no such system existed that could be considered as international patent system. Over the years, nations realised that patenting should be internationalised because it would improve effectiveness and lower costs. This awareness led to worldwide initiatives and formation of treaties and conventions relating to patents. This paper will discuss patent related treaties and conventions administered by various organisations. The most important international organisations for patent law are WIPO and WTO which will be discussed in this paper how these organisations govern all the treaties and the Trade Related Aspects of Intellectual Property Rights respectively. International conventions always played important role in shaping the patent law at both levels, be it national and international. Therefore, Intellectual property has both a national and international perspective. Such as, patents are governed by national laws and rules depending on a given country, while international conventions on patents provide minimum rights and ensure certain measures for enforcement of rights by the contracting states. The aim of various international conventions is that the patent laws and patent protection should become very similar across the world in all countries. The international conventions on patents will be discussed in detail in this paper with the help of various resources.

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INTRODUCTION

Intellectual property deals with the creations of the human mind such as inventions, literary and artistic works, symbols, names, images and designs used in commerce. Intellectual property is divided into two categories: Industrial property which includes patents, trademarks, industrial designs, and geographic indications of source. Copyright which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works for example drawings, paintings, photographs, sculptures, and architectural designs. Intellectual property rights protect the interests of creators by giving them property rights over their creations.¹ Intellectual property is intangible in nature and it mainly includes patents, trademarks, copyrights, and trade secrets, which collectively are referred to as ‘intellectual property’. However, the scope and definition of intellectual property is constantly evolving with the inclusion of newer forms in recent times such as geographical indications, protection of plant varieties, protection for semi-conductors and integrated circuits, and undisclosed information have been brought under the umbrella of intellectual property.²

WHAT IS PATENT?

In this paper the main focus will be on international conventions of patent law. Before moving forward it is necessary to know what is patent. A Patent is an exclusive right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. The exclusive right is to manufacture the new article invented or manufacture an article according to the invented process for a limited period. During the term of the patent the owner of the patent, can prevent any other person from using the patented invention.³ After the expiry of the duration of the patent anybody can make use of the invention. A patent is a form of industrial property, or as it is now called, an intellectual property. The owner can sell the whole or part of this property. He can also grant licences to others to use or exploit it. A patent is a creation of statute and is therefore territorial in extent. Thus a patent granted in one country cannot be enforced in another

¹ Available at: http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf (Accessed on 12/02/17)

² Available at: <http://www.icsi.in/Studymaterial%20Professional/NewSyllabus/ElectiveSubjects/IPRL&P.pdf> (Accessed on 12/02/2017)

³ Available at: <http://shodhganga.inflibnet.ac.in/bitstream/10603/21666/5/chapter-ii.pdf> (Accessed on 12/02/17)

country unless the invention concerned is patented in that country also.⁴

NATIONAL LAW OF PATENT

In India, the national legal regime pertaining to patents is contained in Patents Act 1970 as amended by the Patents Amendment Act, 1999, the Patents Amendment Act, 2002, the Patents Amendment Act, 2005.⁵ The fundamental principle of patent law is that a patent is granted only for an invention which must be new & useful. That is to say, it must have novelty & utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was already known before the date of the patent. Patentee gets the right over his invention for 20 years under Indian law.⁶

INTERNATIONAL CONVENTIONS ON PATENTS

International conventions relating to patents have always played an important role in shaping the patent law at both levels, be it national or international.⁷ It has increased the efficiency and reduced the costs. Some of the important convention has been explained as follow:

Paris Convention for Protection of Industrial Property

This convention was signed by 11 states in 1883, when this convention came into effect on 7th July 1884, the number of member countries came to 14. After Second World War, the Paris Convention increased its membership more significantly. As on November, '98 there are 151 member states. The Paris Convention has been revised several times. Various revision conferences were held in Rome in 1886, in Madrid in 1890 and 1891 in Brussels 1897 and 1900, in Washington in 1911, and in The Hague in 1925 and in London in 1934, in Lisbon in 1958 and in Stockholm in 1967. Each of these conferences adopted a revised act of the Convention.⁸ The provisions of the Paris Convention may be sub-divided into four main categories:

- I. The first category of the provisions contains rules of substantive law which

⁴ World Trade Organisation ; Intellectual property: protection and enforcement, Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.html (Accessed on 14/02/17)

⁵ Dr S.K. Singh, Intellectual Property Rights Laws, 195(2nd Ed., 2013)

⁶ Id at 198-199

⁷ A Venetian Law of 1474 established a positive system of granting ten year privileges to inventors of new arts and medicines: Mandich/Prager (1948) 30 JPOS. 166

⁸ Available at: <http://pib.nic.in/focus/foyr98/fo1298/fo3012981.html> (Accessed on 14/02/17)

guarantee a basic right known as the right to national treatment in each of the member countries.

- II. The second category of the provisions establishes the basic right known as the right to priority.
- III. The third category of provisions defines a certain number of common rules - rules establishing rights/applications or rules required for permitting the member countries to enact legislation following those rules.
- IV. The fourth category of provisions deals with the administrative frame work which has been established to implement the Convention and includes final clauses of the Convention.⁹

Patents granted in different contracting States for the same invention are independent of each other: the granting of a patent in one contracting State does not oblige the other contracting States to grant a patent; a patent cannot be refused, annulled or terminated in any contracting State on the ground that it has been refused or annulled or has terminated in any other contracting State.

The inventor has the right to be named as such in the patent.¹⁰ In the latter case, proceedings for forfeiture of a patent may be instituted, but only after the expiration of two years from the grant of the first compulsory license.¹¹ The Paris Convention has proved to be an effective international legal instrument for the protection and propagation of the technical achievements and distinctive signs through industrial property system.

General Agreement on Tariffs and Trade (GATT)

The GATT has started with great expectations. It suggested the full use and development of resources of the world community and the enhancement of production and exchange of goods besides reciprocal and mutually beneficial arrangements involving significant reduction of Tariffs and a gradual elimination to other barriers of trade. Despite the interest of various

⁹ Available at: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf> (Accessed on 14/02/17)

¹⁰ Available at: http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (Accessed on 14/02/17)

¹¹ Id.

nations to protect self-interest, this Organisation continued till 1990.¹² India was a signatory to the GATT, which was a binding contract on 128 countries by 1994.¹³ TRIPS were an integral part of GATT. Intellectual Property Rights is to be ensured by a strong patent system, which will confer exclusive rights on an inventor to make, use or sell the product or process of his invention. The purpose of providing the patent is to allow the inventor to enjoy the market exclusivity to generate the returns for the time, money and effort spent on the invention.¹⁴

World Trade Organisation (WTO)

The World Trade Organisation (WTO) is the international organisation dealing with the rules of trade between nations. As of February 2005, 148 countries are Members of the WTO. In becoming Members of the WTO, countries undertake to adhere to the 18 specific agreements annexed to the Agreement establishing the WTO. They cannot choose to be party to some agreements but not others (with the exception of a few ‘plurilateral’ agreements that are not obligatory).¹⁵

The main differences between GATT and WTO are as follows:

- a) GATT was ad hoc and provisional. The WTO and its agreements are permanent. WTO has a sound legal basis because members have ratified the WTO agreements and the agreements themselves describe how the WTO is to function,
- b) The WTO has members. GATT was officially only a legal text with no legal organisation,
- c) GATT dealt with trade in goods. The WTO covers services and intellectual property as well,
- d) The WTO dispute settlement is faster, more automatic than the old GATT system, which was based on consensus of all members. Majority cannot block

¹² Amit Sen, *WTO/ TRIPS and Patent Rights in Indian Perspective*, The Law of Intellectual Property Rights, Edited by Shiv Sahai Singh, 70(2002)

¹³ Available at: https://www.wto.org/english/thewto_e/gattmem_e.htm (Accessed on 14/02/17)

¹⁴ Ahuja S.D, *GATT and TRIPS- The Impact on the Indian Pharmaceutical Industry*, Patent World, 65 (2nd Ed. 1994)

¹⁵ Available at: http://www.who.int/medicines/areas/policy/wto_trips/en/ (Accessed on 13/02/17)

WTO rulings,

- e) GATT 1947 has been updated and exists as GATT 1994. It operates with other WTO Agreements.¹⁶

Trade Related Intellectual Property Rights (TRIPS)

The TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced (Article 27.1)¹⁷

There are three permissible exceptions to the basic rule on patentability.

One is for inventions contrary to order public or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of order public or morality (Article 27.2). The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)). The third is that Members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective *sui generis* system of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement (Article 27.3(b)).

The exclusive rights that must be conferred by a product patent are the ones of making, using, offering for sale, selling, and importing for these purposes. Process patent protection must give rights not only over use of the process but also over products obtained directly by the process. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts (Article 28).¹⁸ Members may provide limited exceptions

¹⁶ Harin Wardha, WTO and Third World Trade Challenges, Commonwealth, 2002

¹⁷ Available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.html (Accessed on 14/02/17)

¹⁸ Id.

to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (Article 30).¹⁹

The term of protection available shall not end before the expiration of a period of 20 years counted from the filing date (Article 33). Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application (Article 29.1). If the subject-matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process, where certain conditions indicating a likelihood that the protected process was used are met (Article 34).²⁰

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder. The conditions are mainly contained in Article 31. These include the obligation, as a general rule, to grant such licences only if an unsuccessful attempt has been made to acquire a voluntary licence on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the licence; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority. Certain of these conditions are relaxed where compulsory licences are employed to remedy practices that have been established as anticompetitive by a legal process. These conditions should be read together with the related provisions of Article 27.1, which require that patent rights shall be enjoyable without discrimination as to the field of technology, and whether products are imported or locally produced.²¹

Patent Cooperation Treaty (PCT)

¹⁹ Id.

²⁰ Id.

²¹ Available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.html (Accessed on 14/02/17)

The Patent Cooperation Treaty (PCT) was signed in 1970²² and came into operation from 1978. The significant feature of the Treaty is that it establishes a system of international application and preliminary examination procedure. Presently, PCT has 151 contracting States.²³ Although the PCT provides for an international application and search methodology, the authority to grant the patent remains with the National Patent Office.²⁴ Under the PCT, an applicant applies to an international office and an international search and international preliminary examination is undertaken. Thereafter, the application is sent to the designated national offices to decide whether to grant national patents.²⁵

Organisation and Administration

The PCT is an ongoing international attempt of WIPO to rationalise and facilitate a cost-effective system for filing patents internationally, conducting prior art searches and for the examination of patent applications.²⁶ The PCT has created a Union, which has an Assembly. For effective discharge of its responsibilities, the PCT is assisted by a number of organs, as under:

International Patent Co-operation Union

It is constituted by the countries party to the treaty for bringing about cooperation in the filing, searching and examination of applications for the protection of inventions, as well as for rendering special technical services.²⁷

Assembly

Every country party to the PCT is a member of the Assembly. Important tasks that are assigned to the Assembly include (i) amendment of the regulation issued under the treaty (numbering 69 Articles), ii) adoption of the biennial programme and budget of the Union, and iii) fixing of certain fees connected with the use of the PCT system.

International Bureau

²² Available at: <http://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct.pdf> (Accessed on 15/02/17)

²³ Available at: <http://www.wipo.int/pct/en/> (Accessed on 15/02/17)

²⁴ Available at: <https://cyberlawsconsultingcentre.com/wp-content/uploads/history-and-evolution-of-patents1.pdf> (Accessed on 15/02/17)

²⁵ Available at: <http://www.wipo.int/pct/guide/en/gdvol1/pdf/gdvol1.pdf> (Accessed on 15/02/17)

²⁶ Available at: <https://naarm.org.in/VirtualLearning/vlc/iprpct.htm> (Accessed on 15/02/17)

²⁷ Available at: <http://www.wipo.int/pct/en/> (Accessed on 15/02/17)

It performs the administrative tasks concerning the Union. It publishes the PCT Gazette and brings out other publications.

Advantages of PCT

The PCT simplifies the process of getting patents in a number of countries by filing one application. The Specific advantages to the applicant are:

- A.** By filing one international patent application under the PCT and designating any or all of the PCT countries, the applicant can simultaneously seek patent protection for an invention in each of a large number of countries.
- B.** Filing one application under the PCT entitles the applicant to obtain an international filing date for his application. This filing date will have the effect of a regular national filing in every country he / she has designated for the grant of patent.
- C.** The mandatory requirements that the applicant has to comply are very few such as specific requests for filing a PCT application or an indication of his / her nationality. These are mainly to confirm his / her eligibility.
- D.** By filing one application, the applicant can obtain the effect of regular national filings in a PCT country without initially having to furnish a translation of the application or to pay national fees.
- E.** A lot of time is gained before the applicant can decide to go ahead with his / her application. Due to the extra time of 18 months (more than under the traditional patent system) gained by the applicant through filing of PCT application, he / she can keep all the options open for protecting his / her invention while still investigating its commercial possibilities abroad.
- F.** The initial fees payable in respect of the filing of international application can be paid at one time, at one office and in one currency.
- G.** Through international search report, the PCT provides an excellent opportunity for the applicant to evaluate with reasonable probability the chances of his/her invention being patented before incurring major costs in foreign countries.

During the international preliminary examination, he/she has the possibility to amend the international application to put it in order before processing by the Designated Offices.

- H.** With the benefit of the international search and preliminary examination reports conforming to the international standards, the applicant can rely upon the patents subsequently granted by the National/Regional Patent Offices.
- I.** If the applicant files his/her international application in the form prescribed by the PCT, he/she is reasonably assured that it cannot be rejected on formal grounds by any Designated Office during the national phase of processing the application.²⁸

PATENT LAW TREATY (PLT)

The Patent Law Treaty (PLT) was adopted in 2000 with the aim of harmonizing and streamlining formal procedures with respect to national and regional patent applications and patents and making such procedures more users friendly. With the significant exception of filing date requirements, the PLT provides the maximum sets of requirements the office of a Contracting Party may apply.²⁹

SUBSTANTIVE PATENT LAW TREATY (SPLT)

The Substantive Patent Law Treaty (SPLT) is a proposed international patent law treaty aimed at harmonizing substantive points of patent law. In contrast with the Patent Law Treaty, signed in 2000 and now in force, which only relates to formalities, the SPLT aims at going far beyond formalities to harmonise substantive requirements such as novelty, inventive step and non-obviousness, industrial applicability and utility, as well as sufficient disclosure, unity of invention, or claim drafting and interpretation.³⁰

RIO CONVENTION ON BIOLOGICAL DIVERSITY

The Rio Convention on Biological Diversity was signed in June 1992. The Convention extends to all the developing countries a platform to express their concerns over the

²⁸ Id.

²⁹ Available at: http://www.wipo.int/treaties/en/ip/plt/summary_plt.html (Accessed on 15/02/17)

³⁰ Available at: http://www.wipo.int/patent-law/en/draft_splt.htm (Accessed on 15/02/17)

exploitation of indigenous resources by entities and major corporations from the developed world. This convention offers a strong basis to control the use made of traditional knowledge and provides an impetus for conserving biological diversity and propagating its sustainable use.³¹

CONCLUSION

The intellectual property is the result of constant intellectual approach of inventors, author and other creative persons which helps to gain wealth in a modern economy. The whole idea of Intellectual Property is to protect the owner against its unlawful use by any person offering same or similar products or services. It helps in providing exclusive right to creator or inventor, thus motivates the creator to share information and data rather keeping it confidential. The Rights granted under the intellectual property rights enhances socio-economic growth. The most important international organisations for patent law are WIPO and WTO which govern all the treaties and the Trade Related Aspects of Intellectual Property Rights respectively. Therefore, Intellectual property has both a national and international perspective. Such as, patents are governed by national laws and rules depending on a given country, while international conventions on patents provide minimum rights and ensure certain measures for enforcement of rights by the contracting states. The aim of various international conventions as discussed is that the patent laws and patent protection should become very similar across the world in all countries. The sole aim of international conventions is to safeguard the interests of owner.

³¹ Available at: <https://www.cbd.int/gbo1/chap-02.shtml> (Accessed on 15/02/17)

VIOLATIONS OF HUMAN RIGHTS IN POLICE CUSTODY

Shailesh Mishra*

Abstract

All human beings are born free and equal in dignity. To protect human rights is to ensure that people receive some degree of decent human treatment. To violations of human rights means to treat them as if they are less than human and undeserving of respect and dignity. For example, acts which are typically deemed to be crimes against humanity, including genocide, torture, slavery, enforced sterilization or medical experimentation, rape etc. According to the present democracy concept, police should always be a friend, guide and philosopher to the entire citizen including the criminals in the society. There are many existing legislation for protection of human rights of accused in police custody but their right continue to be violated. The lack of implementation of the existing legal framework has been inadequate for the protection of human rights of accuse in police custody.

Keywords: Human rights, police custody, illegal detention, custodial violence, torture

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INTRODUCTION

Every individual as a member of the human society has some basic rights which are considered as human rights. This can be used against the state or any other public authority irrespective of any other consideration. So every single individual has inborn right to live in dignity in all situations including the time of arrest and under police custody.

In India, the rights of individuals under police custody are protected by Indian constitution and by many other legislation like Indian penal code, code of criminal procedure and protection of human rights act. All these rights are also recognised by various international covenants like UDHR, ICCPR, Convention against torture and cruel inhuman or degrading treatment or punishment and Body of principles for the protection of all persons under any form of detention or imprisonment.

And in spite of all the above mentioned national and international legal standards for the protection of rights under police custody, in India human rights violations under police custody are widespread. Most of human rights violations take place at the time of the administration of law and order by the police. Now day's custodial violence has become the part of the police culture and the incidences of custodial deaths are quite common.

The concept of human rights violation in police custody can be defined in many ways like police brutality, police unrestrained behaviour, police torture, custodial violence and lock-ups crime.

The term 'police' broadly connote the purposeful maintenance of public order and protections of persons and property, from the hazards of public accidents and the commission of unlawful acts. It specially applies to the body of civil officers charged with maintaining public order and safety and enforcing the law including the prevention and detention of crime¹.

POSITION IN INDIA

In India, the history of human rights violations in police custody can be traced to British period. Even after 57 years of independence, in a democratic country like India, the police remains virtually a terror to the people and almost absolutely unaccountable for the violations

¹ Ghosh, S.K. and Rustamji K.F., Encyclopedia of police in India Vol. 1, New Delhi , Ashish Publishing House, p.3

of human rights of people in their custody. Though custodial torture, custodial deaths and other forms of human rights violations in police custody are very common today and the people are being fed up with hearing and talking of such custodial abuses, no static steps have been taken so far for a permanent solution.²

Since conviction rate is considered as the benchmark to measure the ability of an investigating every police officer would try to accomplish the maximum conviction rate to his credit by hook or crook. This will definitely help to increase the rate of police torture.

Nowadays custodial violence has become a part of the police culture and the incidence of custodial deaths is quite common. Though the academic world and judiciary have become conscious of the need of a study of the causes of human rights violations in police custody, its importation into the realm of Human Rights, on any systematic scale, is not yet attempted. In the field of Human Rights, a deep study of the causes of human rights violations in police custody from the legal standpoint has so far received little attention. Though much has been written on this topic, most of them concentrate on individual issues. The area of human rights violations is so vast both in the national and international perspective. Though many of the police officers have co-operated in a better manner, much difficulties arose in the task to penetrate the shields of defence of police staff who tried to conceive the realities in interrogation, torture etc.

CUSTODIAL VIOLENCE AND PERSECUTION IN LOCK-UPS

The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. And also police should have to presume that a person in the custody be innocent until his guilt has been proved.

Article 11(1) of the UDHR,³ Article 14(2) of ICCPR⁴ and Rule 84(2) of the standard minimum Rules⁵ provide principle of innocent. Since arrested persons are presumed innocent, police may impose only those conditions and restriction on them as will ensure

² *Kartar Singh v. State of Punjab*, (1994) 3 S.C.C 569

³ Article 11(1): “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

⁴ Article 14(2): “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

⁵ Rule 84(2) of the Standard minimum Rules reads: “Acquitted prisoners are presumed to be innocent and shall be treated as such.”

their appearance at trial, prevent their interference with evidence and further commission of offence.

There exist a number of violations of human rights in police lockup and surely there is the public dissatisfaction with the police functioning. Police officers know well what is going on in police stations yet they, allow them. Among the violations the most common forms are illegal detention, prolonged detention, manipulation of records of detention, custodial torture, custodial death, custodial suicide, custodial rape, denial of food, clothing and medical care, denial of access to council and interaction with relatives or friends.

ILLEGAL DETENTION AND MANIPULATION OF RECORDS OF DETENTION

Detention means deprivation of personal liberty except as a result of conviction for an offence whereas imprisonment means deprivation of personal liberty as a result of conviction for an offence.⁶

The relevant standard is laid down in article 9(3)⁷ of ICCPR. The code of criminal procedure section 50, 56 and 57 mandate that no person can be detained in custody without informing the ground for arrest and that person must be presented before a Magistrate within twenty-four hours of arrest. Article 21 and article 22 of constitution of India provide additional protection other than Code. And according to the article 226 and 32 entitle person seek judicial intervention through the writ of habeas corpus for his release from unlawful detention and also through inherent jurisdiction of the High Court under section 482 of the Code. However, these legal protections can be made use of only if someone is aware of all this legal and constitutional rights of arrested person.

PROLONGED AND UNCOMFORTABLE DETENTION

Every person who has been arrested has the right to be produced before the Magistrate within twenty-four hour of his arrest and if it will not followed by police then confinement become wrongful confinement.

⁶ Ponnain M., Panch Ramalingam and Rani Ponnaian , Glimpses of Human rights, 1999, p.252

⁷ Article 9(3): "*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement*".

3rd paragraph of article 9 of ICCPR requires that in criminal case, any person arrested or detained should be brought promptly before a judicial authority, whose function is to determine the lawfulness of a person's arrest or detention in given case⁸.

Article 22(2) of constitution of India also protects the right of arrested person to be produced before the magistrate within 24 hours of arrest. Similar to article 22(2) section 56 and 57 and 76 of the criminal procedure 1973 reiterate the same. Section 167 of the Code also requires the police to produce the accused person before the nearest Magistrate within 24 hour of his arrest.

The Supreme Court in *Sheela Barse's*⁹ case has imposed a duty on the Magistrate before whom the arrested person is produced to enquire from the arrested person whether he has any complain of torture or maltreatment in police custody and inform him that he has right under section 54 of the criminal procedure to be medically examined.

In *Joginder Kumar's*¹⁰ case the Supreme Court, with the object of enforcing the directions issued by it to the police regarding information to a friend or relative of an arrested person an making of an entry in the Diary to this effect, imposed a duty upon the Magistrate also, before whom the arrested person is to be produced, to satisfy himself that these requirements are complied with.

All these guide line given by SC to stop the malpractices of the police at the time of custody of the accused. There are many cases in which detainee died in police custody but no action can be taken against police because of lake of evidence.

TORTURE

The term 'torture' has neither in constitution nor in any penal law. Convention against torture¹¹ considers it as the infliction of several pain or suffering on a human being by another

⁸ Article 9(3) : "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

⁹ AIR 1983 SC 96

¹⁰ *Joginder Kumar v. State of U.P. & Others* 1994 SCC 260

¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and open for signature, ratification and accession by general assembly resolution 39/46 of 10 Dec. 1984.

human being who is acting in an official capacity.¹²

Article 15 of convention against Torture provides greater protection to person in police custody by requiring each state party to ensure that any statement procured by ill-treatment shall not be invoked as evidence in a proceeding.¹³ However statement shall be made admissible as evidence against a person accused of torture which is made by the detainee.

In India apart from the constitutional law protection against torture also provide under criminal law as well as under procedural law. I.P.C. section 220 provides for punishment to an officer or authority who detains or keep person in confinement with corrupt or malicious motive. And provide punishment under section 330 for causing hurt to extort confession or information and section 331 for causing grievous hurt. Similarly, the code of criminal procedure prohibits offering of threats, promises or inducement to extract information under section 163(1) and 163(3). Similarly section 24, 25, 26, and 27 of evidence act mean to protect persons suspected of crime from police atrocities.

In spite of the law which provides safeguard to the suspects, the torture and degrading treatment of police still continue. Police continuously uses method like third degree.

In *D.K. Basu*¹⁴ case Supreme Court declare third-degree method illegal. And also the Supreme Court has referred to the historical decision of the U.S. Supreme Court in *Miranda v. Arizona*¹⁵ which several safeguards have been laid down by the U.S. Supreme Court.

CUSTODIAL DEATH

Right to life considered most important, human, fundamental, natural, inalienable, and

¹² Article 1 : "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in the official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions"

¹³ Article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." In India, there exist laws in this regard. The allegation is that many accused persons are afraid to speak openly that they were subjected to torture by the police, for, they are afraid of the evil consequences if such a statement is made even to the court. Of late, the media brings out such matters to the attention of the public and as such there is an increased thinking that the policemen/officers are not as courageous as they were earlier to use torture indiscriminately on people under their custody.

¹⁴ AIR 1997 SC 610

¹⁵ 384 US 436; 16 L ED. 2D 694(1966)

transcendental right and hence it should be given the highest protection from all quarters. Custodial death is one of the worst crimes in civilized society governed by the rule of law, said by Supreme Court in *D.K. Basu* case¹⁶. Death due to torture is murder as defined in section 302 of the Indian penal code which provides death as maximum punishment.

From the sources of India itself the amnesty International has received a report of 36 deaths in custody in 1993 and also the report of 68 deaths in police custody as a result of torture or medical neglect throughout India, excluding the state of Jammu and Kashmir.¹⁷ Deaths of criminal suspects in police custody is most of those who are tortured in order to extract confession or information and in some appear to be innocent of any crime too.

ACCOMODATION, FOOD, MEDICAL CARE

A person in police custody is entitled to a minimum level of physical conditions as regards accommodations, food and medical care. Poor conditions of confinement are incompatible with State's obligations under Article 10(1)¹⁸ of ICCPR. Every person in police custody needs all accommodation specially sleeping accommodation according to environment of the place, but this requirement is not satisfactorily followed in any stations.

Food is also one of the most important requirements of the life but this one also not properly provide by any police station.

The detained person has a right to have him medically examined. A proper medical examination shall be offered to a detained person as promptly as possible after his admission to the place of detention, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge. This would enable the arrested person to complain to the Magistrate that he has been subjected to torture while in police custody. This puts restraint on the exercise of third degree methods by the police. Section 54 of the code of criminal procedure also gives right to arrested person to get himself examined by medical practitioner.

¹⁶ *Supra* note 14

¹⁷ National human rights commission, annual report, 1998-99

¹⁸ Article 10(1) of the International Covenant on Civil and Political Rights reads: "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

In *D.K .Basu v. State of West Bengal*¹⁹, Supreme Court made it clear that everyone should be medically examined at or after every 48 hours in police custody. Police officers detaining a person in their custody should also ensure that he is medically examined for any illness, injuries - afresh or old and they should make a record of the same along with suitable arrangements for treatments of any illness.

DENIAL OF ACCESS TO COUNCIL

An individual does not become an insignificant person because he is under detention in police lock-up. He enjoys many rights and his rights are not surrendered to the whims of police authorities. Article 14(3) (b) of ICCPR gives the provision of legal aid to arrested person.

The U.S. Supreme court in *Escobedo*²⁰and *Miranda*²¹ case expanded and expounded the concept of right to counsel as a pre-trial necessity. In U.S.A. the suspect has a right to remain silent. He has also a right to consult with his attorney. The police are law-bound to effectively advise the suspects of his rights.

Even in India the suspects have many rights but police don't inform them about their right. According to Article 22 (1), an arrested person has the right to counsel and to be defended by a lawyer of his choice.

Before 42nd constitutional amendment in *Janardan v. State of Hyderabad*²², Supreme Court had held that Article 22 does not guarantee any absolute right to be supplied with a lawyer for by the State.

But in 1976, by the Forty-Second Constitutional Law Amendment Act, Article 39-A was inserted to provide for free legal aid to indigent accused. In *Nandhini Sathpathi v. State of Orissa*²³ Supreme court had held that, the right enshrined in Article 22 (1) extends to the accused not only from the time of his arrest under any punitive law but also during the custodial interrogation. Section 303 of code of criminal procedure gives right to defended by a pleader of his choice.

¹⁹ *Supra* note 14

²⁰ *Escobedo v. Illinois*, 378 US 478 (1964)

²¹ *Miranda v. Arizona*, 384 US 436 (1966)

²² 1951 SCR 344

²³ 1978 CriLJ 968

Section 126 of Evidence Act provide that the communication between client and his council is to be privileged and time of consultation the accused shall not be surrounded by police officer.

In this context the supreme court in *Sheela Barse*²⁴ case held that whenever a person is arrested and taken to the police lock up, intimation of the fact of such arrest must immediately be given to the nearest legal aid committee so that immediate steps can be taken for the purpose of providing legal assistance to the arrested person at State cost.

DENIAL OF OPPORTUNITY TO INTERACT BETWEEN DETAINEE AND HIS FRIENDS AND RELATIVES

In Francis Coralie Mullin case²⁵ supreme Court held that the accused has right to have a free and unfettered consultation with his friends and relatives out of the hearings of the police officer. It is very clearly said that there is a right of interaction with confers right to legal consultation and also the need and the scope of the arrestee to consult his near and dear one goes without saying specifically when there are large scale allegation regarding violations of conferred right of arrestees by the police. As the absence of specific provision in this regard gives the police more power to grant or deny the opportunity according to their will and the study has also clearly mentioned the denial of police.

OTHER UNATTENDED HUMAN RIGHT VIOLATIONS

There are many degrees of violations of human rights in police custody which are unnoticed by many of the human rights activists. They are included here in the ‘unattended categories’. The police are very often committing violations of human rights like informal or arbitrary arrest of innocent people, excess use of force against the person arrested, unwanted handcuffing, humiliating the arrested person, using of filthy language, arbitrary denial of bail etc.

ARBITRARY ARREST

Arrest is not defined in the Code of Criminal Procedure, 1973. It is the deprivation of a person of his liberty by legal authority or at least by apparent legal authority²⁶. Arrest is

²⁴ *Supra* note 9

²⁵ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors* AIR 1981 SC 746

²⁶ K.N. Chandrasekharan Pillai, R.V. Kelker's Criminal Procedure (1993), p. 53

usually the preliminary stage of placing a person in police custody and it is initial stage from where custodial violence arises. Hence it is inevitable that the arrest of a person is to be made strictly in accordance with the procedure established by law.

In India power of arrest is one of the chief sources of corruption in the police. Moreover as the National Police Commission suggested nearly 60% of the arrests were either unnecessary or unjustified and such unjustified police action accounted for 43.2% of the expenditure of the jail²⁷.

In foreign countries, arrest of a person is affected only after evidence against him is collected. The police get enough time to collect such evidence. But in India, everyone is impatient and the people, politicians, media and those in authority are not only interested to see that some suspects are arrested at the quickest time possible, but also to see that they are humiliated and interrogated in depth. The pressure exerted by them compels the police to take some people, guilty or otherwise, in custody. Everyone wants quick results in investigation but the policemen are not provided with anything that can aid crime-investigation. Naturally this leads to arbitrary arrests.

Article 9(1) of ICCPR says that no one may be subjected to arbitrary arrest, detention or imprisonment.²⁸ The police can arrest a person only if there is a charge of crime against him. Anyone cannot be arrested only on a complaint or slight suspicion.

Constitution of India Article 21 provides protection against arbitrary arrest or illegal detention. It is supplemented by Article 22, which provides certain procedural safeguards against arbitrary arrest or detention .

Section 41 of the Code authorizes any police officer to arrest any person, without an order from a Magistrate, who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned. Officers in charge of police stations are to report to the District Magistrate all cases of arrest without warrant.²⁹ In making an arrest the police officer is required to actually touch or confine the body of the person to be arrested unless

²⁷ National Police Commission, Third Report (1980), pp. 30-31.

²⁸ Article 9(1): "*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law*".

²⁹ Section 58 Code of Criminal Procedure, 1973

there is a submission to the custody by word or action.³⁰ The Supreme Court, in *Joginder Kumar*³¹ case, to prevent the indiscriminate arrests, directed that Director General of Police of all States in India shall issue directions that a police officer making an arrest should also record reasons for making the arrest.

*D.K Basu's*³² case lays down specific guidelines that must be followed while arresting and interrogating suspects. These guidelines are based on CrPC's provisions and are very much a part of regulations laid down in police manuals and rule books. The Supreme Court has said that failure to comply with these guidelines not only renders an officer liable for punishment through departmental action but also amounts to contempt of court.

UNNECESSARY HANDCUFFING

It is a principle of the criminal law that a person alleged to have committed an offence is liable to arrest. Power of handcuffing a person is not absolute. It is subjected to restrictions by the legislation, court decisions and the police rules of each state. Section 49 of the CrPC puts down that no one shall be subjected to more restraint than is necessary to prevent his escape. Unnecessary handcuffing or handcuffing for the purpose of humiliating people is considered to be a human rights violation. Arrest should be legal and there should not be any occasion to have informal arrests of people. Informal arrest can be considered only as abduction or kidnapping. Handcuffing in routine is violation of Art.21.

In *Prem Shankar Shukla v. Delhi Administration*³³ the court held that handcuffs should be used in the 'rarest of rare cases' and they were to be used only when the person was 'desperate', 'rowdy' or the one who was involved in non-bailable³⁴ offence. There should ordinarily be no occasion to handcuff persons occupying a good social position in public life, or professionals like jurists, advocates, doctors, writers, educationalists, and well known journalists.

³⁰ Section 46(1), Code of Criminal Procedure, 1973

³¹ *Supra* note 10

³² *Supra* note 14

³³ 1980 SCC 526

³⁴ Non-bailable offences are laid out in the First Schedule of the Code of Criminal Procedure, 1973 [CrPC]. Bail in such offences is given at the discretion of the police or the court.

In *Sunil Batra v. Delhi Administration*³⁵ Supreme Court held that handcuffing without a magistrate's approval is not permitted, save in rare instances. In such instances, the burden of proving that the use of handcuffs was warranted lies on the police. If the detaining authority or escort party fail to satisfy the court about the genuineness of the danger or threat posed by the person who was handcuffed, they will be liable under law.

FALSE MEMO OF ARREST

In *D.K. Basu* case the Supreme Court in its land mark decision directed that memos of arrest should be prepared at the time of arrest which should be attested by at least one witness and countersigned by the arrestee. The memo of arrest should also include the time and date of arrest. But in most of the cases these guidelines are not strictly followed. In many cases arrest memos do not contain the signature of witnesses to the arrest. When lawyers bring it to the notice of Magistrates, they usually express their helplessness and advice lawyers to file contempt petitions

FAILURE TO INFORM THE GROUND OF ARREST

An arrested person should be made aware of the grounds of his arrest in order to make him capable of defending himself. Article 9(2) of the ICCPR recognizes right to inform arrested person ground of arrest³⁶. Also article 5(2) of the European Convention says that, anyone who is arrested must be “informed properly, in a language which he understands, of the reasons for his arrest and of any charge against him”

In India, this is a newly propounded duty of the police as an essential part of right to life and liberty enshrined under Article 21 of the Constitution. Article 22 (1) of the Constitution³⁷ lays down that an arrest will be illegal if the arrested person has not been communicated grounds of his arrest. Similar provisions are contained in Section 50 of the Code of Criminal Procedure.

³⁵ 1978 SCC 494

³⁶ Article 9(2) of the ICCPR reads: “*Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him*”. Thus the Covenant contemplates a two stage notification, firstly, at the time of arrest and secondly, as soon as the charge is framed.

³⁷ Article 22(1): “*No person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest nor shall be denied the right to consult, and to be defended by a legal practitioner of his choice*”

Similarly, when a person is to be arrested under a warrant, Section 75 of the Code³⁸ requires that the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required shall show him the warrant. The same requirement to notify the grounds of arrest is provided under Section 55 of the Code³⁹ where a police officer deputes any officer subordinate to him to arrest a person.

In spite of the above provisions, it is difficult to ensure protection of the rights of the arrested persons from the indiscriminate and arbitrary exercise of powers by the police.

In *Sheela Barse v. States of Maharashtra*⁴⁰, the Supreme Court has taken serious note of non-disclosure of grounds of arrest and issued directions that, “*whenever a person is arrested by the police without warrant he must be immediately informed of the grounds of his arrest and in case of every arrest, it must be made known to the person arrested that he is entitled to apply for bail.*”

ARBITRARY DENIAL OF BAIL

There are many reasons why pre-trial detention should be avoided. Economic crisis in the family of the detainee, who usually are from economically backward situations, is another argument in favour of the release of the detainee on bail by the police. Detention, even for a short span of time is bound to cause disruptions in his private life.

Section 50(2) of the Code of Criminal Procedure guarantees this right to an arrested person⁴¹. First proviso to sub-section (1) of Section 436 gives discretionary power to the officer in whose custody a person is or the court to discharge the accused on bond without sureties for his appearance.

³⁸ Section 75, CrPC: “*The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant.*”

³⁹ Section 55(1) CrPC: “*When any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.*”

⁴⁰ *Supra* note 9

⁴¹ Section 50(2): “*Where a police officer arrests without warrant any person other than a person accused of a nonbailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.*” There are also provisions for the release of persons arrested under warrant. Chapter XXXIII of the Code of Criminal Procedure contains provisions relating to bail and bonds.

If a crime is bailable, the police can release the arrested person on bail and so it is his right to be released on bail. Instead of bail, he can even be released on a personal bond if the police officer considers it to be enough. In the case of bailable offences to which Section 436 applies, a police officer has no discretion at all to refuse to release the accused on bail, so long as the accused is prepared to furnish surely.

Section 437 gives the court or a police officer power to release an accused person on bail even in non-bailable offences. But such person shall not be released on bail if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life. Such person shall also not be released on bail if the offence is cognizable and the accused had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence. But in view of first proviso to sub-section (1) a person (i) under the age of sixteen years, or (ii) a woman or (iii) a sick or (iv) infirm person may be released on bail even if the offence charged is punishable with death or imprisonment for life or the accused is a previous convict of the category stated above.

Last proviso of section 436A provided that “no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law”

*Hussainara Khatoon & Others v. Home Secretary, State of Bihar*⁴² lays down that the length of residence of the accused in the community; the employment status and history of the accused; family ties and relationships of the accused; the reputation, character and monetary condition of the accused; any prior criminal record including record of prior release on bail; the existence of responsible persons in the community who can vouch for the reliability of the accused; the nature of the offence that the accused is charged with; probability of conviction; and likely sentence insofar as these are relevant to risk of non-appearance of the accused should be taken into account while determining bail conditions.

Section 440 (1) CrPC lays down that the amount of bail bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.

⁴² AIR 1979 SC 1360

In *Motiram & others v. state of M.P.*⁴³ Supreme Court gave following direction-

- I. Bail should be given liberally to poor people simply on a personal bond, if reasonable conditions are satisfied.
- II. The bail amount should be fixed keeping in mind the financial condition of the accused.
- III. The accused person should not be required to produce a surety

The police normally refuse to grant bail in many cases mainly because the police officer does not want to take the risk. Due to the laziness or irresponsibility of the police officers many accused who are having permanent residence etc. are refused bail in the police stations and unnecessarily they spend twenty four or more hours in the police custody and they get bail only in the court. Thus the system of granting bail in the police station has to be made liberal especially in the cases of persons accused of less serious offences.

CHARACTER ASSASSION AND USING OF FILTHY LANGUAGE

Code of Conduct for the police lay down that 'a police officer shall be deemed to have committed abuse of authority if he is uncivil to any member of the public'. Vulgar language and filthy expressions are regularly uttered by police personnel while effecting arrest. If people belonging to uncivilized area speak filthy language there is justification. But police personnel most of whom are hailing from civilized family back ground is also using this language to those even from civilized family set up.

CONCLUSION

The police are empowered to enforce the criminal laws and many regulatory laws which are designed to make society orderly and safe. Police have been vested with additional authority and powers. Providing a sense of security to ordinary citizens and attending to their grievances is dependent on the establishment of a police force which is efficient, honest and professional. The fact that such a police force does not exist in India, as attested by the findings of various commissions and committees, the complaints received by the human rights commissions, the stories reported by the press and the experiences of the common people on the street. The need for police reform is self-evident and urgent.

⁴³ AIR 1978 SC 1594

The legislative framework of India ensures rights to the person under the police custody like no person can be detained in custody without informing the grounds for arrest and also that a detainee must be present before a magistrate within twenty-four hours under the code of criminal procedure and also there are constitutional protection available under articles 226 and 32 entitle a person to seek judicial intervention through writs.

And there are international instruments which ensure the protection of person in the police custody like U.N. Convention against torture, ICCPR and UDHR etc. and also various judgments and guide line given by Supreme Court and High Courts.

Police and public relation should be friendly enough to create a mutual respect. The cardinal principle behind the concept of human rights is the recognition of the rights of everyone to live with dignity and let others also live with such dignity. The police should also follow the same philosophy since them also from a part of society. The police should bear in mind the fact that they are also human beings and that either the notoriety or reputation they have earned in their service does not end with their retirement. Hence, it is necessary for the police to reorient its style of functioning for playing a more effective role in controlling crime and winning support and confidence of the people.

SOCIAL SECURITY AND LEGAL PROTECTION FOR WORKERS IN STONE QUARRIES

P. Satheesh*

Abstract

Social security is a basic need of all people regardless of employment in which they work and live. It is an important form of social protection. It should be begun with birth and should continue till death. In a general sense social security refers to protection extended by the society and State to its members to enable them to overcome various contingencies of life. The social security needs of the unorganized sector are extensive and varied whereas the funds available for the programmes are necessarily limited. India has a long tradition of social security and social assistance directed particularly towards the more vulnerable sections of society. Stone quarrying industry, which supplies many of our patios and pavements, goes largely unregulated. The Major issue is the complete lack of any proper sanitation, health or hygiene facilities in the quarry areas. The vast majority of quarry workers are migrants. The other big issue for migrant workers is that in India, social benefits such as access to free education and healthcare are usually only available in their home state. As most of the migrant workers come from other states, they are effectively barred from accessing these facilities. They come to the region for the dry season and then head back to their villages when the rains begin. There are various other issues which affect the life of workers in Stone quarries. Though there exist a good number of legislations protecting these workers there is a lack of their implementation by the respective agencies which makes their plight pitiful.

Keywords: Contingencies, Free Education, Healthcare, Migrant Workers, Social Assistance, Vulnerable Sections.

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INTRODUCTION

Social security is a dynamic concept. Being a dynamic subject no rigid limit can be laid down for all time to come. In India, the National Commission on Labour has endorsed the ILO definition of social security and observes: "*Social security envisages that the members of a community shall be protected by collective action against social risks causing undue hardship and privation to individuals whose prime resources can seldom be adequate to meet them.*"¹ The National Commission on Labour, 2002 accepts the need of social security as fundamental human right. The National Commission on Labour, 2002 is of the view that no single approach to provide social security will be adequate. The problem has to be addressed by multipronged approach that would be relevant in the Indian context.² Workers in stone quarries are the most affected among the working population in our country. Though they are guaranteed with very social and legal protections there are many factors which prevent them from having access to these rights guaranteed by the state.

ABOLITION OF BONDED LABOUR IN STONE QUARRIES

Bonded labour is endemic in India's stone quarries, and constitutes a modern form of slavery. The precise number of bonded labourer's in India is unknown and heavily disputed, with NGOs suggesting there are as many as 20 to 65 million bonded labourer's, including adults and children, working across a range of sectors in the country. Official government estimates are widely criticized as under-inclusive (a 2002 government survey identified just 1795 bonded labourer's), and therefore forestall appropriate state action to address the problem. The use of bonded labour breaches international Labour Organisation Forced Labour Convention.³ This Convention prohibits all forms of forced or compulsory labour, which is defined as '*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him voluntarily*'.

The Convention also requires that the illegal extraction of forced or compulsory labour be punishable as a penal offence, and that ratifying states ensure that the relevant penalties imposed by law are adequate and strictly enforced. The prevalence of bonded labour is also in

¹ Report of the first National Commission on Labour, 1969 p.162

² Report of the second National commission on Labour, 2002 8.51

³ ILO Convention Concerning Forced or Compulsory Labour (No. 29), opened for signature 28 June 1930, 39 units 55 (entered into force 1 may 1932). International labour standards are legal instruments drawn up by the ILO's tripartite constituents. The system of international labour standards takes the form of conventions and recommendations.

breach of ILO Convention on the Abolition of Forced Labour which provides for the abolition of all forms of forced or compulsory labour as a means of political coercion or education; as sanctions against the free expressions of political and ideological opinions; as workforce mobilisation; as labour discipline; as a punishment for taking part in strikes; and as measure of racial, social, national or religious discrimination. India has ratified both these conventions.⁴ Forced labour is prohibited by Art 23 of the 1950 Constitution of India and the landmark national Bonded Labour System (Abolition) Act 1976('BLSA Act').

Under this scheme, it falls upon individual states to enforce the BLSA Act, with the central government carrying secondary responsibility for ensuring that states enforce the act and establish 'vigilance committees' to eradicate the phenomenon. Theoretically, the act allows for a company to be found liable and punishable for violations of the act, though there has been virtually no enforcement of this provision.⁵ Despite the robust provisions of the act, as well as a number of landmark public interest litigation (PIL) cases before state and central Supreme courts,⁶ little has been done to stamp out the practice of bonded labour in practice.

On June 11, 2014 the ILO adopted the Protocol to the Forced Labour Convention (1930) that updates a widely ratified, but outdated, treaty. The protocol was developed in order to better address contemporary abuses, including abuses against migrants and in the private sector.⁷ The prevention measures in the new Forced Labour Protocol include creating national plans of action, expanding labour laws to sectors at risk of forced labour, improving labour inspections, and protecting migrant workers from exploitative recruitment practices. The new Protocol also requires governments to support due diligence by businesses to prevent and respond to forced labour in their operations. The Protocol requires governments to take measures to identify, release and provide assistance to forced labour victims as well as protect them from retaliation. The treaty also obliges governments to ensure that victims have access to justice and remedies, including compensation.

⁴ ILO Convention Concerning the Abolition of Forced Labour (No. 105), opened for signature 25 June 1957, 320 units 291 (entered into force 17 January 1959) Art 1.

⁵ See Siddhartha Kara, *Bonded Labor: Tackling the System of Slavery in South Asia* (Columbia university press, 2012) pp. 185–207

⁶ *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161; *PUCL v. Union of India* (1982) 3 SCC 235 ('Asiad Workers' Case')

⁷ Human Rights watch, Global Treaty to Protect Forced Labor Victims Adopted, 11 June 2014, Available at: <http://www.hrw.org/news/2014/06/11/global-treaty-protect-forced-labor-victims-adopted>, (Accessed on 24.2.2017)

Forced Labour is more than just low wages, or unpleasant working conditions. As the ILO points out; “*the mere fact of being in a vulnerable position, for example, lacking alternative livelihood options, does not necessarily lead a person into forced labour. It is when an employer takes advantage of a worker’s vulnerable position, for example, to impose excessive working hours or to withhold wages that a forced labour situation may arise. Forced labour is also more likely in cases of multiple dependencies on the employer, such as when the worker depends on the employer not only for his or her job but also for housing, food and for work for his or her relatives.*”⁸

Srivastava (2005), in an overview of bonded labour in India prepared for the ILO, concluded that “*.....in more recent years, few academics or others have investigated the issue in a systematic way, and official statistics may indeed not cover all aspects of the situation. ILO supervisory bodies have for example referred on many occasions to the urgent need to compile accurate statistics of the number of persons who continue to suffer under bonded labour, using a valid statistical methodology, with a view to identification and release of bonded labourer’s.*”⁹

The situation remains unchanged. There are two main global estimates of the number of workers in a forced labour situation. The ILO estimates are not dis-aggregated by country; the Global Slavery Index estimates 13,300,000 – 14,700,000 in India. There is very limited data on the numbers by sector or state. In 2011, Indian National Human Rights Commission (NHRC), which is mandated by the Supreme Court to monitor the implementation of the Act, established a Core Group on Bonded Labour. The Core Group is chaired by NHRC and brings together government and non-government actors working to end bonded labour to review laws and policies, identify best practice, and coordinate the country’s response On 15 October 2012, the Supreme Court issued a judgment, requiring all states to carry out surveys to identify and release those in bonded labour. None of these initiatives appears to have resulted in credible surveys in Tamil Nadu. There is no robust evidence of forced labour in the sandstone sector, although anecdotal reports do appear in the press from time to time.¹⁰

Enforcement of the law, which is the responsibility of State Governments, varies from state to

⁸ ILO, Indicators of forced labour, Geneva 2012.

⁹ Bonded Labour in India: Its Incidence and Pattern, Ravi S. Srivastava, Jawaharlal Nehru University, ILO InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, 2005.

¹⁰ Available at: <http://www.thehindu.com/news/national/other-states/debt-crushes-bonded-labourers-in-kotas-quarries/article4431741.ece>. (Accessed on 26.3.2017)

state. A key part of the system for implementation of the law is the establishment by the relevant government, which in the case of the Tamil Nadu stone quarry cluster would be the Tamil Nadu State Government, of a Vigilance Committee at district level. The NHRC carried out regular visits to states to assess the bonded labour situation up till 2010. The 2007 visit to Rajasthan, carried out by a former national Ministry of Labour official, who had also worked for the ILO, provides the most recent overview of forced labour in that state. The report concluded that the Committees were not collecting data and indeed, were not active in the field at all.¹¹ Currently those workers in a bonded Labour situation could approach the government machinery to take action, although in many cases action is initiated by an NGO.

PROHIBITION OF CHILD LABOUR

Reports say that there has been a decline in the magnitude of child labour in granite quarries in Tamil Nadu compared to previous years.¹² Out of the 12 quarries surveyed in Tamil Nadu in 2 quarries direct or indirect employment of children was found. Out of the total of 510 workers in 12 quarries, 1 was a child below 14 years, 5 were in the age group of 15 to 18 years and the remaining workers were adult workers. In Karnataka the situation is different from Tamil Nadu. Though there is some decline in the incidence of child labour compared to previous years, they still constitute an important segment of the workforce, mainly in waste stone processing. Children were present in five out of six quarries covered in this research. Children accounted for almost 10 percent of the total workforce (4.6 % below 14 years and 5.1 % between 15-18 years). Not much difference in numbers of working children is found between quarries producing for domestic and export markets.

Active intervention from the State Government is one of the key factors that have contributed to the decline in child labour in granite quarries in Tamil Nadu. When illegal granite mining became a political issue in 2012, the government appointed special teams to visit all the granite quarries to check illegal mining activities. During the visits labour rights violations such as the presence of children at quarry sites, lack of safety measures and poor facilities for

¹¹ Report of review of activities pertaining to implementation of The Bonded Labour System (Abolition) Act of 1976, and the Child Labour (Prohibition & Regulation) Act 1986 for the state of Rajasthan by from 31st of January 2007 to 3 February 2007 by Dr Lakshmidhar Mishra, Special Rapporteur, NHRC

¹² For Karnataka see the report, *our mining children: A Report of the Fact Finding Team on the Child Labourers in the Iron Ore and Granite Mines in Bellary District of Karnataka*, Published in 2005. For Tamil Nadu see the report. *Between a rock and a hard place: The exploitation for quarry workers in Tamil Nadu*, by People's Watch. Commissioned by the India Committee of the Netherlands (ICN), Dutch Working Group on Sustainable Stone (WGDN) and FNV, 2009 (Unpublished)

migrant workers were observed as well. The special teams warned quarry owners to address these issues which put pressure on quarry owners not to engage children in quarry operations. Furthermore this resulted in quarry owners asking seasonal migrant workers not to bring their families to the worksite is an attempt to avoid problems related to child labour and poor accommodation for workers' families.

Both ILO Conventions on child labour namely, *Convention No.182 on the worst forms of child labour* and *Convention No.138 on the minimum age to work* have still not been ratified by India. The present *Child labour (Protection and Regulation) Act, 1986* only (partly) deals with hazardous work under 14. Study reports, like the '2013 Findings on the Worst Forms of Child Labour' and the ILO 'World Report on Child Labour 2013' show that the law is not implemented properly.¹³ For some years now a new Child Labour Act reflecting both ILO Conventions is being considered. India should enact and implement such a law as soon as possible.

ENSURING MINIMUM WAGES

The Minimum Wages Act, 1948 is the most important legislation that has been enacted for the benefit of unorganized sector labour. It was enacted for fixing, reviewing and revising the minimum rates of wages in the scheduled employments where workers are engaged in the unorganized sector. Stone quarry industry is come under the schedule employment of the Minimum wages Act. The Minimum Wages Act is meant to ensure that the market forces, and the laws of demand and supply are not allowed to determine the wages of workmen in industries where workers are poor, vulnerable, unorganized, and without bargaining power. The minimum rates of wages are fixed, keeping in view the minimum requirements of a family, and wages at these rates are to be paid by all employers irrespective of their capacity to pay. In *PUCL* case the Hon'ble Supreme Court of India ruled that employing workers at wage rates below the statutory minimum wage levels was equivalent to forced labour and prohibited under Article 23 of the constitution on India even though economic compulsion

¹³ 2013 Findings on the Worst Forms of Child Labour by United States Department of Labour, September 2014, Available at: <http://www.dol.gov/ilab/reports/child-labor/findings/2013TDA/2013TDA.pdf>; World Report on Child Labour: Economic vulnerability, social protection and the fight against child labour, Published by the ILO, 2013; Available at: http://www.ilo.org/ipec/Informationresources/WCMS_178184/lang--en/index.html (Accessed on 23.3.2017)

might drive one to volunteer to work below the statutory minimum wage.¹⁴

PROTECTION THROUGH COMPENSATION

The Workmen's Compensation Act, 1923 provides for the payment of compensation to workmen for injuries sustained in accidents. After the amendments effected in 1995, the Act has 4 schedules. Schedule I provides a list of injuries with percentage of disablement (loss of earning capacity). If the injury is not a scheduled injury, the loss of earning capacity has to be proved by evidence. The majority of workers who are not insured under the ESI Scheme are covered under the Workmen's Compensation Act. The Act does not apply to those who are employed in occupations enlisted in the Schedule II. Nor is relief available if the injury has taken place when the injured worker was not actually engaged in discharging duties related to the employer's trade or business. The employer is liable to provide monetary compensation to the worker or dependent in case of death or disablement provided it occurs 'out of and in the course of employment.' An occupational disease listed in Schedule III of the Act is also accepted as an accident that occurred while on duty. The burden of proving that the accident arose out of employment is upon the worker.

The method of claiming compensation for disability is so long and torturous that one rarely gets the compensation to which one is entitled by law. Any qualified medical practitioner can certify the case, and the victim can file a claim in the court of the workmen compensation commissioner with a copy to the employer. The workmen's compensation commissioner decides the case, and the revenue department recovers the amount of compensation. But workers, who are in the unorganised sector, often find it very difficult to prove who is their employer, and as a result cases are prolonged, and often workers die without receiving any compensation.

EQUAL REMUNERATION ACT 1976

Remuneration, whether payable in cash or in kind, has to be the same for female and male workers for the same work or work of a similar nature. Regarding recruitment, the act makes it clear that no employer shall, while making recruitment for the same work or work of a similar nature, or in any condition of service subsequent to recruitment such as promotions, training or transfer, make any discrimination against women except where the employment of

¹⁴ PUCL v. Union of India AIR 1982 SC 1473

women in such work is prohibited or restricted by or under any law for the time being in force.

MATERNITY BENEFIT ACT, 1961

The Act is applicable to mines, factories and other establishments employing ten or more persons, except employees covered under the Employees' State Insurance Act, 1948. An establishment is defined in Section 3(e) to mean a factory mine, plantation or establishments to which the provisions of the Act have been declared to applicable.¹⁵ The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks, that is to say, six weeks up to and including the day of her delivery and six weeks immediately following that day.

MINES ACT, 1952 AND MINES RULES, 1955

The Act provides for separate bathing facilities, sanitary, latrines and lockers for male and female coal mine workers.

MINES CRÈCHE RULES, 1966

The Act provides that in any mine where any woman is employed, a crèche should be provided.

FACTORIES ACT, 1948

This Act has special provisions for employment of women. A woman worker cannot be employed beyond the hours 6 a.m. to 7.00 pm. The state government can grant exemption to any factory or group or class of factories, but no woman can be permitted to work during 10 PM to 5 AM. If a factory employs more than 30 women it must provide a crèche.

Another research finding is the prevalence of gender based wage discrimination. Female quarry workers involved in waste stone processing earn less than the legal minimum wage rates prescribed by the Karnataka and Tamil Nadu state governments for unskilled workers in stone quarries. The daily wage rates paid to male workers may seem at par or even higher than the legal minimum wages for skilled and unskilled quarry labour prescribed by the governments; but if we take the number of working hours into consideration the actual wages

¹⁵ Prof. K. M. Pillai, *Labour and industrial Laws*, Allahabad Law Agency, pp.437-438

fall short of meeting legal requirements. Overtime work is common but paid overtime is almost non-existent.

INTER STATE MIGRANT WORKERS ACT (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICE) ACT, 1979

The Act applies to every establishment in which five or more Inter-State migrant workmen (whether or not in addition to other workmen) are employed or who were employed on any day of the preceding twelve months; and to every contractor who employs or who employed five or more Inter-State migrant workmen (whether or not in addition to other workmen) on any day of the preceding twelve months.

It is therefore quite possible that the act will apply in many quarries in the Rajasthan sandstone sector. Inter-State migrant workman means any person who is recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State. The concept of principal employer is also fundamental to this act. No principal employer can engage interstate migrant workers without having first registered. Contractors must register as well. The contractor must issue every worker with a pass book, with the following information:

- i. The name and place of the establishment wherein the workman is to be employed;
- ii. The period of employment;
- iii. The proposed rates and modes of payment of wages;
- iv. The displacement allowance payable;
- v. The return fare payable to the workman on the expiry of the period of his employment and in such contingencies as may be prescribed and in such other contingencies as may be specified in the contract of employment; and
- vi. Deductions made.

The wage rates, holiday hours of work and other conditions of service of an inter-state migrant workman shall be the same or similar kind as those applicable to other workman. The Principal employer should nominate a representative to be present at the time of disbursement of wages by the contractor.

UNORGANIZED WORKERS' SOCIAL SECURITY ACT, 2008

An *Unorganized Sector Worker* is one who works for wages or income directly or through any agency or contractor, or who works on his own or her own account, or is self-employed and works in any place of work including his or her home, field or any public place. This worker is not eligible for benefits under the Employees State Insurance Act, Workmen's Compensation Act etc. The Act provides some form of protection to those workers defined as unorganised which includes home-based and self-employed workers, but also include workers whose employers are too small to otherwise fall within the scope of the law. Both the Central and State governments can develop social security benefits such as health insurance, maternity benefit and pensions and should set up boards to administer the schemes. The District Administration is supposed to provide workers with identity cards. Without identity documents workers cannot access many welfare schemes.

CONCLUSION AND SUGGESTION

Though there are a host of legislations apart from those discussed above for protecting the workers in stone quarries there is a sheer lack in the implementation part which needs to be addressed at the earliest. The Social Security measures which are the hard won rights of the workers should be made available to all the workers under the unorganized sector including those working in stone quarries. A Central and State level mechanism for the monitoring and supervision of the plight of worker in stone quarries should be created and should take the appropriate measures for protecting them.

RTE IN INDIA: PROBLEMS AND SUGGESTIONS IN REFERENCE TO FREE AND COMPULSORY EDUCATION ACT 2009

Manish Kumar Kushwaha*

"The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into a fullness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation."

Justice P.N. Bhagwati¹

Every generation looks up to the next generation with the hope that they shall build up a nation better than the present. The education which empowers the future generation should always be the main concern for any nation. Education is the most important thing in man life, it makes sense, it effect on mind, it change the character. Right to education is an inherent right, which deals with the right to know and right to change their life and life style.

Emile Durkheim defined education as, the action exercised by the older generations upon those who are not ready for the social life. Its object is to awaken and develop in the child those physical, intellectual and moral states which are required of him / her both by his society as a whole and by the milieu for which he is specially destined.² The right to education has been universally recognized since the Universal Declaration of Human Rights, 1948 and has since been enshrined in various international conventions, national constitutions and development plans.

Article 26 of the Universal Declaration of Human Rights lays down that:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.³

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¹ Laxmikant Pandey v. Union of India AIR1984 SC 469

² Emile Durkhem, Education et. Sociologie (1992) T.B. Bottomore, Society (1986) p. 262

³ UDHR was adopted and proclaimed by General Assembly Resolution 217 (III) of 10 December 1948

Apart from UDHR, right to education is affirmed, protected and promoted in numerous international human rights treaties, such as the following:

- Convention against Discrimination in Education (1960)⁴
- International Covenant on Economic, Social and Cultural Rights (1966) - Article 13⁵
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1981) –Article 10⁶
- The United Nations Convention on the Rights of the Child (1989) – Article 28⁷ & 29⁸.

The right to education has therefore long been recognized by these international treaties as encompassing not only access to educational provision, but also the obligation to eliminate discrimination at all levels of the educational system, to set minimum standards and to improve quality. With respect to applicability of these treaties in India, it is worthwhile to mention that India is a State party to the ICESCR, the CERD Convention, the CEDAW Convention and the Convention on the Rights of the Child.

RIGHT TO EDUCATION IN INDIA: A HISTORY

The Right to Education legislation has a long and chequered history, having been subjected to numerous rounds of heated debate and philosophical and semantic alterations. The right to

⁴ Convention against Discrimination in Education is a multilateral treaty adopted by UNESCO on 14 December 1960 in Paris and came into effect on 22 May 1962, which aims to combat discrimination and racial segregation in the field of education.

⁵ Article 13: “*the states parties to the present covenant recognize the right of everyone to education. The states parties to the covenant recognize that primary education shall be compulsory and available free to all. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.*”

⁶ Article 10: “*States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.*”

⁷ Article 28: States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all;

⁸ Article 29 (1): States Parties agree that the education of the child shall be directed to:
 (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 (e) The development of respect for the natural environment.

education was initially not included as a fundamental right in the constitution and was included as directive principles⁹ under article 45, which required the state to endeavour to provide, within a period of 10 years from the commencement of the constitution, for free and compulsory education for all children until they complete the age of 14 years.

The Supreme Court has implied the ‘right to education’ as a fundamental right from Article 21. The word ‘life’ has been held to include ‘education’ because education promotes good and dignified life. In the case of *Mohini Jain v. State of Karnataka*¹⁰, Supreme Court accepted that the constitution does not expressly guarantee the right to education, as such, as a fundamental right. But reading it with Article 21 along with the directive principles contained in Article 38, 39(a), 41 and 45, the court opined that “*it becomes clear that the framers of the constitution made it obligatory for the state to provide education for its citizens.*” The court argued that, ‘life’ in article 21 means right to live with human dignity. ‘Right to life’ is the compendious expression for all those rights which are basic to dignified enjoyment of life. Thus, ruled the court, “the right to education flows directly from the right to life,” and that the ‘right to education’ being concomitant to the fundamental rights, “the state is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens.”

Subsequently, in *Unni Krishna v. State of Andhra Pradesh*¹¹, the Apex court was asked to examine the correctness of the decision given by the court in Mohini Jain case. The five judge bench by 3-2 majority partly agreed with the Mohini Jain Decision and held that right to education is a fundamental right under Article 21 of the constitution as ‘it directly flows’ from right to life. But as regards its content the court partly overruled the Mohini Jain’s case, and held that the right to free education is available only to children until they complete the age of 14 years, but after the obligation of the state to provide education is subject to the limits of its economic capacity and development. The obligation created by Article 41, 45 and 46 can be discharged by State either establishing its own institutions or by aiding, recognizing or granting affiliation to private institutions. Thus, the Supreme Court by rightly and harmoniously construing the provision of Part III (fundamental rights) and Part IV

⁹ Articles 36 to 51 contain the Directive Principles of State Policy; these principles oblige the state to take positive action in certain directions in order to promote welfare of the people

¹⁰ AIR 1992 SC 1858

¹¹ AIR 1993 SC 2178, 2231

(directive principles of state policy) of the Constitution have made right to education a basic fundamental right.

The Government of India by Constitutional (86th Amendment) Act, 2002 had added a new Article 21-A which provides that, “the state shall provide free and compulsory education to all children of the age of 6 to 14 years as the state may, by law determine.”¹². It also amended Article 45 which provides that The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years¹³; and also introduced a fundamental duty in Article 51-A for parent or guardian to provide opportunities for education to his child between the age of 6-14 years¹⁴.

Seven years after an amendment was made in the constitution, the dream of Free and Compulsory education for all children became a reality in August 2009, when the Parliament passed the Act. The Right of Children to free and Compulsory Education passed by the Indian Parliament on 4th August 2009. This Act is a milestone which provides for institutional instructions so that education as a fundamental right spreads to all children between the age group of 6-14 years. The Act intends to provide full time elementary education to every child in a formal school, which satisfies certain essential norms and standards. Private education institutions have to reserve 25% of their seats starting from Class I. Strict criteria for the qualification of teachers is also one of the important provisions. There is a requirement of a teacher student ratio of 1:30 at each of these schools that ought to be met within a given time frame. The school needs to have certain minimum facilities like adequate teachers, playground and infrastructure etc. The Government will evolve some mechanism to help marginalized schools comply with the provisions of the Act. Moreover, the concept of neighbourhood schools that has been devised. This would imply that the state government and local authorities will establish primary schools within walking distance of one kilometer of the neighbourhood. In case of children for class VI to VIII, the school should be within a walking distance of three kilometers of the neighbourhood. Moreover, unaided and private schools shall ensure that children from weaker sections and disadvantaged groups shall not be segregated from the other children in the classrooms nor shall their classes be held at places and timings different.

¹² Ins by the Constitution (Eighty-sixth Amendment) Act, 2002, s.9 (w.e.f. 01.04.2010)

¹³ Id.

¹⁴ Ins. by the Constitution (Eighty-sixth Amendment) Act, 2002, s. 4 (w.e.f. 01.04.2010)

PROBLEMS ASSOCIATED WITH THE IMPLEMENTATION OF RTE ACT

Under the section 12(1)(c) of right of children to free and compulsory education Act, there is a legal obligation on all private unaided schools to reserve 25% of their seats for children from economic weaker section{EWS} and disadvantaged groups{DG}. True intention of this provision, is to ensure that state as well as other component of the society would share joint liability to ensure the realization of free and compulsory education till elementary level. Supreme Court of India also held in Society for Unaided Private Schools V Union of India that the authority of the state to fulfil its obligations under the right to education can be extended to private, non-state actors.

To meet this requirement of reservation, some private schools apparently take in children from disadvantaged sections until class VIII but remove them from the rolls at a later stage. An educationist explained what happens after they are removed from elite schools: “such children come from weaker background and their parents are unable to send them to good schools. The children are unable to adjust themselves in badly run government schools. So, such children end up in cheaper private or unregistered schools.” Only 18 per cent of the schools in Delhi have reported admitting 25 per cent children from disadvantaged backgrounds in their institutions.¹⁵

The teachers are the kingpin of entire education system and it is this factor on which lies the onerous responsibility of ensuring the effective implementation of RTE Act and given today’s complex environment, the diversity and complexity of backgrounds from which students enter in the schools today, this responsibility increases in magnitude¹⁶. Teachers are now a days are overburdened with non-teaching activities like making of Aadhar cards and voter IDs, mid-day meal schemes, block level duties etc. this must be avoided as it hampers the education in single teacher schools where only one teacher is there for one subject.

On august 20, 2008, the Delhi High Court ordered that teachers should not be deployed for election duty on teaching days and during teaching hours. It also said that disabled and female teachers should have the option of declining such duties. But according to Dabas, the order is violated routinely¹⁷.

¹⁵ Divya Trivedi, *Capital Concerns*, The Frontline (2016)

¹⁶ Padma Sarangapani, *Teachers First*, The Frontline (2011)

¹⁷ *Supra* note 15

According to academicians, while educational institutions have mushroomed across the country, not enough quality education is being imparted. Besides, they said, those who excel in academics are mostly not taking an interest in teaching as a profession and that's needs to change¹⁸. The International Centre for Peace and Development in its report stated that early childhood education in India was subject to two stream, but contrary deficiencies. "On the one hand, millions of young children in lower income groups, especially rural and girl children, comprising nearly 40% of first grade entrant's never complete primary school. Even among those who do, poorly qualified teachers, very high student-teacher ratios, inadequate teaching materials and outmoded teaching methods result in a low quality of education that often imparts little or no real learning. It is not uncommon for students completing six years of primary schooling in village public schools to lack even rudimentary reading and writing skills."¹⁹

It's not only classrooms and teachers our government schools in the country lack, they lack basic infrastructure too. The DISE report finds that 30% to 40% of even the available classrooms is in need of serious repair work. Computers donated to government schools by IT companies as part of their CSR programme, often sit unused in the principal's room, because there are no teachers to teach the students how to use them²⁰. Facilities are inadequate in primary schools in many ways, including high teacher-pupil ratio resulting in crowded classrooms, lacking in adequate sanitary facilities for boys and girls and lacking of pure drinking water for hygiene. Separate sanitation facility for girls is the one of the main problems because of which girl students are not carrying education and results in drop outs.

Precipitous fall in the ratio of drop outs after the elementary level and result of that an increasing gap from elementary to secondary is matter of great concern. Those who are coming under the DG's are affected very badly, ratio of their drop out are even worse. Primary factors which are very much responsible for the failure to achieve a universalize education system are caste, class, gender etc. Poor and the disadvantaged sections of society are denied from their fundamental right to education.

¹⁸ Mihika Basu, *Even teachers in school aren't educated enough*, Bangalore Mirror (2016).

¹⁹ ICPD national education programme for India

²⁰ Janaki Murali, *Govt. Schools struggle with poor facilities, unskilled teachers and high dropout rates*, Firstpost, (2016)

SUGGESTIONS AND CONCLUSION

Thus, keeping in mind the end goal of RTE, the accompanying strides are out rightly needed:

1. The Right to Education act should not be limited to the age of 14 years it should be up to the secondary level. The government should make some changes like introducing diplomas/degrees with specialization in IT, mobile communication, media, entertainment, telecommunication, automobile, construction.
2. There is a need of integrated system of educational management for the proper implementation of right to education. All stakeholders are needed to move in that direction.
3. Proper measures needed to be taken by states to prohibit and eradicate discrimination, harassment, and victimization of children from marginalised group. Eliminate discrimination in relation to the admission process including denying or limiting the access of disadvantaged group to the benefit of enrolment or other facilities provided by school. Proper protection is providing against the financial extortion or forced expenditure.
4. Parents need to play a significant role to make RTE a main success in India. It can be done only by motivating them through counselling and they must be made aware about the RTE Act through media, pamphlets campaigns, hoardings, rallies etc. only then we can expect that our future generation will be well educated.
5. In the poor families, kids are viewed as assistance, the more the better. They help in family tasks and in the farm, other than acquiring cash from labour occupations. Their commitment is notable for the survival of the family in general. Sending them to schools removes this support from the family. Money related support to guardians for sending children to schools must be provided.
6. Special drive for roadside, domestic children, children in hazardous occupation and those utilized in household and also perilous occupation to schools.
7. Motivate teachers to innovate and create such a culture in the classroom that produce such an environment for children, especially for girls and children from oppressed and disadvantaged society.
8. Schemes like mid-day meal, SSA, RMSA along with world organization UNICEF are playing an important role in increasing the enrolment ratio. By providing initial and basic education to Indian children. However these national and international agencies should aim weaker sections of the society, economically backward, females and highly

populated states of India, these states and these societies should be the top priority to improve efficacy of this act.

9. Utilize PC and satellite innovation to create awareness and intrigue. Make versatile units that make visits to various tutoring centres, especially in remote territories and show important films to both the instructors and the students. This will help support curiosity and excite interest.

10. Provision for severe punishment regarding the abuse of this Act should be made and the responsibilities of state government, central government, parents, teachers, and administrators, Owners of the school, should be fixed.

11. Most importantly local governing bodies should get involved so as to enrol the new born babies and their record should be sent to nearby school. After that school authorities should follow up the child and sent the info for registration and admission to his/her parents without any biasness.

The success of RTE is largely depending on consistent political care. Financial allocation of funds should be adequate in this respect. The youth in India should come forward and spread the utility of education to illiterate parents who are unable to appreciate the significance of education in limiting the social evils. Social differences and monopolization by any group should not be accepted at any cost. Education which is free of cost up to a certain age must be accessible to each and every one. Right to education for all and free education for certain age group of people is a brilliant policy by the government and we appreciate that, as key to a developed nation is that its citizens are literate enough to earn their bread and to contribute in the economy. As a nation, we are still exceptionally a long way from such an objective. The viability and proficiency of our increased expenditure should be genuinely explored. Unless there is a shift in focus and take decision, we will lose a colossal chance to enhance the life odds of an era of kids and youth seriously.

CHILD TRAFFICKING: RIGHTS AND PROTECTION AVAILABLE TO CHILDREN IN INDIA

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Abstract

The existence of child trafficking in world in general and in India in particular is not a new practice, but what is new is little human awareness towards it and its perception as a social problem. In most of the developing countries child trafficking in one form or other still exists. It is one of the most dangerous, demeaning, inhuman activities existing in civilized world which can shake up any sensitive person. This paper is an attempt to study the various rights of children available in Indian Legislation to save them from Child trafficking.

Keywords: Child, Trafficking, Rights, Legislation, Child trafficking

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INTRODUCTION

Exploitation of man by man is not the new phenomenon in human history. There are various forms of social problem or issues related to exploitation of human beings and one of the alarming one is Child Trafficking. Child trafficking is the very sensitive and common problem faced by almost so many countries now a days and India is also not untouched with it. This practice hampered the growth and development of the Nation. Lot of efforts has been taken by the Indian legislature to keep a check on this evil practice and to protect the future youth of our Nation. Forced prostitution, child trafficking and abuse are real and sad facts of life and society. In the present world scenario traffic in persons and exploitation through the prostitution of others remain rife in various parts of the world and are acquiring new forms and being pursued on an industrial scale to a dangerous extent. Children from poor backgrounds are the key target groups, ethnic minorities, SCs, OBCs, indigenous people, hill tribes, refugees and illegal migrants are the easy victims. Poverty, deprivation, natural disasters, inadequate educational and employment opportunities, economic disparities, erosion of traditional family systems, war and violation of human rights are inter alia, some of the factors responsible for the growth of this malaise in society.

RESEARCH OBJECTIVE

The objective of this research is to study the root cause or the various factors responsible for practice of child trafficking in India and its effects on child as well as on society. Researcher also focuses on the different constitutional and legal provisions to prevent the children from child trafficking.

RESEARCH METHODOLOGY

This research study is basically based on the secondary data collected by the compilation of material from various books, articles, journals newspapers, research papers, etc., and from other miscellaneous sources the different governmental plans and policies to provide protection to the victims of child trafficking.

WHAT IS CHILD TRAFFICKING?

The dictionary meaning of Trafficking is ‘Trade’. In simple words child trafficking is trade of Children. It is very important that before going into the depth of the various aspects of child

trafficking such as forms of child trafficking, causes and reason of child trafficking, different legislation for protection of children from trafficking, etc., we should know the legal definition of child, then only we are able to understand in real sense the concept of child trafficking.

DEFINITION OF CHILD

- As per English Oxford Living Dictionary, Child is, “*A young human being below the age of puberty or below the legal age of majority.*”
- In Cambridge Dictionary, Child is , defined as, “*A boy or girl from the time of birth until he or she is an adult, or a son or a daughter of any age: an eighteen year old child.*”
- The Factories Act, 1948 defines child in section 2(c) as, ‘*child’ means a person who has not completed his fifteen year of age.*’
- The Child Labour (Prohibition and Regulation) Act, 1986 defines in section 2(ii) as, ‘*child’ means a person who has not completed his fourteen year of age.*’

CAUSES OF CHILD TRAFFICKING

There are so many factors responsible for child trafficking in all over the world as well as in India such as poverty, migration, political instability, militarism, civil unrest, natural disaster in homeland, unemployment, lack of educational opportunities, etc. Due to lack of home stability and lack of financial security children are thrown into the trade of trafficking. Rates of trafficking are usually high in those areas where there are limited job opportunities are available, where children are having less or minimal educational and vocational skills. Apart from this those children are the primary and easy target of the traffickers who are living without their parents or guardians. Porous borders and the presence of natural disasters or conflicts leads towards forced migration of the families from one state to another. Children without birth registration or identity documents also faced an extreme risk of trafficking. UNICEF remarks that, Traffickers exploit the fact that children have a less developed capacity than adults to assess the risk, to differentiate between right and wrong and to look after them. Unsurprisingly, trafficking frequently has devastating long-term effects on the mental and physical health of its victims.

IMPACT OF CHILD TRAFFICKING ON VICTIMS AND ON SOCIETY

In this piece of paper researcher tries to focus on the various aspects of child trafficking one of them is the impact of child trafficking on victims and on society. Victims of child trafficking are the children who has not completed the age of 18 years. Most of the victims are often experience harsh physical impact because of the excessive work load or the use of extreme force by the traffickers. Apart from this due to sexual exploitation victims are facing serious health issues such as HIV/AIDS, as well as serious mental health risks. Anxiety, insecurity, fear, and trauma are all products of trafficking. Being victims of child trafficking they lost support from family and community, there is loss of proper education, there is isolation from the society, etc. Not only victims but also the society has the harsh impact of child trafficking such as countries deprives of human capital, this practice of child trafficking promotes social breakdown, undermine public health, subverts government authority, imposes enormous economic cost, etc. so this practice of child trafficking affects both victims as well as society at large.

LEGAL FRAMEWORK TO PREVENT CHILD TRAFFICKING

There are following legal framework to keep a check on practice of child trafficking:

1. International Legal Instruments

The United Nations Convention on the Right of the Child, 1989 defines child prostitution as sexual exploitation of a child below the age of 18 years for remuneration in cash or kind. It is also important to note that child prostitution, in present days is very closely related to child pornography. The First World Congress held in Stockholm in 1996 against commercial sexual exploitation of children describes child pornography as any visual and audio material which uses children in sexual context. It consists of “the visual depiction of a child engaged in explicit sexual conduct, real or stimulated, or the lewd exhibition of the genitals intended for sexual gratification of the users”.

Besides, in 1999, the ILO adopted the convention concerning prohibition and in media Action for Elimination of Worst forms of Child Labour which addresses among other issues, sale and trafficking of children, child prostitution and child pornography. ILO also adopted the Forced Labour Convention, 1930 and the Migrant Workers Convention, 1949 to stop child trafficking for forced labour and exploitation of child as migrant workers. In May 2000, the UN General Assembly adopted an optional Protocol to the Conventions on the Rights of

the Child on the sale of children, child prostitution and child pornography. In October 2000, the United States Congress passed the Trafficking Victims Protection Act. This legislation seeks to dramatically change the way traffickers are prosecuted and victims are treated. This Act provides harsh penalties for traffickers, particularly those who traffic in children and witness protection and limited immigration for relief for victims. The Second World Congress against Commercial Exploitation of Children was held at Yokohama in Japan in December 2001. The Congress expressed concern over the major increase in the availability of child pornography because of the emergence of the internet.

2. Constitutional Provisions

Exploitation of man by man is not a new phenomenon in human history. The framers of the Constitution were aware of the various exploitative practices prevailing in the country. The Constitution in the Preamble promises to secure to all its citizens justice, liberty, and assures dignity of the individual. An exploited individual has no dignity. Therefore, Article 23 and 24 captioned as ‘Right against exploitation’ are meant to fulfil the assurances of the Preamble. These articles are available to all human beings and are not confined to citizens only. The directives contained in article 39(e) and 39(f) also direct the state in particular to protect men, women and children from abuse and exploitation respectively.

Article 23 prohibits traffic in human beings, beggar and other similar form of forced labour. Any person including the State employing these practices is punishable in accordance with law. The power to make law on such practices is exclusively with the parliament. State legislatures have no such power. Article 23 expressly prohibits three practices, namely:

- a) Beggar,
- b) Traffic in human beings, and
- c) Forced Labour.

Begging is also one of the purpose for which children are trafficked from one state to another state. Beggar is a form of forced labour under which a person is compelled to work involuntarily without any payment. Thus, beggar is a form of forced labour for which no wages are paid. Article 23(1) abolishes beggar and forced labour and such type of any practises are strictly prohibited.

Traffic in Human Beings means trade in human beings such as slave trade. It includes trade in women and children for immoral or other purposes. The parliament has enacted the Immoral Traffic (Prevention) Act, 1956 to punish persons who indulge in trafficking in human beings.

Besides beggar and traffic in human beings, especially in children, Article 23 of the Constitution of India also prohibits other similar forms of forced labour. Because usually children are trafficked for doing forced labour.

Slavery in its ancient form may not so much be a problem in every State today but its newer forms which are labelled in the Indian Constitution under the general term “Exploitation” are no less a serious challenge to human freedom and civilisation. It is in this view that our Constitution, instead of using the word ‘slavery’ uses the more comprehensive expression ‘traffic in human beings’ which includes a prohibition not only of slavery but also of traffic in women and children or the crippled, for immoral or other purposes. Our Constitution also prohibits forced labour of any form which is similar to beggar, an indigenous system under which landlords sometimes used to compel their tenants to render free service. What is prohibited by the clause is therefore the act of compelling a person to render gratuitous service where he was lawfully entitled either not to work or to receive remuneration for it. The clause therefore does not prohibit forced labour as punishment for criminal offence. Nor would it prevent the State from imposing compulsory recruitment or conscription for public purposes, such as military or social service.

3. National Legal Framework

Apart from International Instruments and Constitutional provision, there are other legal measures which are oriented towards the protection of rights of children from child trafficking such as:

- i. Immoral Traffic (Prevention) Act, 1956.
- ii. Indian Penal Code, 1860.
- iii. Juvenile Justice (Care and Protection of Children) Act, 2000.
- iv. The Protection of Children from Sexual Offences Act, 2012.
- v. The Child Labour (Prohibition and Regulation) Act, 1986.

- Immoral Traffic (Prevention) Act, 1956

Though there were a number of local Acts in force in the country they were neither effective nor uniform. In 1956, the Immoral Traffic in women and girls Act known as SITA, was passed. The basic objective of SITA was to punish brothel keepers, procurers and pimps and to prevent prostitution in or in the vicinity of public places. The Act was amended in 1978 and more recently in 1986 and is now titled ‘The Immoral Traffic (Prevention) Act’. It is applicable to both men and women. It provides more stringent penalties, particularly with reference to offences against children and minors. It provides that the special trafficking police officer making a search shall be accompanied by at least two women police officers and a woman would be interrogated only by a women police officer and on their non-availability, in the presence of a social worker. The bona fides of those coming forward to take custody of rescued victims must now be investigated by a welfare institution or Organisation before she is released. Provisions are made for police officers to deal with offences of interstate ramifications when dealing with trafficking. Compulsory medical examination of those rescued and their rehabilitation are also provided for.

The object of the enactment was to inhibit or abolish the commercial vice of traffic in women, men and children for the purpose of prostitution as an organised means of living. The said Act criminalises the procurers, traffickers and profiteers of the trade but in no way does it define ‘trafficking’ per se in human beings. Under Immoral Traffic (Prevention) Act, 1956 stringent punishment has been prescribed which ranges from seven years to life imprisonment. The Act tries to define certain important expression such as Brothel, Prostitution, etc. It also provides punishment for keeping a brothel, for allowing premises to be used as brothel. Then provides punishment for living on the earnings of prostitution, for procuring, inducing or taking person for the sake of prostitution, for detaining a person in premises where prostitution is carried on, for prostitution in or in the vicinity of public places, for seduction- seducing or soliciting for prostitution.

This is a social legislation with a double objective, both penal and ameliorative, and the legislature not only wanted prostitution to be stopped but also to provide for the rehabilitation of prostitutes. Therefore, the provisions of the legislation are more preventive than punitive.

- The Indian Penal Code, 1860

The Indian Penal Code, 1860 for its part, contains various provisions related to child trafficking. It imposes, for instance, criminal penalties for kidnapping, abduction, buying or selling a minor for prostitution, unlawful compulsory labour, importing/procuring girls and buying or selling a person for slavery. In addition, sexual assault on a child under 16 years of age, even with formal consent, amounts to rape under the Indian Penal Code.

- The Juvenile Justice (Care and Protection of Children) Act, 2000

The Juvenile Justice (Care and Protection of Children) Act, 2000 is also relevant for the repression of child trafficking which includes prohibition on cruelty to child, employment of child for begging, providing a child with narcotic drugs or psychotropic substances and forcing a child into hazardous employment. Child is defined by the Act as a person under the age of 18. The important features of the Act are that it prescribes a uniform age for both boys and girls to be treated as children which are based on United Nations convention on the rights of child, 1989. There is differential treatment for two categories of children, namely child in need of care and protection and juvenile in conflict of law. For fulfilling the former purpose under section 29 of the Act the State Government may by notification constitute for every district one or more Child Welfare Committees for exercising the powers and discharging the duties conferred on such committees in relation to children in need of care and protection under this Act. This Act also provides for Children's Homes maintained by State government for their care, treatment, education, training and rehabilitation. It also provides for Shelter Homes which function as drop-in-centres for children brought in need of urgent support. Then Section 40 of the Act provides for rehabilitation and social reintegration of a child.

The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 has inserted a new section 62-A which envisages constitution of a Child Protection Unit for every district consisting of such officers and other employees as may be appointed by that government to take up matters relating to children in need of care and protection and juveniles in conflict with law with a view to ensure the implementation of this Act. It includes the establishment and maintenance of homes, notification of competent authorities in relation to these children and their rehabilitation and coordination with various official and non-official agencies.

- The Protection of Children from Sexual Offences Act, 2012

This Act is relevant for protecting those children who are especially trafficked for sexual

activities. Article 15 of the Constitution, inter alia, confers upon the State powers to make special provisions for children. Further, Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood or youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, the exploitative use of children in pornographic performances and materials.

The data collected by the National Crime Records Bureau shows that there has been an increase in cases of sexual offences against children. A large number of such offences are neither specifically provided for nor are they adequately penalized. The interest of child as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

This Act provides for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and wellbeing of the child at every stage of the Judicial process, incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Court for speedy trial of such offences.

- The Child Labour (Prohibition and Regulation) Act, 1986

This legislation is relevant for protecting those children who are especially trafficked and compelled to do forced labour. Children being of tender age faces so many problem, they are exploited and are forced to work in dangerous and hazardous industry due to which they are suffering from so many health issues. This Act is beneficial because it prohibits and regulates such type of practices.

4. National Policies and Plans

The National Child Labour Policy was approved by the cabinet on 14th August 1987 during

the Seventh Five Year Plan Period. The policy was formulated with the basic objective of suitably rehabilitating the children withdrawn from employment thereby reducing the incidence of child labour in areas of known concentration of child labour. Then the Government of India has formulated a National Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children in 1998, with the objective to mainstream and to reintegrate the women and child victims of commercial sexual exploitation in society. The National Plan of Action for Children, 2004 is very beneficial. According to this plan The Ministry of Women, Children and Social Welfare has developed a 10 year National Plan of Action for Children. The plan aims to improve quality of every child's life by promoting child-friendly environments focusing on education, health, nutrition and other sectors through increased access to all basic needs, facilities and services. The plan aims to eliminate all forms of exploitation, abuse and discrimination against children (MoWCSW, 2004).

5. Commissions

As we all know India participated in the United Nations (UN) General Assembly Summit in 1990, which adopted a Deceleration on Survival, Protection and Development of Children. India also acceded to the Convention on the Rights of the Child, 1992 which makes it incumbent upon signatory States to take all necessary steps to protect Children's rights enumerated in the Convention. In order to ensure protection of rights of children, the Government has adopted the National Charter for children 2003. To fulfil its international commitment an Act, the Commission for Protection of Child Rights Act, 2005 was passed. It is an Act to provide for the constitution of a National Commission and State Commission for Protection of Child Rights and Children's Courts for providing speedy trial of offences against Children or of violation of child rights. By the commission for the Protection of Child Rights (Amendment) Act, 2006, in the proviso to section 4, for the words "Minister-in-charge of the Ministry of Human Resource Development", the words "Minister-in-charge of the Ministry or the Department of Woman and Child Development were substituted.

CONCLUSION

Addressing human trafficking truly requires a comprehensive and multi-faceted strategy, which includes efforts aimed at the rehabilitation and social reintegration of trafficked victims. Otherwise, the strategy will not be successful in the long run. In essence, at the very

core of any anti-trafficking strategy must be an unwavering commitment from individual countries and other multilateral actors to address human trafficking at every stage of this cycle, from prevention to recruitment, transportation to bonded labour, and from rescue to reintegration. Without this commitment, anti-trafficking efforts will be fundamentally unable to intervene on behalf of the trafficked victims whose human rights violations form the backbone of this exploitative trade.

Also, the enactment of the law on paper with no real training and support to the functionaries would be futile and therefore, what is needed now is “actual”, “planned” and “effective” implementation. Involving the community participation in the whole implementation process would create a greater impact. The procedures and technicalities should not reduce the ambitious legislations to empty words, because at stake here is the children- the future of the nation.

“Governments have to do more to guarantee children and young people their right to protection from trafficking. There is hope, and real and practical solutions exist. Trafficking of children for sexual purposes happens in virtually every country in the world, developed and developing and we must see governments uphold their commitments to those solutions.”

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6. The Protocol was adopted by the United Nations General Assembly in 2000 and entered into force on 25 December 2003. As of October 2013 it has been ratified by 158 states.
7. Convention on the Rights of the Child, http://www.unicef.org/crc/index_30204.html
8. Section 366, Indian Penal Code
9. Section 372 and 373, Indian Penal Code
10. Renamed as such by drastic amendments to the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA)
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FACTORS TO BE CONSIDERED BEFORE ARBITRATING IN THE ARAB MIDDLE EAST IN OIL CONTRACT

Khaled Abdalhadi A. Hamad*

INTRODUCTION

The Arab Middle Eastern countries represent some of the leading business market participants in the world.¹ Moreover, many Arab countries own the lion's share of the planet's crude oil resources and by 2012, nine of the world's ten largest oil refineries will exist in the Middle East.² In addition, the Middle East presents many dynamic trade and investment opportunities,³ particularly because of its favorable geographical position, availability of natural resources, and competitively priced labor. Also, its growing population and an increasingly young population integrated with Western pop culture through technology has increased demand for American and Western products in general. Furthermore, there has been a strong inclination by American and European investors towards investing in the Arab Middle East.⁴

Arbitration has historically not been a popular method of dispute resolution in the Kingdom of Saudi Arabia. The historic distrust of parties in using arbitration to resolve their disputes was not assisted by the courts intervention in the arbitral process and the uncertainty surrounding the enforcement of arbitral awards. In the past, many arbitral awards which have sought to be enforced in Saudi Arabia have fallen victim to the courts willingness to look into the merits of the case, and their wide interpretation and application of what constitutes public policy. In some instances, the courts have refused to enforce awards on generic public policy grounds and have even conducted a complete hearing *de novo* of the underlying dispute.⁵

However, with the passing of the new Law of Arbitration (new Arbitration Law), along with

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¹ NisrineAbiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study 51 (2008).

² Turkey [Constitution] 1961, Art. 2; see also Kemal Gözler, Turkish Constitutional Law Material in English, Available at: <http://anayasa.gen.tr/english.html>

³ Tunisia [Constitution] June 1, 1959, No. 57, Ch. 2; see also The Republic of Tunisia, Representatives Council, The Constitution, Available at: <http://www.chambre-dep.tn/>

⁴ Constitution of The Arab Republic of Egypt, 11 Sept. 1971, as amended on May 22, 1980, May 25, 2005, March 26, 2007. See also <http://www.egypt.gov.eg/english/laws/Constitution>

⁵ The infamous case of *Jadawel International v. Emaar Property PJSC* being a prime example

the new Enforcement Law (new Enforcement Law) in 2012, there is reason to be quietly confident that the arbitration landscape in Saudi Arabia is changing for the better. The proposed establishment of a commercial arbitration centre in 2014, the Saudi Centre for Commercial Arbitration, is also encouraging. The cause for optimism is supported by the authors recent experience of enforcing in Saudi Arabia, under the new enforcement provisions, a US\$18.5 million International Chamber of Commerce (ICC) award handed down in London against a Saudi Arabia award debtor (the first of its kind that the authors are aware of), with the enforcement process before the Enforcement Court taking less than three months⁶.

However, there needs to be a note of caution: for the most part, it remains to be seen how the new arbitration and enforcement provisions will be applied in practice and, in particular, whether the judiciary will consistently apply the pro-arbitration laws that have recently been passed by the legislature. Further, the Implementing Regulations which are contemplated by the new Arbitration Law have not yet been enacted; it remains to be seen how effective these regulations will be in helping to re-shape the arbitration landscape in Saudi Arabia.⁷

APPLICABLE LEGISLATION

The new Arbitration Law applies to arbitrations (both domestic and international) conducted in Saudi Arabia. Parties can also agree to the application of the new Arbitration Law to international commercial arbitration proceedings conducted outside of Saudi Arabia (Article 2 of new Arbitration Law). The new Arbitration Law is largely based on the UNCITRAL Model Law. However, the drafters have also sought to maintain the essential principles of Shari'a, therefore creating a hybrid set of laws which, in some instances, depart from the UNCITRAL Model Law. The new Enforcement Law is also an important piece of legislation which applies to the enforcement of arbitral awards in Saudi Arabia.⁸

Arbitration conducted in Saudi Arabia must be conducted in accordance with the principles of Shari'a (Article 2, new Arbitration Law). While parties are free to agree and adopt a set of procedural rules, including those of the major arbitral institutions, in all cases the application

⁶ Malaysia [Constitution] 1957, art. 3.1. See also Constitution of Malaysia, Part I- The States, Religion, And The Law Of The Federation, Available at: <http://confinder.richmond.edu/admin/docs/malaysia.pdf>

⁷ Yemen [Constitution] 1994, Article 1-3 & 23; see also Republic of Yemen Supreme Commission for Elections and Referendum, The Constitution of the Republic of Yemen, Available at: <http://www.scer.org.ye/>

⁸ Saudi Arabia [Constitution] 1992, Article 1; see also Kingdom of Saudi Arabia Ministry of Foreign Affairs, The Basic Law of Government, Available at: <http://www.mofa.gov.sa/>

of the rules must not contravene the principles of Shari'a (Article 25(1), new Arbitration Law). For example, the principles of Shari'a might be breached if a tribunal permits a witness to give evidence without taking oath, or if the application of the rules would deprive a party of the opportunity to set out its case in full (this could include the situation where a tribunal grants the relief sought in a summary judgment or strike-out application)⁹ Further, while parties are also free to agree and adopt a governing law other than Saudi Arabian law to govern the substance of their dispute, it is important that the arbitral award does not contain any findings or make any determinations which are contrary to Shari'a law and public policy (Article 38(1), new Arbitration Law). For example, an award which provides for interest will most likely be unenforceable in Saudi Arabia either in part (if the interest element of the award can be severed from the remainder of the award) or in whole (if the interest element is embedded in the award for damages and cannot be separated out). Similarly, awards which provide for punitive or exemplary damages may not be enforceable in Saudi Arabia, in whole or part.

As a practical measure, if the arbitration is seated in Saudi Arabia, or if it is likely that a foreign arbitral award will have to be enforced in Saudi Arabia, it is advisable that the arbitral tribunal has some expertise in Shari'a law, or is alive to the need to render an award which is Shari'a law compliant.¹⁰

DOES THE LAW PROHIBIT ANY TYPES OF DISPUTES FROM BEING RESOLVED VIA ARBITRATION?

The new Arbitration Law mandates that disputes relating to personal status and matters in respect of which no settlement is allowed cannot be referred to arbitration (Article 2, new Arbitration Law). This will be taken to include criminal matters, matters involving public policy and administrative law matters. In addition, arbitration is prohibited in disputes involving Saudi Arabia government bodies, unless the approval of the Prime Minister has been obtained or arbitration is provided for under a special provision of law.

LIMITATION

If parties have agreed a limitation period in their contract, this will be upheld under Shari'a

⁹ See also Article 27, new Arbitration Law

¹⁰ Qatar [Constitution] 2003, art. 1. See also Embassy of the State of Qatar in Washington DC, Constitution of Qatar, Available at: <http://www.qatarembassy.net/constitution.asp>

law. Otherwise, save for any specific legislative provisions relating to certain discrete categories of claims, there is no time limit prescribed in the new Arbitration Law (or elsewhere) for commencing an arbitration.¹¹ Under Shari'a law, there are no prescribed limitation periods, as one of the applicable maxims of Saudi Arabia law is a just right never dies. That said, in practice, the courts in Saudi Arabia have been known to dismiss disputes if more than ten years have passed from the date of the relevant events which have given rise to the dispute, unless there is good reason why this should not be the case.

The new Arbitration Law provides that, in the absence of agreement between the parties, the final award will be issued within 12 months from the date of the commencement of the arbitration proceeding (Article 40(1), new Arbitration Law). However, the tribunal can extend this period by up to six months on its own initiative. It is open to the parties to agree a longer period (Article 40(2), new Arbitration Law).

APPLICABLE PROCEDURAL RULES

Article 25(1) of the new Arbitration Law upholds the principle of party autonomy, and provides that the parties can agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Specifically, the parties can agree to subject the proceedings to the rules of any organisation, agency or arbitration centre in Saudi Arabia or abroad. To the extent of any inconsistency between the rules agreed by the parties and the procedural rules in the new Arbitration Law, the rules agreed by the parties will prevail (except where the relevant Saudi Arabian law is mandatory).

However, there is an important proviso: any rules agreed by the parties must not be in conflict with Shari'a law. Again, this shows the importance of appointing at least one member to the arbitral tribunal who has relevant Shari'a law expertise and who (in the context of a three member tribunal) will be able to provide guidance to the tribunal on whether the application of a particular rule might be in conflict with Shari'a law.

DEFAULT RULES

The new Arbitration Law contains a default set of procedural rules which are to apply to the arbitration in the absence of agreement by the parties. Further, Article 25(2) provides that, in the absence of agreement, the arbitral tribunal can, subject to the provisions of Shari'a and

¹¹Article 10(2), new Arbitration Law

the new Arbitration Law, determine the procedure to be adopted as it deems fit.

The default procedural rules in the new Arbitration Law are largely based on those in the UNCITRAL Model Law, although some differences do remain. For example, the new Arbitration Law provides for both written statements of case (Article 30) and the holding of hearings and proceedings to be determined on the papers (Article 33). However, the new Arbitration Law mandates that the tribunal must record the summary of each hearing in minutes which are to be signed by those in attendance, including any witnesses, experts, attending parties or their agents, along with members of the tribunal. A copy of the signed minutes must be delivered to each party, unless the parties agree otherwise. This reflects the usual practice in the region. In practice, a signed transcript of any hearing would satisfy these requirements.

CONCLUSION

Enforcement proceedings in Saudi Arabia must now be brought before the Enforcement Court and are dealt with under the new Enforcement Law provisions. While there is no expedited procedure as such, the authors recently transferred an enforcement action from the Board of Grievances to the Enforcement Court where the enforcement process was duly completed within three months. However, there is not yet an established track record of enforcement actions in the Enforcement Court, and it is possible that an enforcement action commenced afresh before the Enforcement Court might take longer than the three months experienced by the authors.

E- LEARNING TOOLS: AN INNOVATIVE APPROACH TO ENGLISH LANGUAGE TEACHING AND LEARNING

Shameena Bano*

Abstract

Today we are living in an age, where technology has a great power and influence. The emergence of new technologies like “E-Learning” or “Technology in Education” created a paradigm of changes within educational circles as many began to understand its significance and benefits. The classroom environment is quite different from the tradition classroom environment. Usually the traditional methods which are based on delivering lecturer and notes learning reduce English language learning to the mechanical memorization. But, they miserably fail in developing and growing English language as a skill among the learners. New technologies like Internet, Blue Tooth, YouTube, Tweeter, Blogs, i-pad, Mobile phones, E-mail, Interactive/smart boards and many more engage learners and true interactivity session within the classroom. Learners engage in different ELT technique like English songs, movie clippings, dramatics, advertisements, sports commentaries, and other activities to become skilled at English language. This paper will focus on implanting of various ICT tools and the famous trends in ELT to make English language more enjoyable and comfortable through innovative ELT methods. It will also discuss the availability and use of various ICT tools. E-learning is a catalyst agent into education in the present day and its importance or benefits cannot be ignored by teachers and students. Once there was famine of information, but today we are drowned in the cascade of information/ new technology. New Applications of e-learning tools act as a source of Information and Communications technologies (ICT), which comprises of communication devices or applications encompassing radio; television as well as newer digital technologies such as overhead projectors, projectors, i-pads, blogs, computers, the Internet, interactive/smart boards, cameras, printers, audio equipment, scanners, e-mails, video conferencing and many more are not only influencing and supporting and promoting what is being learned in schools, colleges and universities, but it is also help to changes the way students are learning and grasping.

Keywords: Language, Vocabulary, Methods, Peer Practice, New Devices, ELT, ICT, Pedagogy, Learning Process

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WHAT IS E- LEARNING?

Learning facilitated and supported through the use of information and communications technology, e-learning can cover a spectrum of activities from supported learning, to blended learning (the combination of traditional and e-learning practices), to learning that is entirely online. Whatever the technology, however, learning is the vital element.”¹

‘The delivery of a learning, training or education program by electronic means. E-learning involves the use of a computer or electronic device (e.g. a mobile phone) in some way to provide training, educational or learning material.’²

PAST TRENDS IN TEACHING ENGLISH LANGUAGE

English language teaching in particular has undergone tremendous changes over, especially the last few years. When English language entered in the modules of the students as a compulsory subject, it becomes a challenge for the English language teachers how to teach to the foreign language to the students, so they taught English as a “Know-ledge Subject” not as a “Skill Subject” because their main intention was to teach students just/mere to pass the examinations. Students are burdened with studying, learning and grasping the materials. One can see that learning environment is restricted within classroom and has limited choice of learning. Teachers adopted “Grammar-Translation Method” in which they used to explain word to word students in the native language to make them understand and to learn English Language. Though this sort of method ignores the development of oral proficiency or professional proficiency skill of the learners, it is still in use with majority teachers in the modified or changed form. Many other methods were also used such as bilingual- method, audio-lingual- method, direct -method the structural approach and the situational teaching, communicative language teaching, etc. but no method was said to be a successful method. Hence, ELT seems to be swinging like a pendulum between the extremes of method as a language teachers have ever been in search of better and more effective method of teaching. Now a day ELT trends that were very popular in the past have vanished and have been substituted by innovative ELT methods. Simply, a new / revolutionary society demanded new skills and this meant that new technology could play an important role in education.

PRESENT TRENDS IN TEACHING ENGLISH LANGUAGE

¹ Available at: www.internal.bath.ac.uk/web/cms-wp/glossary.html

² Available at: <http://derekstockley.com.au/elearning-definition.html>

Deena Boraie has discussed eight trends in English Language of Teaching, “Change is the Goal of Teaching English” says Boraie “In my opinion there are two key changes in the purpose of teaching English. Firstly, as Penny Ur (2009) noted, the goal is to produce fully competent English knowing bilinguals rather than imitation of native speakers. The purpose is not to aspire to become native speakers of English because we are already native speakers of our own, but to focus on English as a means of communication. Secondly, English is not viewed as an end in itself, but as a means to learn content such as science and mathematics”. Modern learning paradigms have improved the skills of students. The improvement of technology is said to benefit the student in improving digital learning, communication, collaboration, listening skills, problem-solving skills, math skills, self-evaluation skills mobile learning, planning, valuing diversity, global awareness, social skills and also in presentations. Such a technology is a good productive and constructive tool in education institutes to enhance productivity of both teachers and students. Educational institutions should also promote “learning to learn” i.e. the acquisition of knowledge and skills that make possible continuous learning over the lifetime. It is responsibility of English language teacher to equip students with proficiency in the English language with a proper blend of edification and e-learning tools (modern technologies)” (T. Mani-chander “Emerging Trends in Digital Era Through Educational Technology” 1) Technological tools should be used to make learning more interesting, motivating, invigorating, appealing and meaningful to the students. These tools have been recognized as potentially powerful helping tools for educational change. They are encroached into the combination of digital technologies in language learning and teaching.

USE OF E-LEARNING TOOLS IN TEACHING AND LEARNING ENGLISH

Internet

Internet is one of the most effective tools for teachers to help students collaborate, interact and participate actively in the learning and teaching process. It is an important source of information and materials in the form of mails, conference, seminar, research material and many more and also in promoting communicative approaches that are fully operated through use of collaborative technologies. One can find that there are three such types of electronic communication, within a single class: first teacher- student communication, and second out-of-class electronic discussion, third within-class, fourth real time electronic discussion. Usually, these lesson plans focus/ light on integrating four different courses: English

Composition, Journalism English, Word- Processing, The Application of Computer Software. “*It contains several learning modules, where each can have two teaching aims: one is in the realm of reading and writing skills (main content aim), whereas the other focuses on using the Internet as a tool (instrumental aim).*”³ Sometimes available resources / tools may cause confusion among students, and will discourage them from participating/initiating, if they are not given the proper guidelines/information and support. One of the most important tasks for teachers is to assist their students so that they can discover what they enjoy and gain most according to their level of linguistic competence. No doubt, teachers are also responsible for the evaluation and instruction of all the web tools offered.

Using YouTube

You tube can be used as a tool for improving their Listening and Speaking, Reading and Writing skills. It can also be used in an ELT classroom for different aspects of English as to enhance vocabulary, accents, pronunciations, voice modulation, intonation, and stress many more. The teachers can select a part of movie and ask the students to watch it carefully and replay it once more and thereafter ask the students to frame the dialogues of the movie clip and just see whether the students able to narrate the rest of the story or the climax of the particular movie. For example: The teacher can also ask the students to write a paragraph related to the movie as: “If I were the hero of the movie.....” Or “What, according to you, should be the title of the movie?”

Using Skype

Every internet service has audio functions, and technological instruments like laptops with cameras. The students could communicate with their teachers and friends who are far away from them. Likewise, they could very well communicate with the speakers of native language and get their pronunciation checked, so as to improve their speaking skill. The students can read, learn, write, present, or perform task for other students and also collaborate with other students on writing or research projects. They can also participate in proficiency professional development activities within or outside the town/country. The students could also connect their classes with classes in other town and countries to practice their language skills.

Using Smart Boards

³ Available at: <https://www.hindawi.com/journals>

Smart Boards can be used as a student-centered approach to teach English language. Language is an art, where teacher can use SMART Boards to improve reading and comprehension, and teach grammar and writing. The teachers can also enhance student's communicative skill by using anagrams or jumbled sentences and short or peer story, the synonyms or antonyms or the lexis or collocation words, displaying paragraphs with errors and ask the students to edit the paragraphs or proofread them. This will teach the students the usage and functions of the language.

Using E-Mail

By creating a personal e-mail account (g-mail, yahoo, hotmail, etc.), the students can send text to teachers on concerned topic and get revert corrected. Educators can also provide feedback, suggestions, and reviews for the betterment of every work done.

IPODS

Ipods, one of the multimedia devices, enhance the users to generate, exchange texts deliver, image, audio and video scripts as per the requirement of the users. The teachers can also reach to the quires of students and answer to them. In addition to this, the students can record and listen to their speeches, poems, drama, short stories etc. The teacher can also give students assignment for homework on the given topic for next day. Thus, ipods give a chance to the learners of English to improve their writing, learning, reading, listening, pronunciation, vocabulary, grammar.

Mobile Phones

Mobiles phone has a large range of applications, such as messaging text, MMS, , Internet access, Email, short-range wireless, communications (infrared, Bluetooth), business applications, gaming, and digital photography. Using the camera functions can make a photo documentary and teachers can assign a theme to the students for creative work. After clicking/taking a sufficient number of photos, now the students can upload the given documentaries prepared by them to websites, such as Flicker and type narrative descriptions for each picture to share with their teachers, classmates, family and friends. Students can also make use of dictionary or translators instead of trawling through books for a piece of literature. They can also easily access and purchased online books on Flip Kart, Amazon, Snap Deals, Infli-beam and Bookstore many more.

Blogs

Blogging has become the most popular forms of sharing and generating information especially in the realm of education. Many educators prefer these new techniques to teach students and gain experience with different form of social media. One can easily use guest blogging as a way to earn links and learn such as Blogspot, Wordpress, or Tumbler to host the blog. Blog display photo s and audio and video. The teacher should also encourage the students to visit blog frequently. He should respond to student posts quickly, writing a short comment related to the content. He should also ask questions about what the learner writes to create stimulus for writing. Writing to the blog could be required, and it may form part of the class assessment. Students should be encouraged to post their writing homework or assignment activity on the blog instead of only giving it to the teacher.

Twitter

Tweet starts with short conversation and message with friends of the same or different classroom. Examples include “Rahul is a better writer than a singer” Impact of fast food restaurants on health issue, and other many more. Smart-boards are interactive, whiteboards which is a good replacement for traditional whiteboards or flipcharts as they use to provide ways to show students everything which can be presented on a computer’s desktop (educational software, web sites, and many others).

CONCLUSION

We are living in the age of technological advancement where a teacher plays the role of a controller, organizer, assessor, promoter, participant, resource, tutor and observer to achieve goals of learning English Language in the present global scenario. The traditional method of teaching lay more emphasis on a teacher or teacher centered and its repetitive practice, mechanical drills and memorization are traditional hallmarks. Little Wood conceptualizes the role of the teacher as a facilitator of learning, an overseer, a classroom manager, a consultant or adviser and at times a co-communicator with the learners. “Task Based Language Teaching (TBLT), the current paradigm is basically an off shoot of Communicative Language Teaching. Nuan (2004,12). The teachers of the ELT should understand current trend and evaluative method of the ELT. The teacher becomes a true facilitator of learning for the language learners, purely by means of dialogic communication (Vygotsky, 1978). The

teacher's role is not shunned altogether, but is restricted; the teacher is expected to be a guide by the side.

"Teacher is the pivot of civilization" as said by Dr. S. Radha Krishnan, every teachers play a pivot role to shape the future of child to learn English in the most enjoyable and appealing manner and to face challenge in career and life settlement.

WOMEN UNDER CONSTITUTION OF INDIA

Diksha Dwivedi* & Jahnavi Singh**

Abstract

The aim of this paper is to understand the rights of the women under the Constitution of India, 1950. Women who constitute half of the world's population have always been discriminated against men. Self-denial and self-sacrifice are their nobility and yet they have been subject to all kinds of inequalities and discrimination. The constitution of India provides various provisions relating to the welfare and development of women in every sphere of life. The Indian Constitution enshrined the principle of gender equality in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles of State Policies. Preamble is the key to the constitution. Part III of the Constitution of India deals with fundamental rights. The provisions of Fundamental rights are dealt from Article 12 to 35. It guarantees right to equality to women and also empowers the state to make laws and special provisions for women and children. Part IV of the Constitution of India deals with Directive Principle of State Policy. . The most important feature of DPSP is to protect the rights of women. However, the Constitution of India plays an important role in the development, welfare and uplifting the status of the women in every sphere of life.

Keywords: Woman, Rights, Human Rights, Constitutional Rights, Directive Principle of State Policy

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"There is no tool more effective than the empowerment of women for Development of the country"

-**Kofi Anan**

INTRODUCTION

Women, a girl, a wife, a mother overall women is the key to a family. Since many decades, women were regarded as the weaker section of the society but as days passed, many laws have been implemented for the protection of women. The rights of women can be protected either by constitutional rights or by legal rights. If we talk about the Constitution of India it prohibits discrimination based on sex but it equally directs and empowers the government to undertake special measures for women.

The status of women in ancient times was quite high. Aryans regarded women as the important member of the society. They were given equal status as compared with men. The women got opportunities to attain the high standard. During this period there was no practice of Sati, Child Marriage or Polygamy. Women also enjoyed politics.

However, the position of women got deteriorated with the passage of time. Further, the practice of polygamy, sati pratha, dowry system, female infanticide, etc. became dominant and gave rise to the male - dominated society. They were forced to live behind burkha. Manu said that" *man should enjoy supremacy over the women*". In short, the status of women got vanished.

In medieval period the status of women did not change. They were asked to live within their boundaries. Medieval period gave rise to the practice of child marriage and polygamy. As we talk about child marriage, girls got married before the age of 8 or 9, which was illegal. The education of girl child was neglected. The practice of polygamy was basically practiced among the higher class Hindu families. The practice of 'Sati' was encouraged and the widows who did not perform 'Sati' were looked down upon by the society. During this period only Ramanujacharya gave rise to Bhakti movement by which the status of women got improved and women were entitled to education and many more. But it could not uplift the economic status. The women continued to be dependent on the males for their maintenance. During this period two principle school of Hindu Law came into existence i.e Mitakshara and Dayabhaga.

During British Period, the position of women was in an unpromising state. The cause was the evil social practices which were done in previous times. Many changes were taken place while keeping in mind the status of women. Many movements took place and two most important movements were the Nationalist Movement and Social Reform Movement. Sati system got abolished. The Hindu Woman's Right to Property Act was passed in the year 1937. This act basically focused on the positions of widow in respect of property.

As time passed, many laws were implemented for the protection of women and our Constitution of India played a very important role with regard to this. Women got their position. They were treated equally. In today's world women are not less than men. In every field women are giving their best and are achieving their goals. In the Constitution of India many articles were made for women and some of them are article 14, 15, 16 and many more. In recent times also government is doing their best to protect the women and give them a status in today's world. This is how our law is making such changes and making women securing in this world.

FUNDAMENTAL RIGHTS AND WOMEN

According to a report by the United Nation's published in 1980 - "Women constitute half of the world's population, perform nearly two - third of the work hours, receive one- tenth of the world's income and owns less than one hundred percent of the world's property."¹

In the view of Supreme Court in *Madhu Krishnan v. State of Bihar*², women form half of the Indian population. Women have always been discriminated against men and have suffered denial and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and yet they have been subject to all kind of inequalities, indignities and discrimination.³

The rights available to women in India can be divided into two categories, namely constitutional rights and legal rights. The constitutional rights are those rights which are provided by the Constitution of India whereas the legal rights are those rights which are provided by the various laws of the Parliament and State legislature.

¹ Dr. S.C Tripathi, *Women and Criminal law*, Central Law Publications, p. 15

² (1956) 5 SCC 148

³ *Supra* note 1

The Constitution of India provides certain principles relating to gender equality which are enshrined in its Preamble, Fundamental rights and duties and Directive Principle of State Policies. The Constitution of India, 1950 provides certain provisions relating to women. It guarantees the right to equality to women. The constitution of India not only grants equality to women but it also deals with welfare and development of women in every sphere of life.

According to Article 15(3) of the Constitution, discrimination on the grounds of caste, sex, race, religion or place of birth does not prevent the state from making laws or special provisions for women and children. The Constitution of India gives power to the state to make special provision for women and children. However, Article 15(1) prohibits gender discrimination. Article 15(3) lifts ignominy and permits the State to positively discriminate in favour of women to make special provisions to ameliorate their social, economic and political condition and accord them parity.⁴

Part III of the constitution of India deals with the Fundamental Rights. Fundamental Rights are basic Human rights which are applicable to all the citizens irrespective of sex, caste, religion, race or place of birth. The provisions regarding Fundamental Rights are dealt in Article 12 to 35, which are applicable to all the citizens irrespective of sex. There are certain provisions which protect the rights of the women. These rights are granted by the constitution equally as it has been given to men.

1. ***Right to Equality:*** It means that the state shall not deny any person equality before law, equal protection in the laws whereas Article 15 says prohibition of discrimination on grounds of religion, caste, race or place of birth
2. ***Right to Freedom:*** Article 19 to 22 deals with right to freedom. It includes right to freedom of speech and expression, protection against conviction of offences, protection of life and personal liberty and protection against arrest and detention etc.
3. ***Right against Exploitation:*** Right against exploitation, states eradication of human trafficking and forced labour.
4. ***Cultural and Educational Rights:*** The Indian Constitution guarantees cultural and educational rights under article 29 and 30. Article 29 protects the interest of the minorities whereas article 30 provides that all minority communities have the right to establish and administer educational institution of their choice.

⁴ Dr. G.B. Reddy on Women and Law, IV Ed. 2000, p.2

5. Right to Constitutional Remedies: Article 32 to 35 deals with Right to Constitutional Remedies which means a person has a right to move to the courts for violation of fundamental rights.

The judiciary has played an important role in the development and uplifting the status of women in every sphere of life. The Judiciary has always tried to uplift the status of women by giving various landmark judgments. Through this paper, we intend to analyse how judiciary has played an important role in the development and uplifting the status of women.

- a) ***Triple talaq violates constitution, rights of women:*** In the landmark judgement the court held that triple talaq was a violation of the Indian constitution and rights of women in terms of personal laws. In the present case a Muslim women filed a case against her husband regarding harassment for dowry. Therefore, the court held that no personal law is above the Constitution of India and triple talaq was violation of fundamental rights and rights to women under article 14, 15 and 21.
- b) ***A woman shall not be denied a job merely because she is a woman:*** In its landmark judgement the Apex court in *Air India v. Nargesh Meerza*⁵, has held that a woman shall not be denied employment merely on the ground that she is a woman as it amounts to violation of Article 14 of the Constitution. In the present case, the air hostesses of Indian Air Lines have challenged the service rules which states, "*Air Hostesses shall not marry for the first four years of their joining; they will lose their jobs if they become pregnant. They shall retire at the age of 35 years, unless Managing Director extends the term by ten years at his discretion.*"

The Supreme Court suggested that the first provision is legal, as it would help in promotion of the family planning programmes, and will increase the expenditure of airlines recruiting air- hostesses on temporary basics, but the second and third provisions to be declared as unethical, cruel, unreasonable, and unconstitutional and an open insult to womanhood. Thus, the above decision of the apex court has greatly raised the status of women.

- c) **Constitutional validity of Section 497 IPC –** In the offence of adultery section 497 of the Indian Penal Code, 1860 punishes only the male counterpart and exempts the woman from punishment. The constitutional validity of section 497, IPC was challenged on the ground that it violates Article 14 and section 15(1) of the

⁵ AIR 1981 SC 1829

Constitution.⁶ In *Adul Aziz v. State of Bombay*⁷, the Apex Court upheld the validity of the provisions on the ground that the classification was not based on the ground of sex alone. The court relied upon the mandate of Article 15(3) of the constitution to uphold the validity of the said proviso of the code. However, in the present case the petitioner contended that even though the women may be equally guilty as an abettor, only the man was punished, which violates the right to equality on the ground of sex.

DIRECTIVE POLICY OF STATE POLICY AND WOMEN

Part IV of Indian Constitution deals with Directive Principle of state policy. The provisions contained in this Part cannot be enforced by any court, but these principles are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Article 36 to 51 deals with Directive Principle of State Policy. The constitution borrowed it from the Irish government. The most important feature of DPSP is to promote the welfare of people. It also focus to minimize the inequalities in income, inequalities in status and opportunities not only among individuals but also among groups of people residing in different areas or engaged in different vocations . DPSP plays a vital role in Indian Constitution. Now, the question arises how Directive Principle of State policies are helping the women to achieve their rights?

Basically, DPSP have some provisions regarding women and it is the right of a government to enforce these provisions. There are basically three article which deals with women i.e. Article 39(a), 39(d), 42.

Article 39(a) basically talks about the promotion of justice on a basis of equal opportunity and also provides free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 39(d) says that both men and women should have equal right of livelihood and there should also be equal pay for both men and women and most importantly the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

⁶ *Supra* note 1

⁷ AIR 1994 SC 321

Article 42 allows states to make provision for securing just and human conditions of work and for maternity relief which is a very important factor.

UNIFORM CIVIL CODE AND GENDER JUSTICE/EQUALITY

Article 44 of the Indian Constitutional law states that, “*The state shall endeavour to secure for the citizens Uniform Civil Code throughout the territory of India.*” As we know that India is a secular country but because of our personal laws women are the ones who are suffering the most. Unless equality is not being accepted and Uniform Civil Code does not come into force then there is a less chance that women will be treated equally and they get a chance to live a better life. In a landmark judgement in *Sarla Mudgal v. Union of India*⁸ the Apex Court has passed direction to the Central Government to take a fresh look at Article 44 of the Constitution which enjoins the State to secure a Uniform Civil Code which, according to the Court is imperative for both protection of the oppressed and promotion of national unity and integrity. The above direction was given by the Court while dealing with the case where the question for consideration was whether a Hindu husband married under Hindu law, converted to Islam, without dissolving the first marriage, after he can solemnize a second marriage. It has been held by the Apex Court that such a marriage will be illegal and the husband can be prosecuted for bigamy under section 494 of Indian Penal Code, 1860. In the present case, the Court further held that a Hindu marriage continues to exist even after one of the spouses converted to Islam.

*Mohd. Ahmed Khan v. Shah Bano Begum*⁹ is seen as one of the milestones in Muslim women's fight for rights in India and the battle against the said Muslim law. It was held that Section 125 of the code is truly secular in character and it was enacted to provide quick and summary remedy to the class of persons who are unable to maintain themselves. Irrespective of the person being of any religion sec 125 is applicable because it is a part of Criminal Procedure Court and not Civil Laws. Secondly, Neglect by a person of sufficient means to not give maintenance to any defendant's leads to invoking of 125. Lastly, In this case husband liabilities to provide maintenance doesn't get limited into the foundation of time period of Iddat but as long as the wife is unable to maintain herself or remarried even though Iddat period is over.

⁸ (1995) 3 SCC 635

⁹ AIR 1985 SC 945

This case changed the whole system and still there is a big debate which is been going on. Basically a uniform civil code will free women from the chain of inequality. While many women throughout India are standing in support of a UCC, others are speaking out against it, claiming it would tear as under their personal religious practices. The current scenario might be slightly different on paper but the harsh reality has not changed on ground zero. Be it the crime against women or their rights, there has been very little or no progress at all.

The Uniform Civil Code and gender justice, in many aspects, have a relation which cannot be given a blind eye. Muslim personal laws have given more rights to men as compared to women. The discrimination has taken place in many aspects of Iddat, divorce, inheritance. Both these concepts are interrelated and complimentary to each other. The Indian State has the necessary statutory bedrock for the implementation of the Uniform Civil Code and it should be enforced. It will lead to true equality among the citizens as its existence will strengthen gender justice, without which there can be no equality at all. It is time to forever remove the chains of antiquated ideologies, and in doing so, begin to realise the immorality of forcing women - or anyone else - to live under laws that were as miserable and vile in the 7th century as they are today.

It can be said that women in India, through their own unrelenting efforts and with the help of Constitutional and other legal provisions and also with the aid of Government's various welfare schemes, are trying to find their own place under the sun. As we see, still we are not at that point to achieve equality and justice. We should educate the male with regard to women issue as to solve this problem as soon as possible.

CONCLUSION

Women who constitute half of the world's population are protected under Constitution of India which provides various development schemes and welfare programme for the protection of women in every sphere of life. The constitution of India and other legal provisions helps in the up-liftment of women and protect their rights.

SOCIAL JUSTICE FOR DISABLED PERSONS

Dr. Shefali Yadav* & Pooja Kaushik**

INTRODUCTION

Disability is an ill-fated part of human life which can affect not only the natural way of living but also desolate strength and power. Persons with disability are most disadvantaged section of society; they are also neglected in their family. As per the 2011 Census, the number of disabled in India is 2.68 crore, which is 2.21 per cent of the population. This is marginally higher than 2001, when the disabled population was 2.19 crore, and the disabled made up 2.13 per cent of the population, which means a huge percentage of workforce¹.

The constitution of India envisages the principles of International human rights, the principles of equality, autonomy, dignity, liberty and security. The preamble of the constitution clearly states the primary objective of the constitution is to secure to all its citizens; Justice, social, economic and political; liberty of thought, expression, belief, faith and worship; ; Equality of status and of opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. Article 39A² of the Constitution provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Under the Preamble, the first priority is given to the social justice .Disability hits at this basic concept or promise of social justice which is provided in the preamble, the soul of the constitution. Providing opportunity to the disabled section of the society to perform well will go on to secure the social justice of this section of the society. Absence of adequate infrastructure which is disabled friendly will actually supplement the concept of reservation provided to the disabled in higher education and public employment.

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¹ Census of India 2011, Data on Disability, Office of the Registrar General & Census Commissioner, New Delhi, 27/12/2013; Available at: <http://www.disabilityaffairs.gov.in/upload/uploadfiles/files/disabilityinindia2011data.pdf> (Accessed on 14/07/2017)

² The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

This paper discusses several judgments of court with the help of which the guarantee given under the constitution of India is assured and helps the disabled to attain social justice in true sense.

JUDICIAL EFFORTS

Since the time of framing of the Constitution the Supreme Court and Various High Courts in the country have put an extreme effort to bring social justice and equality to the disabled persons.

In *Ram Kumar Gijroya v. Delhi SSSB*³, the apex court opined that Social and economic justice is a right enshrined for protection of society. The right in social and economic justice envisaged in the Preamble and elongated in the Fundamental Rights and Directive Principles of the Constitution, in particular Arts. 14, 15, 16, 21, 38, 39 and 46 are to make the quality of the life of the poor, disadvantaged and disabled citizens of the society meaningful.”

In *Vikas Sankhala & Ors Etc v. Vikas Kumar Agarwal & Ors*⁴, it was held that it hardly needs to be emphasized that the State has a legitimate and substantial interest in ameliorating or eliminating where feasible, the disabling effects of identified discrimination. It is a duty cast upon the State, by the Constitution, to remedy the effects of ‘societal discrimination’.

Further, in *Lala Ram v. Union of India*⁵ it was said, “*A welfare state is one, which seeks to ensure maximum happiness of maximum number of people living within its territory. A welfare state must attempt to provide all facilities for decent living, particularly to the poor, the weak, the old and the disabled i.e. to all those, who admittedly belong to the weaker sections of society. Articles 38 and 39 of the Constitution of India provide that the State must strive to promote the welfare of the people of the state by protecting all their economic, social and political rights. These rights may cover means of livelihood, health and the general well-being of all sections of people in society, especially those of the young, the old, the women and the relatively weaker sections of the society. These groups generally require special protection measures in almost every set up. The happiness of the people is the ultimate aim of a welfare state, and a welfare state would not qualify as one, unless it strives to achieve the same.*”

³ AIR 2016 SC 1098

⁴ AIR 2016 SC 5265

⁵ (2015) 5 SCC 813

In *Pradip Kumar Maity v. Chinmoy Kumar Bhunia & Others*⁶, court has dealt with the definition "person with disability". It is held that a person with disability would mean a person from suffering not less than 40% of any disability as certified by medical authority and the same would have primacy notwithstanding any State legislation or rules irreconcilable or repugnant thereto.

In *Justice Sunanda Bhandare v. U.O.I. & Anr.*⁷, apex court directed that in the matters of providing relief to those who are differently abled, the approach and attitude of the executive must be liberal and relief oriented and not obstructive or lethargic. A little concern for this class who are differently abled can do wonders in their life and help them stand on their own and not remain on mercy of others. A welfare State, that India is, must accord its best and special attention to a section of our society which comprises of differently abled citizens. This is true equality and effective conferment of equal opportunity.

*Sambhavana v. Union of India & Ors.*⁸, on the issue of granting extra time to persons with disability, it was held that the word 'extra time or additional time' that is being currently used should be changed to 'compensatory time' and the same should not be less than 20 minutes per hour of examination for persons who are making use of scribe/reader/lab assistant. All the candidates with disability not availing the facility of scribe may be allowed additional time of minimum of one hour for examination of 3 hours duration which could further be increased on case to case basis.

In *Union of India v. National Federation of the Blind*⁹, on the issue of reservation to the disabled, the apex court opined that, the ceiling of 50% reservation applies only to vertical reservation under Article 16(4) of the Constitution of India, whereas reservation in favour of persons with disabilities is horizontal. Where the Statute provides for reservation, the extent of reservation cannot be denied. It was held that the computation of 3% reservation is based on total number of vacancies in cadre strength.

In *Union of India v. Shri Yaswanth G V* on 27 October, 2014, Hon'ble Apex Court has held that laudable intention of the disability Act, 1995 is to provide full participation and equality

⁶ (2013) 11 SCC 122

⁷ 2014 AIR SCW 3683

⁸ 2014 (5) ADR 763

⁹ (2013) 10 SCC 772

to persons with disabilities in the matter of protection of their rights, provision of medical care, education, training, employment and rehabilitation.

After analyzing the provisions of PWD Act, 1995 in the background of human and civil rights, it is held that identification of posts under Section 32 is for the purpose of making appointments and not for the purpose of reservation under Section 33. It is further held that persons with disability cannot be appointed unless posts are identified under Section 32 but provision for reservation under Section 32 became effective immediately when Act came into force in 1996.

On issues relating facilities to disabled at polling stations Supreme Court has given directions in *Disabled Rights Group v. Chief Election Commissioner*¹⁰, as – “It is on the Election Commission to give appropriate directions to the officials manning the polling stations, regarding the special facilities for the physically disabled electorate at all polling stations. This should be done well-in-advance and sufficient publicity should also be given in the print and electronic media about the availability of such facilities so that the persons with disabilities are aware of the facilities beforehand and are, thus, encouraged to go and exercise their franchise. Further, its observers should also satisfy that such facilities are given. The absence of such facilities should be notified to the respective Government for remedial/future action”.

Supreme Court in *State of Uttaranchal v. Balwant Singh Chauhan*¹¹, held that it is well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. The court has to innovate new methods and devise new strategies for the purpose of providing access to

¹⁰ Laws (SC)-2004-4-102

¹¹ 2010 (3) SCC 40

justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning.

The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated.

Supreme Court in *Jeeja Ghosh & Anr v. Union of India & Ors*¹², held that, in order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and system, and to other facilities and services open or provided to the public.

CONCLUSION

Thus, for the purpose of allowing social justice to the persons with disability, the Indian judiciary has made sincere efforts to realize the society and authorities that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largess but their right as equal citizens of the country.

Therefore, to conclude, it is significant to note that equality and steps towards equalization are not idle ‘incantation’ but actuality, not mere ideal but real, life. It is a practical observance that to most disabled persons, the society they live in is a closed door which has been locked and the key to which has been thrown away by the others. Helen Keller has described these phenomena in the following words: “*Some people see a closed door and turn away. Others see a closed door, try the knob and if it doesn't open, they turn away. Still others see a closed door, try the knob and if it doesn't work, they find a key and if the key doesn't fit, they turn away. A rare few see a closed door, try the knob, if it doesn't open and they find a key and if it doesn't fit, they make one!*” These rare persons are needed to be found out.

¹² AIR 2016 SC 1715

DEFAMATION: EMERGING TRENDS IN INDIA

Ritika Juneja*

Abstract

Freedom of Speech and Expression being a fundamental right in the democratic country is as essential as human existence. However, there arises a need to balance this right of freedom of speech and expression with one's right to reputation and thus rises the conflict. This paper aims to explore the various forms of defamation. The paper focuses on the dire need to regulate freedom of speech and expression on the internet as it is causing irreparable injury to the reputation of the people. The paper also highlights as to how Indian Judiciary has been in favour of criminalization of defamation.

Keywords: Defamation, Freedom of speech and expression, internet, press, decriminalization.

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INRODUCTION

Next to life, what man cares most is their reputation. Each man is qualified for have his reputation. Jurist Blackstones has added to this proposition and indicted that “Every man is entitled to have his reputation preserved inviolate”. A man’s reputation is his property. Contingent on impression of that man, reputation is more significant to him than whatever other property. Reputation is the condition of being held in high regard and respect or the general estimation that people in general has for a man. Thus, the privilege to have reputation includes appropriate to have reputation untouched or in place.

DEFAMATION: MEANING

The word defamation is driven from Latin word ‘Diffamare’. Semantics or Etymology of the Latin word ‘Diffamare’ provides that it means ‘Spreading evil report about someone’. Thus, defamation is causing injury to the reputation of a person. Hence the subject of defamation is fundamentally connected up with one’s reputation. In any case, the idea is no place characterized in books of laws. Despite the fact that numerous definitions have been endeavored to surround this word ‘defamation’, none has been discovered thorough. As per Black’s Law Dictionary, defamation means the offence of injuring a person’s character, fame, or reputation by false and malicious statements. The term is by all accounts exhaustive of both libel and slander.¹

Defamation is civil as well as criminal wrong. Likewise the codified criminal law on the subject, the civil law of defamation is not codified. The criminal law on the subject is contained in separated 499 to 502 of Indian Penal Code, 1860. Be that as it may, defamation as a Civil Wrong is secured under Law of Torts. It is simply in view of precedential advancements, i.e. through choices articulated by Courts.

Defamation can be either: Libel - Representation in a permanent form, e.g., writing, printing, picture, effigy or Statute or Slander – Depiction in transient form. It is basically through words spoken or gestures.

LEGAL PROVISIONS REGARDING DEFAMATION

English law: The Defamation Acts of 1952 and 1996 are the important statutes in England

¹ Ratanlal and Dhirajlal, The Law of Torts 279 (LexisNexis, New Delhi, 26th Ed., 2013)

that lay down the law related to defamation. Under English law, there is a distinction between libel and slander. Two reasons have been accorded. Firstly, libel not slander is punishable under

Criminal law: In fact, slander is no offence. Thus, libel is always actionable per se. Secondly; in most cases of slander “special damage” must be shown.

As far as law of torts is concerned, slander is actionable, only in exceptional cases on proof of special damage. There are four exceptional instances in which proof of special damage has to be proved:

- I. Imputation of criminal offence to the plaintiff,
- II. Imputation of a contagious (disease) or an infectious disease to the plaintiff (which has the effect of preventing others from associating with the plaintiff),
- III. Imputation that a person is incompetent, dishonest or unfit in regard to the office, profession, calling or trade or business carried out by him,
- IV. Imputation of unchastity or adultery to any woman or girl is also actionable per se.

This exception was created by the Slander of Women Act, 1891. Thus, in England slander is only a civil wrong. However, it is to be noted that civil action is more onerous than criminal action.²

DEFAMATION LAWS IN INDIA

In India, there is no such distinction between libel and slander. Both libel and slander are criminal offence. For better understanding, it can be divided into two categories: Criminal and Civil.

The IPC under chapter XXI sections 499-502 protects an individual's / person's reputation. Defamation against the state is contained in section 124A [Sedition], Section 153 of the Code provides for defamation of a class i.e., community [Riot], while section 295A deals with hate speech with regards to outraging religious sentiments. [Hate Speech]

An interesting aspect of defamation as a tort is that it is only a wrong if the defamation is of a nature which harms the reputation of a person who is alive. In most cases, this translates to saying that it is not a tort to defame a deceased person since, as a general rule, the plaintiff

² id

needs to be able to prove that the defamatory words referred to him. However, this does not mean that there can be no cause of action if a dead person is defamed - if, for example, a defamatory statement negatively impacts the reputation of a deceased person's heir, an action for defamation would be maintainable. Further, if an action for defamation is instituted, and defamation is found to have been committed, damages will be payable to the plaintiff (usually, the person defamed). In addition to this, a person apprehensive of being defamed in a publication may seek the grant of an injunction to restrain such publication. However, pre-publication injunctions are rarely granted as Indian courts have tended to follow the principle laid down in the 1891 case of *Bonnard v. Perryman*³ which is as follows:

The Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases-in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable. An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so.

This principle has been followed by a division bench of the Delhi High Court in the 2002 case of *Khushwant Singh v. Maneka Gandhi*⁴.

As such, even if there is an apprehension that content may be of a defamatory nature, it is likely that publication would not be restrained except in exceptional cases - presumably, those cases where the later payment of damages would clearly not suffice to set right the wrong done to the person defamed. In non-exceptional circumstances, Indian courts have shown a tendency to support free speech, and have not displayed a tendency to grant injunctions which would have the effect of muzzling speech on the ground of possible defamation.⁵ It is significant to mention that a defamation bill was proposed by the Rajiv Gandhi government to deal with the law pertaining to defamation. However, Defamation Bill, 1988 received widespread criticism from the media and opposition parties due to its draconian provisions; as a result it was withdrawn.

³ 14 (1891) 2 CH 269

⁴ AIR 2002 Delhi 58

⁵ Available at: <http://copyright.lawmatters.in/2012/02/defamation.html> (Accessed on 09/02/2016)

WHAT CONSTITUTES DEFAMATION?

1) Words must be defamatory

The statement must be defamatory. According to Lord Atkin, the statement must tend to lower the claimant in the estimation of right-thinking members of society generally, and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem.

Mere abuse: Vulgar abuse is not defamatory. Mansfield CJ stated “For mere general abuse spoken no action lies.”⁶ Winfield & Jolowicz states that spoken words which are *prima facie* defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them. Further, the same applies to words spoken in jest.⁷

Innuendo: Sometimes a statement may not be defamatory on the face of it but contain an innuendo, which has a defamatory meaning. Such a statement may be actionable. The hidden meaning must be one that could be understood from the words themselves by people who knew the claimant⁸ and must be specifically pleaded by the claimant.

2) Reference to the claimant

The statement must refer to the claimant, ie, identify him or her, either directly or indirectly. If a class of people is defamed, there will only be an action available to individual members of that class if they are identifiable as individuals. *“If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual.”*⁹

If the defendant made a reference to a limited group of people, eg the tenants of a particular building, all will generally be able to sue.¹⁰ This issue was considered by the House of Lords in *Knupffer v. London Express Newspaper Ltd.*¹¹

⁶ *Thorley v. Kerry* (1812) 4 Taunt 355 at 365

⁷ *Donoghue v. Hayes* (1831) Hayes R 265

⁸ *Lewis v. Daily Telegraph* [1964] AC 234

⁹ per Willes J in *Eastwood v. Holmes* (1858) 1 F&F 347 at 349

¹⁰ *Browne v. DC Thomson* (1912) SC 359

¹¹ [1944] AC 116

At common law it was irrelevant that the defendant did not intend to refer to the claimant. Section 4 of the Defamation Act 1952 provided a special statutory defence in cases of ‘unintentional defamation’, by allowing the defamer to make an ‘offer of amends’ by way of a suitable correction and apology and may include an agreement to pay compensation and costs. The defence is now contained in sections 2-4 of the Defamation Act 1996, which was an attempt to modernise the law. The person accepting the offer may not bring or continue defamation proceedings. If the offer to make amends fails, the fact that the offer was made is a defence and may also be relied on in mitigation of damages. A publication made ‘maliciously’ (spitefully, or with ill-will or recklessness as to whether it was true or false) will destroy the defence of unintentional defamation.

3) Publication

The statement must be published, ie communicated, to a person other than the claimant. For example, dictating a defamatory letter to a typist is probably slander¹², but when the letter is published to a third party it is libel. However, in *Bryanston Finance v. De Vries*¹³ it was held that where a letter was written to protect the interests of the business there was a common interest between the employer and employee, and so a letter dictated to a secretary in the normal course of business was protected by qualified privilege.

A statement made to one’s own spouse will not be ‘published’ for the purposes of defamation.¹⁴ Communication between husband and wife is protected as any other rule might lead to disastrous results to social life.

The defence sometimes known as ‘innocent dissemination’ is designed to protect booksellers and distributors of materials which may contain libellous statements. The law is now contained in s1 of the Defamation Act 1996.

A person has a defence if he shows that he was not the author, editor or commercial publisher of the statement; he took reasonable care in relation to its publication; and he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. A person shall not be considered the author, editor or publisher of a statement if he is only the printer, producer, distributor, or seller of printed material

¹² Salmond and Heuston, Law of Torts, 1996, p154

¹³ [1975] QB 703

¹⁴ *Wennhak v. Morgan* (1888) 20 QBD 635 at 639

containing the statement, or the broadcaster of a live programme.

An internet service provider was held not to be the publisher, within the meaning of s1, of defamatory statements posted on a newsgroup, and therefore was entitled to rely on. However, on the facts the claimant had notified the defendants that the posting was defamatory and requested that they remove it, but they had refused to do so.

Consent of the claimant to the publication of a statement, by showing other people defamatory material which the defendant meant for the claimant only, will create a situation in which technically there has been no publication.¹⁵

TEST TO DETERMINE DEFAMATION

1. Does the statement refer to you?

Regardless of the possibility that you are not particularly named, it must be evident the announcement is about you. A general articulation, which might possibly apply to you, won't be sufficient.

2. Is the statement substantially true?

Truth isn't an outright defense; however it can be troublesome or even difficult to overcome. Why just substantially? Indeed, even an announcement with a few mistakes or, on the other hand distortions can in any case be considered by and large genuine. For illustration, somebody tells a partner you were captured over the end of the week for intoxicated driving in the wake of slamming your auto. In any case, there was no mishap; you were halted and captured at a checkpoint. This detail will probably have small bearing on any potential defamation claim.

3. Is the statement an opinion?

An opinion may be brutal and it might be savage, yet it is hard to demonstrate as defamatory. If the statement started with something that could demonstrate it is an opinion ("In my conclusion", "it is my conviction", and so on.), it is considered as an opinion rather than as a statement of fact.

¹⁵ *Hinderer v. Cole* (1977) (unreported) - defamatory letter sent by the defendant to the claimant was shown by the claimant himself to third parties

4. *Have you suffered any substantial damages?*

Would you be able to point to a particular individual or individuals who have a lower conclusion of you as a result of the defamatory statement announcement? Are you in risk of losing your work or other wage on account of the statement? You may be humiliated, stunned or distraught about the statement, yet in the event that you can't demonstrate any genuine harm, you have no case.

DECRIMINALISATION OF DEFAMATION AND THE INDIAN JUDICIARY

The decriminalization of defamation has been a burning issue in recent times. The provision of IPC which makes defamation a criminal offence raises a serious doubt on the fundamental freedom of speech and expression. In the presence of such penal provision this fundamental right loses its sanctity.

In the recent and landmark case of *Subramanian Swamy v. Union of India*¹⁶ petitions filed by leading political figures unanimously demanded decriminalizing defamation on one hand and strengthening civil remedies and financial compensation for the loss of individual reputation.

According to the petitioner, these provisions cast an unreasonable restriction on free speech, one that falls beyond article 19(2) of the Constitution of India. Apart from that, other contentions submitted by the petitioner are as follows:

- i. In a democratic body polity, public opinion, public perception and public criticism, are the three fundamental pillars to guide and control the Executive action and, if they are scuttled or fettered or bound by launching criminal prosecution, it would affect the growth of a healthy and matured democracy.
- ii. Fundamental rights of liberty and free speech are controlled and not absolute as per the Constitution, but in the name of control the freedom of speech that pertains to criticism of certain governmental actions cannot be gagged.
- iii. The individual interest in the guise of reputation cannot have supremacy over the larger public interest, for the dominant interest in a democracy is the collective interest and not the perspective individualism.
- iv. The Executive does not permit expression of public opinion by instituting cases of

¹⁶ Writ Petition (Crl.) No. 184/2014), Available at: http://supremecourtofindia.nic.in/outtoday/wr18414p-2014_10_30.pdf

defamation through the public prosecutors by spending the sum from the State exchequer which is inconceivable.

- v. The concept of sanction, which is enshrined under Section 199(2) of the Code of Criminal Procedure, is a conferment of unfettered power by which the citizenry right to criticize, is gradually allowed to be comatose.

The counsel appearing for the State of Tamil Nadu submitted that sections 499 and 500 could not be said to travel beyond reasonable limits on free speech, because article 19(2) itself imposes such a restriction.¹⁷ Also, there has to be a debate with regard to the conceptual meaning of the term ‘defamation’ used in article 19(2) of the Constitution and ‘defamation’ in section 499 of the IPC. It was also pointed out that the freedom of speech and expression has to be a controlled one and does not include the concept of defamation as defined under section 499.¹⁸ The bench while going through the petition raised a question that whether abolition of criminal action in other countries¹⁹ could really have effect when the court decides on the constitutional validity of a provision regard being given to India’s own written and organic constitution.

However, the Court held that the penal code provision is not disproportionate. The reasonableness and proportionality of a restriction is examined from the stand point of the interest of the general public, and not from the point of view of the person upon whom the restrictions are imposed. Applying this standard, the Court judged the criminal defamation laws to be proportionate.

DEFAMATION AND THE PRESS

Freedom of Expression and the press is the backbone of all democratic set up and the press has an exceptional part to play in giving a gathering to free political dialogs for the best possible working of a popular government. In order to preserve the democratic nature of life which is provided under the Indian Constitution, it is necessary that people should have the freedom to express their feelings and have the opportunity to make their views known and disseminated to the people at large. The right to express free and honest opinion on the matters of public policy strengthens the spirit of democracy and the Press has an integral role

¹⁷ *Vijay Kant v. Union of India* [T.P. (Crl) No. 94-101/2015].

¹⁸ *Arvind Kejriwal v. Union of India* [W.P. (Crl) No. 56/2015]

¹⁹ Cyprus, Estonia, Ireland, Romania, Sri Lanka and the United Kingdom (UK) have repealed criminal defamation as an offence against private individuals.

to play in it. This role can be effectively played only in the absence of any restrictions.

Right to freedom of the press is not specifically mentioned in article 19(l)(f) of the Constitution,²⁰ and what is mentioned there is only freedom of speech and expression. Since the enactment of the Constitution the question has arisen whether the freedom of speech and expression includes within its ambit freedom of the press, which is essentially freedom of publication and freedom of circulation of the matter so published. The reference to the debate of the Constituent Assembly is relevant for the point.²¹

It was made clear by Ambedkar, Chairman of the Drafting Committee, that no special mention of the freedom of the press was necessary at all as the press and an individual or a citizen were the same so far as their right of expression was concerned. The Constitution of the United States provides specifically for the guarantee of freedom of the press and gives recognition of the subject-matters of the press as an organ of publicity and media of mass communication. But the framers of the Indian Constitution were content to treat the freedom of the press as an essential part of the freedom of speech and expression as guaranteed in Article 19 (l)(a) of the Constitution.

In *Romesh Thappar v. State of Madras*²² and *Brij Bhushan v. State of Delhi*²³, the Supreme Court took it for granted that the freedom of the press was an essential part of the right to freedom of speech and expression. It was observed by Justice Patanjali Sastri in Romesh Thappar that the freedom of speech and expression included propagation of ideas, and that freedom was ensured by the freedom of circulation²⁴. It is thus clear that the right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and other views with complete freedom and by resorting to all available means of publication. This view was reiterated in *Sakal Papers (P) Ltd. v. Union of India*²⁵ and

²⁰ Article 19: (1) All citizens shall have the right— (a) to freedom of speech and expression; (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

²¹ 7 Constituent Assembly Debates 712-716, 780

²² AIR 1950 SC 124

²³ AIR 1950 SC 129

²⁴ AIR 1950 SC 124, 127

²⁵ AIR 1962 SC 305

regarded as settled in *Bennett Coleman & Co. v. Union of India*²⁶. Moreover, freedom of the press in India stands on no higher footing than the freedom of speech and expression of a citizen and no privilege attaches to the press as such as distinct from the freedom of the citizen.²⁷ As the right to freedom of speech and expression is guaranteed to a citizen, and not to a person, a non-citizen running a daily paper, is not qualified for the advantage of flexibility of the press.

The right to freedom of speech and expression is not absolute and its exercise is subject to the limits permissible under clause 2 of article 19 of the Constitution; these limits apply equally to freedom of the press. Parliament or state legislatures may validly pass a law which places restrictions on the right to freedom of speech and expression provided such restrictions are related to one or more of the purposes mentioned in clause (2) of article 19. These restrictions have to be reasonable, and the ‘reasonableness’ is justiciable.

The recent trends highlight the growing charges leveled against the journalist for the defamation. In one of the recent case The Second JM First Class (JMFC) court convicted senior journalist Gauri Lankesh and sentenced her to simple imprisonment for six months and imposed Rs 10,000 as a fine in a defamation case. Further, Chief minister Oommen Chandy has filed criminal defamation complaint against Saritha S Nair and four media personalities for allegedly conspiring and creating a fake document for alleging sexual harassment charges against Chandy. These trends manifestly highlight the sad reality of misuse of defamation laws.

Present day media has upgraded the nature of democratic process by giving a stage to open support on issues of national or social worry in a way that can impact the Government. Media fulfills a two overlay need. It not just conveys information to the general population, additionally conveys back open reactions to the administration, convincing the later to be more open to public opinion. But, however, the media can perform its function effectively only in the absence of any fear of being prosecuted. As long as this fear exists there cannot be justification of democratic set up which is provided by the Constitution. Thus, there is a dire need for decriminalization of and to accord higher protection to Media in the matters of defamation.

²⁶ AIR 1973 SC 106

²⁷ *M.S.M. Sharma v. Sri Krishna Sinha*, AIR 1959 SC 395, 402

DEFAMATION AND THE INTERNET

The development of the Internet has enabled people worldwide to look for and share information. In any case, while the Internet presents remarkable open doors for communication and debate, it likewise intensifies the pressure as of now observed disconnected between flexibility of articulation and different interests. Among those contending interests are the rights to reputation and privacy, generally ensured by criticism law.

Since, India's civil law of defamation is not codified and owes its origins to English common law that has subsequently evolved through judicial activism. Under such law, the offence of defamation is *prima facie* made out by the publication of a statement which refers to the plaintiff and tends to lower the reputation in the minds of reasonable people. The burden then falls on the defendant to escape from the liability. In this form, defamation acts as a strict liability offence. This means that an author cannot save herself even if she has taken due care in publishing her content.

In 2001, the Delhi High Court assumed jurisdiction over cyber defamation for the first time in the case of *SMC Pneumatics v. Jogesh Kwatra*²⁸. The defendant was restrained from sending obscene, vulgar, abusive, intimidating, humiliating and defamatory emails to the plaintiffs and its subsidiaries. This has paved the way for the application of traditional civil and criminal defamation laws to the Internet. While the Internet doesn't foreclose the application of pre-existing laws, we must note that such laws were not drafted keeping the Internet in mind and Shreya Singhal's case²⁹ is a landmark judgement in the field of freedom of speech and expression. This epic case brings forth various dimensions which are important facets of Article 19(a). Section 66A of the Information Technology Act which was widely criticized for its over breadth, vagueness and its chilling effect on speech was struck down by the apex court as it was unconstitutional. However, in Swamy's case Mishra J takes a different route and points out that there is a difference in the canvas on which the Shreya Singhal's case has been made. In that case there was a narrow interpretation of the provision. However in Swamy's case 'reputation' (which is implicit in article 21) was also involved and narrow interpretation was not the case.

²⁸ CS(OS) No. 1279/2001, Delhi High Court

²⁹ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523

The term ‘chilling effect’ in lawful setting essentially depicts a circumstance where a speech or conduct is stifled by dread of penalisation at the interests of an individual or gathering. It is the hindrance of the lawful exercise of legal rights by the danger of lawful sanction. With respect to expansiveness, the apex court opined that the net thrown by section 66A was wide to the point that basically it secured any opinion on any subject.³⁰

Thus, striking down Sec 66A of the Information Act as unconstitutional is a positive move in regard to give meaning to the fundamental freedom guaranteed under Article 19(1)(a) of the Constitution but there is a long journey to travel in order to give effective meaning to the fundamental freedom of speech and expression.

REMEDIAL MEASURES AT THE DISCRETION OF THE COURT

The case of *Parshuram Babaram Sawant v. Times Global Broadcasting Co. Ltd.*³¹ is an apt example of the fact that the remedies available in the matters of defamation is highly at the discretion of the court and sometimes so disproportionate that it shakes the very existence of fundamental freedom of speech and expression. In the abovementioned case, the Plaintiff, Mr. Parshuram Babaram Sawant, a former judge of the Supreme Court, the former chairman of the Press Council of India and the former president of the World Association of Press Councils sued Defendants No. 1 and No. 2 i.e., the Times Now Channel and the Editor in Chief, for damages of Rs. 100 Crores. According to the facts of the case, as the scandalous Provident Fund Scam (June/July 2008) of Gaziabad District Court involving a number of judges comprising the higher judiciary began to surface, the Times Now Channel began reporting all the developments related to it. The public at large and the legal fraternity across the world watched as it unfolded. Amongst the judges, Justice P. K. Samantha of the Calcutta High Court was allegedly involved. On 10.9.2008, as the channel was telecasting news relating to this scam, a photograph of the Plaintiff i.e., Mr. P.B. Sawant was flashed as that of Justice P.K. Samantha. The flashing of photograph created a false impression amongst all viewers in India and abroad that Mr. P.B. Sawant was involved in the PF Scam, which is per se highly defamatory considering his stature in the society. Though the said channel stopped publishing the photograph of the plaintiff when the mistake was brought to their notice, no corrective or remedial steps to undo the damage caused to the reputation of the Plaintiff were taken by the defendants on their own. Mr. P.B. Sawant vide a strongly worded letter called

³⁰ *Supra* note 1

³¹ Special Suit No. 1984/2008

upon the Times Now Channel to apologize publicly and asked for damages of Rs. 50 crores for the harm caused to his reputation. The channel then tendered an apology informing that it had published a corrigendum on 23.9.2008. It also conveyed that the showing of the photograph of the plaintiff as an accused in PF scam was an unintentional error. But the reply was completely silent about the damages demanded by the Plaintiff. Considering this to be a belated action taken by the defendant that caused him mental anguish and damaged his reputation, the Plaintiff made it known to the defendants that their apology or corrective action was neither earliest nor sincere. Hence, the Plaintiff demanded an enhanced compensation of Rs. 100 crores. The learned judge held that the amount of damages awarded in respect of vindication and inquiry to reputation and feelings depends on a number of factors, which are not exhaustive and are based on facts of different cases. These factors have been elaborated are as follows:

- i. The gravity of the allegation
- ii. The size and influence of the circulation
- iii. The effect of the publication
- iv. The extent and nature of the claimant's reputation
- v. The behavior of the defendant An examination of these factors was done in the context of the case in the following corresponding manner:
 - I. The gravity of the allegation was observed to be extremely serious in view of the former positions Mr. P.B.Sawant had held.
 - II. The size and influence of the Times Now channel is undeniably large as a 24X7 hour current affairs news channel with a viewership in India and abroad.
 - III. With regard to this size and influence of the circulation, the effect of the publication was considered to be extremely damaging to the reputation of the plaintiff.
 - IV. The extent and nature of the claimant's reputation is undisputed.
 - V. The behavior of the defendant was decidedly "extremely casual, callous and cavalier" as they had allowed the defamatory news to go uncorrected for about 13 days.
 - VI. And as for the behavior of the plaintiff, the learned judge took note of how his PA had called the news channel the same day of the incident, although denied by the claimants, and how the Plaintiff patiently waited for remedial steps to be taken. Since these steps were not taken, the Plaintiff wrote a letter

demanding a public apology and compensatory damages of Rs. 50 Crores from the defendants. But on observing their callous attitude to this, he enhanced the sum to Rs.100 Crores. Taking into consideration these circumstances, the evidence and citations put forth before the learned judge, she held that the plaintiff is entitled to damages amounting to Rs 100 Crores.

Case of such type throws light upon the fact that existence of freedom of speech is now somehow limited in words as there is a great fear in the exercise of such right due to punitive attitude of judiciary in case of defamation. Thus, there stands a dire need to make provisions to guide the judiciary regarding grant of compensation in the matters of defamation in order to give effective meaning to the fundamental right of freedom of speech and expression. Moreover, such an attitude of the judiciary also highlights its discriminatory nature in regard to granting of compensation as the poor person is not entitled to claim same damages as compared to an elite person. Thus, there is violation of Art 14 of the Constitution in that regard.

CONCLUSION

Thus, the Right to Reputation and Right to Free Speech and expression are both integral part of the Constitution of India. Where Free speech is basic tool for a democratic government to work, a man's reputation is his most prized possession. This puts a heavy burden on the judiciary to strike a balance between the two essential rights. The judiciary should not impose unreasonable restrictions on the exercise of fundamental right of freedom to speech and expression and neither should it adopt a lenient approach to allow people to injure the reputation of others.

A CRITICAL DISCOURSE ON THE MULTI-DIMENSIONAL FACETS OF INDEPENDENCE OF JUDICIARY IN INDIA

Tanmoy Roy*

Abstract

Independence of the Judiciary is multi-faceted. It begins with ensuring that the legislature, executive and the judiciary function in conformity with the cardinal norm of Separation of Powers. However, real judicial independence flows from a system wherein its independence is coupled with judicial accountability, transparency and various other multidimensional aspects. The present researcher realizes that in a country like India, the appointment, transfer and tenure of judges are not suffice to address and ensure the independence of judiciary in its entirety. Therefore, the present researcher, through this research work, highlights the other multi-dimensional facets like judicial accountability, reflective judiciary, post-retirement appointment or engagement of judges, lack of financial and administrative autonomy of the judiciary, uncritical reliance of IB reports in the matter of appointments in higher judiciary, omission of distinguished jurists, that continue to pose a serious and grave threat in the process of ensuring the cherished principle of independence of judiciary in its real terms. The author, in this paper, concludes by observing that independence of the judiciary which is very essential for a nascent democracy can be achieved in its real terms by addressing all those aspects and thereby can promote an all-round development of society, otherwise the concept would be a mere illusory and ornamental one.

Keywords: Grundnorm, judicial accountability, collegium, decisional independence, institutional independence.

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INTRODUCTION

“We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.”¹ Judiciary is often referred as the watchdog of our Constitution and the fundamental values underlying it. It is also termed as the lifeblood of constitutionalism in almost all democratic societies. Since the epoch making decision of *Marbury v. Madison*², the authority of courts’ functioning and working under a written democratic constitution takes within its ambit the power to declare unconstitutional even laws made by the legislature. This is a formidable authority and thereby necessarily implying an important responsibility. A wide exercise of such power requires an efficient and independent judge as well as judicial system.³ “Since administration of justice is the main task of judiciary, its independence is considered essential for smooth functioning of it. No democracy can flourish without an independent judicial system, a system free from fear or favour, a system isolated from the other branches of the government. It enhances the prosperity and stability of social order”⁴. Today it is no longer in dispute that, “the independence of judiciary and the confidence of the public in the judiciary is of supreme importance for democracy to survive”, without which democracy will certainly fail. As it has been recently observed by apex court that, an independent judiciary is the *sine qua non* to protect rule of law in any civilised society. Its independence was rightly described as “integral to the scheme of the constitution without which neither primacy of the constitution nor Federal character, social Democracy nor Rights of Equality and Liberty can be effective.”⁵

MEANING OF INDEPENDENCE OF JUDICIARY

The notion of judicial independence is not a new concept but its exact meaning is still imprecise and not clear to the legal fraternities. It may well turn out that judicial independence is easier to protect than to define⁶. Different dictionaries have attributed different meanings to the word “independent”. It has been meant as ‘freedom from outside

¹ CHARLES EVANS HUGHES, speech before the Chamber of Commerce, Elmira, New York, May 3, 1907; Addresses and papers of Charles Evans Hughes, Governor of New York, 1906-1908, at p.139 (1908).

² 5 US 137 (1803)

³ *Supreme Court Advocates-on-Record Association v. Union of India*; AIR 2015 SC (Supp) 2463; [per Jasti Chelameswar, J.]

⁴ Zia Mody, *10 Judgements That Changed India*, SDE Penguin, 1st Ed., p.163,

⁵ *Supra* note 3; [per Adarsh Kumar Goel, J.]

⁶ Steven Lubet, *Judicial Discipline and Judicial Independence*, p. 59, 61 LAW & CONTEMP. PROBS

control', 'not influenced or affected by others', 'impartial' and 'capable of thinking or acting for oneself'. Independence in all these senses must be complete, unimpaired and uncorrupted and that means first ---- that independence is antithetical to corruption and second ---- that it is ensured by accountability.⁷

Apparently this concept is based on the *doctrine of separation of power* as propounded by *Baron De Montesquieu* in his book "*esprit des lois*" (spirit of laws) in 1748. It will appear that the cornerstone of the independence of judiciary in every country laid its base upon this doctrine. Therefore primarily it means the independence of the judiciary from the other two limbs of the state. But that amounts to only the independence of the judiciary as an institution from the other two institutions of the state without regard to the independence of judges in the exercise of their functions as judges. In that case it does not achieve much. The underlying object of the independence of judiciary is that judges must be able to adjudicate a dispute before them according to legal principles, uninfluenced by any other consideration. Owing to that, the independence of the judiciary is also the independence of each and every judge. In this aspect one would like to borrow the words of *Shimon Shetreet*, a leading jurist, wherein he had asserted that the independence of the judiciary means and includes the independence of the judiciary as a collective body or organ of the government from its two other organs as well as independence of each and every member of the judiciary i.e; the judges in the performance of their roles as judges. Without the former the latter cannot be secured and without the latter the former does not serve much purpose.

Thus judicial independence can be categorized as (1) *decisional independence*, the independence of a judge in deciding the case before hand and (2) *institutional independence*, the independence of the court or the judiciary as an organisation.

Decisional independence provides an independent status to the judge with the autonomy in deciding cases without political or popular pressure and without any fear of intimidation. This freedom protects the integrity of the judges, fairness and impartiality at every stage of decision making process.

On the other hand, *institutional independence* provides freedom from improper influence and interference in the governance and the management of the judiciary's own affairs. This aspect

⁷ Speech delivered by Justice Ruma Pal in the Fifth VM Tarkunde Memorial Lecture; *CHOOSING HAMMURABI - Debates on judicial appointments*, p. 16, (1st Edition, 2013), Lexis Nexis

covers the selection of judicial officers, their evaluation, judicial discipline, judicial compensation, the proper funding and budgeting of the judiciary, freedom from interference with personnel, facility or internal financial management of the judiciary.⁸

INDIAN EXPERIENCE OF INDEPENDENCE OF JUDICIARY

In tune with the other countries of the world community and in accord with the international instruments and declarations concerning the independent judiciary, an independent judiciary was also considered as the sine qua non of a vibrant Indian democratic system. Our constitution framers perceived that ‘only an impartial and independent judiciary can stand as a bulwark for the protection of the rights of the individual and mete out even handed justice without fear or favour’⁹. They also perceived that for Rule of Law to prevail, judicial independence is of prime necessity. Therefore they thought it necessary to incorporate certain values, principles as well as prohibitions in the ‘Grundnorm’ of our country i.e; Constitution of India, so that the Indian Judiciary especially the Supreme Court and High Courts can work in an atmosphere of independence of action and judgement and so that they can be insulated from all kinds of pressure, political or otherwise. Today the activist Indian judiciary adjudicates disputes as diverse as river water distribution between states, the legality of a Governor’s proclamation of President’s rule in a state and even matters involving allegations of corruption by high-ranking public officials including the prime minister and members of parliament. In fact in the context of the Indian democracy, citizens disillusioned with the political system often resort to the Supreme Court as their last hope. In such circumstances it is imperative to safeguard the independence of the judiciary so that it continues to play a proactive role in our democracy¹⁰. *But is the Judiciary in India really independent?*

Apart from the appointment and transfer of judges and other several issues which constitute a direct threat to the independence of the judiciary and its judges, there are some other seminal factors which require particular focus and sensible discourse for upholding the legitimacy of the court and its decisions and thereby ensure the independence of the judiciary in the long run. The following issues thus require a particular mention and are therefore required to be undertaken in this research work:

⁸ Dr. T Vidya Kumari; *Judicial discipline is an integral part of judicial independence*”, Published in Constitutional Development Through Judicial Process by G.M.RAO, p.160

⁹ M.P.JAIN; *Indian Constitutional Law*; p. 292; 7th edition, Lexis Nexis,

¹⁰ *Supra* note 4 at p. 163

VARIOUS FACETS OF INDEPENDENCE OF JUDICIARY

Reflective Judiciary

As has been rightly observed by *Shetreet* that, an important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like. This is based on a doctrinal ground of the principle of fair reflection. The judiciary is a branch of the government, not merely a dispute resolution institution. As such it cannot be composed in total disregard of the society. Hence, due regard must be given to the consideration of fair reflection.”¹¹ Reiterating the same at another place, *Shetreet* observed: “*If the judiciary is not reflective of society as a whole, the adjudication may be based on background understandings strongly coloured by a narrower set of values.*”¹²

One of the judges in the Second Judges case explicitly supported the stand while the entire Court acknowledged its relevance in the Third Judges case. Thus, in the Second Judges¹³ Case, Justice Pandian stated: “It is essential and vital for the establishment of real participatory democracy that all sections and classes of people, be they backward classes or scheduled castes or scheduled tribes or minorities or women, should be afforded equal opportunity so that the judicial administration is also participated in by the outstanding and meritorious candidates belonging to all sections of the society and not by any selective or insular group”.

Similarly in the *Third Judges Case*, taking note of the fact that merit is the ‘predominant’ consideration in the appointment to the Supreme Court, the Court held thus: “When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court bench.”¹⁴

¹¹ Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shimon Shetreet & Jules Deschane Ed., 1985) p.635

¹² Shimon Shetreet, *Judging in Society: The Changing Role of Courts*, in THE ROLE OF COURTS IN SOCIETY (Shimon Shetreet Ed., 1988), p.480

¹³ *Supreme Court Advocates-on-Record Association v. Union of India*; AIR 1994 SC 268 at p. 442-443

¹⁴ In *Re : Presidential Reference (Special Reference No. 1 of 1998)*, AIR 1999 SC 1 at p. 18[per Justice S.P. Bharucha J.]

S.P. Sathe, has also focused on this aspect by observing that “..... A constitutional court has to be representative of all sections of society. We may not call it reservation, but some representation of the most disadvantaged sections has to be on the court in order to make it a real national court.....The legitimacy of the Supreme Court depends upon the reflection of Indian pluralism in its composition. Women as well as members of the Scheduled Castes and Scheduled Tribes ought to be appointed to the court in larger number”¹⁵

Judicial Accountability

Another most important facet of judicial independence is judicial accountability. “Simply put, accountability refers to taking responsibilities for one’s own actions and decisions. It generally means being responsible to any external body; some may insist accountability to principles or to oneself rather than to any authority with the power of punishment or correction”.¹⁶ Judicial Independence derives from a system wherein its independence co-exists with Judicial Accountability. Therefore, independence of judiciary lies in the working of the judiciary in a manner which is in harmony with the doctrine of the Separation of Powers, while being accountable for its actions, amenable to rectification for its misconduct and not acting beyond the scope of its powers vested in it. However, the problem actually lies in the understanding of independence; it should be understood as independence from executive and legislature and not independence from accountability. The factum of independence has been highlighted very aptly by *Lord Woolf*. His Lordship opined, “*the independence of the Judiciary is not the property of the Judiciary, but a commodity to be held by the Judiciary in trust for the public.*” To protect the judiciary from dangers within, our Constitution framers considered it sufficient to provide for removal of a judge of a High Court or the Supreme Court in extreme cases of ‘proved misbehaviour’ or ‘incapacity’ under Articles 217 and 124 respectively; and to vest the control over the subordinate judiciary in the respective High Court under Article 235. In this manner, our Constitution enumerates judicial accountability preserving the independence of the judiciary.

Since long, the judiciary had put a sacrosanct spell around it, such that the judges were considered demi-gods who could not commit any wrong; their decisions were unquestionable. However, it is not easy to turn a blind eye from what is happening across the

¹⁵ S.P.Sathe: *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, p. 297-299, 2nd Ed, Oxford India Paperbacks

¹⁶ David Pimentel, *Reframing the Independence versus Accountability Debate*, p.15, Available at: <http://www.clevelandstatelawreview.org/57/issue1/Pimentel.pdf>

country in the guise of dispensation of justice. In the present scenario, taking note of the increase in the rate of corruption charges one is prompted to ask the question '*who is judging the judges?*' It can easily be realized that because of lack of accountability all these are happening. With a power like contempt of court they could deter anyone who would criticize the court. It is the need of the hour to strike a balance between accountability and independence. Just for the sake of independence, if we do not adhere accountability, then 'we will only see the crumbling of a very important organ of the government – the judiciary'.

Justice J.S.Verma has also opined, "A serious debate is now raging about the inadequacy of the existing mechanism for enforcing the judicial accountability of any erring judge in a High Court or in the Supreme Court. There is now a general consensus that some recent incidents involving a few in the higher judiciary has exposed the inadequacy of the existing provisions to deal with the situation; and it calls for an effective mechanism to enforce the judicial accountability of the higher judiciary, in case of need". However, Justice Verma was of the opinion that "self regulation is dignified while outside imposition is demeaning".

That's why it obviously comes to the mind of a prudent person of our civil society that our Apex Court might have forgotten what it had itself preached in the case of *Indira Nehru Gandhi v. Raj Narain*¹⁷, that accountability is an integral part of a democratic polity; it implies the people's right to know the manner of working of the government; accountability improves the quality of governance; secrecy, on the other hand, promotes nepotism and arbitrariness. This view has been reiterated in *S.P Gupta v. Union of India*,¹⁸ *Secretary, Ministry of I&B, Govt. of India v. CAB*¹⁹ and again in *Dinesh Trivedi, M.P & Others. v. Union of India*²⁰ and many others. Therefore, it is reasonable to assume that the Supreme Court will practice what it had preached and made the law of the land.

It is no doubt true that the existing systems of accountability have failed, and the growing corruption is eating away the vitals of this branch of democracy. The demigod's image has to be replaced, after all judges are also humans capable of committing mistakes and vices. Just for the sake of maintaining independence, if we forsake accountability, then we will only see the crumbling of a very important organ of the government – the judiciary.

¹⁷ AIR 1975 SC 2299

¹⁸ AIR 1982 SC 149

¹⁹ AIR 1995 SC 1236

²⁰ (1997) 4 SCC 306

POST RETIREMENT APPOINTMENT AND BEHAVIOUR

Presently a wide based discourse has come to the forefront that how far such post retirement appointment of those judges is compatible with the concept of independence of the judiciary? The constitution framers were also aware that post-retirement benefits and entitlements of the judges could potentially be employed as a carrot and a stick to influence the judicial demeanour of our judges. However, the only ban imposed by the Constitution on a Supreme Court Judge is that he should not plead or act in any court or before any authority after retirement.²¹ And so far as High Court judges are concerned, they are debarred from pleading or acting in any court or before any authority in India except the Supreme Court and the other High courts.²² Initially at the time of the formulation of the Constitution, to provide a check against this, *Prof. K. T. Shah* had suggested that the pension of the judges should be similar to their salary while they are in office. He was in favour of a post-retirement prohibition on a retired Supreme Court or High Court judge against holding ‘any executive office’.²³

The first Attorney General of India, *M. C. Setalvad* shared an exactly similar concern. In his autobiography he discussed the incident of post-retirement appointment of Justice Fazl Ali as Governor of Assam. He raised the issue of ‘constitutional propriety’ i.e., “...whether a Judge of the Supreme Court should be appointed the executive head of a State. The separation of the judiciary and the executive at all levels was an old and healthy demand which had been widely accepted and given effect to in many parts of the country. Was not the appointment of a Supreme Court Judge to a Governorship a clear negation of that principle?” and answered in the affirmative “I thought that there could be only one answer. Such appointments were also bound to impair the independence of the highest judiciary.....”²⁴

The Law Commission of India also observed that, “The practice of Judges looking forward to or accepting employment under the Government after retirement was undesirable as it could affect the independence of the Judiciary”.

However, *Dr. Ambedkar* rejected most of the suggestions and amendments concerning post-retirement prohibitions and restrictions. Ambedkar observed: “The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The

²¹ Article 124(7) of the Constitution of India

²² Article 220 of the Constitution of India

²³ Constituent Assembly Debates, Vol. VIII, at p.236-239

²⁴ Motilal C. Setalvad, *My Life – Law And Other Things*, at p. 190-191

*judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government. Consequently the chances of influencing the conduct of a member of the judiciary by the Government are very remote.....*²⁵

With due respect to the architect of our constitution, this seems to be a flawed logic. The Fundamental Rights are enforceable against the State the definition of which includes both the Executive and Legislative branches of the government.²⁶ When the Constitution itself provides for a machinery of constitutional courts for the purpose of enforcement of Fundamental Rights against the State itself, it cannot be maintained that the judiciary would be engaged ‘very rarely’ in deciding cases between the citizens and the State. As it turned out, the government is the biggest litigant in India. Dr. Ambedkar’s insistence therefore seems to be not logical one.

Prof. M.P. Jain has rightly highlighted that the dangers in accepting a political office, like that of a State Governor, are very tellingly revealed by the case of Fatima Beevi. Fatima Beevi, a retired SC Judge, was appointed the Governor of Tamil Nadu. She reinstated Jayalalitha as the Chief Minister. Jayalalitha was at that time disqualified to be a member of the State Legislature. Annoyed by the action of the Governor, the Central Executive recalled her from her office.

Prof. S.P. Sathe has also expressed his concern on this issue. He observed, “*How far is such post retirement engagement of the judges as arbitrators compatible with their independence? Further, judges are appointed to the National Human Rights Commission, the National Commission or state commissions under the Consumer Protection Act, the Environmental Appellate Authority under the National Environment Appellate Authority Act, 1997, and various other administrative agencies and tribunals.*²⁷ *How are such appointments made? Will a judge not compromise his independence by looking forward to such post-retirement appointment by the government?.....*²⁸

The Law Commission of India, has also criticised the prevailing practice of re-employing the retired judges. It observed that, “*It is clearly undesirable that Supreme Court Judges should look forward to other government employment after their retirement. The government is a*

²⁵ *Supra* note 23 at p. 259-60

²⁶ Article 12 of the Constitution of India

²⁷ S.P. Sathe, *The Tribunal System in India* (Tripathi, 1996)

²⁸ *Supra* note p. 299-300

party in a large number of cases in the highest court and the average citizen may well get the impression, that a Judge who might look forward to being employed by the government after his retirement, does not bring to bear on his work that detachment of outlook which is expected of a Judge in cases in which government is a party. We are clearly of the view that the practice has a tendency to affect the independence of judges and should be discontinued.”²⁹

In *Nixon M. Joseph v. Union of India*;³⁰ a very pertinent and significant question was raised before the Kerala High Court through a PIL, viz: should the retired Supreme Court and High Court judges take any job, or contest election for the legislature. There is no explicit bar in our Constitution against this. Nevertheless, *K. Narayana Kurup, J.* has expressed a firm opinion against this practice by observing thus: “*The judiciary should continue to merit the exalted position it occupies in the minds and hearts of the people as the “saviour of democracy”. It cannot be gainsaid that the one necessary condition for this is its independence. Independence in the sense free from the executive, meaning the bureaucracy and politician’s interference and influence of every type. And fundamental to freedom from such influence and pressures on the judiciary is to eschew active politics and acceptance of positions by judges after retirement.*”

During the impeachment of Justice Soumitra Sen, Arun Jaitley in the Rajya Sabha said, “*the desire of a job after retirement is now becoming a serious threat to judicial independence*”.³¹ Rajeev Dhavan, was of the view that “*India needs a policy on embagoing post-retirement jobs for judges whilst increasing their retiring age.*”³²

Therefore, Prof. M.P. Jain has rightly suggested that “*the solution of the problem appears to lie in increasing the age of retirement of a Supreme Court Judge from 65 to 70 years, to make liberal pension provisions for the retired judges, to put a legal ban on a Supreme Court Judge accepting an employment under any government after retirement and to use his judicial talent in an honorary, and not in a salaried capacity.*”³³

FINANCIAL AND ADMINISTRATIVE AUTONOMY

²⁹ Law Commission of India; Report XIV, p.46

³⁰ AIR 1998 Ker 385

³¹ Satya Prakash; *Objection, Your Honour*, Hindustan Times, 27/09/2011

³² Rajeev Dhavan; *Judicial Propriety and Tehelka*, The Hindu, 29/11/2002

³³ Supra note 9, p. 295

Financial and administrative autonomy is also necessary if the judiciary is to be really effective, vibrant and independent. Former CJI A.S. Anand, in his Singhvi memorial lectures delivered at Delhi, has urged that financial dependence on the executive, to an extent, impinges upon the independence of the judiciary because judiciary is required to negotiate every time with the State, which is evidently the largest litigant. Such financial dependency has the tendency to compromise the cherished norm of independence of judiciary.

OMISSION OF THE DISTINGUISHED JURISTS

Although this issue has no direct nexus with the independence of the judiciary, but it has its indirect bearing on a vibrant and effective judiciary and thereby helps to ensure true independence of the judiciary. Our Constitution permits jurists to be appointed as judges of the Supreme Court of India.³⁴ It appears that in the US, Justice Felix Frankfurter was appointed to the Supreme Court straight from the Harvard University Law School. In Canada, Justice Laskin was appointed to the Supreme Court from the Toronto University Law School. Both of them proved themselves as great judges. In India, appointment of a jurist has not been made as yet. The 42nd Amendment, 1976, had provided that jurists shall be eligible for appointment as judges of the High Court, perhaps on the ground that experience at the High Court might prove useful before a jurist is appointed to the Supreme Court. But that provision was dropped by the constitution 44th Amendment Act, 1978. It is hard but true that good lawyers are unwilling to accept judicial appointments. Lawyers such as Nani Palkhivala, Seervai, Shanti Bhushan, Soli Sorabji, F.S. Nariman and the like have not made themselves available for judgeship. At this juncture, jurists as law professors or researchers might be considered for judicial appointments. This will in the long run benefit our legal education and ensure a truly effective, vibrant and independent judiciary.

UNCRITICAL RELIANCE OF IB REPORTS

Over the years, the uncritical assessment of the Intelligence Bureau report played vital in the appointment process of our higher judiciary. Uncritical assessment of IB reports is detrimental to judicial independence and also accountable democracy itself. In the appointment process, the inputs of the government come in the form of reports. These reports can cast a stigma forever on the potential candidates. Time and again the use of the IB reports by the government has been a subject of serious concern. The final arbiter on the integrity

³⁴ Article 124(3) of the Constitution of India

and character of a potential candidate of the judgeship is the IB, which incidentally is not a statutory body. ‘The lack of transparency combined with no legislative accountability makes their intelligence reports vulnerable to political manipulation, be it in the case of Gopal Subramanium or Ashok Kumar’.³⁵

Recently the Executive using the Intelligence Bureau reports came in sharp focus with regard to the appointment of *Mr. Gopal Subramanium* which the government was determined to scuttle.

In his article, titled “*Some Judgment Please!*”, *Pratap Bhanu Mehta* criticised the blind reliance on the IB report which is worthy of quoting: “.....This shadowy institution, whose own functioning is beyond all accountability, whose own norms are unclear and whose competence is doubtful, is now paraded as the final word on the suitability of candidates.....So let us put it gracelessly. Inputs from the IB can be important. But if they are accepted uncritically, if no one has the courage to ever overrule them, Indian democracy will be in great danger.....”³⁶

Thus it can be said with certainty that these reports are being misused as a formidable weapon from the armoury of the government to suppress the names of the independent minded persons from entering into the fray for consideration of judgeship, probably for their adverse political inclination and thereby seriously constituting a threat to the notion of independence of judiciary.

CONCLUSION

One jurist has said that, *judges can be fully independent provided they are prepared to face the prospects of a promotion less career*. Therefore independence of the judiciary is a difficult task to achieve. The notion of judicial independence includes several aspects like – appointment, posting, tenure, promotion, discipline and other forms of informal scrutiny of judges. However the above examined other multi-dimensional facets, which continue to pose a serious threat in the process of achieving judicial independence, are required to be addressed at length in order to ensure real independence. The time speaks of, that constitutional provisions pertaining to the judiciary alone are not suffice to secure the

³⁵ Available at: <http://www.firstpost.com/india/subramanium-to-katju-the-dangerous-elevation-of-the-ib-report-1631981.html>

³⁶ Available at: <http://indianexpress.com/article/opinion/columns/some-judgement-please>

independence of the judiciary. Our constitution has failed miserably to address those multi-dimensional threats and thereby independence of judiciary is seriously compromised in India. The other factor which is destroying the faith of our people in the judiciary and constitutes a serious threat to its independence is the allegation of widespread corruption among the judges' at all three levels. Independence and corruption in a judge or judiciary are self-contradictory and cannot co-exist. Therefore, a holistic and clear understanding of the concept of independence of judiciary also leads to the conclusion that the destination of independence of judiciary, which has several milestones to be crossed, can be reached only with the consistent and conscious efforts of all stakeholders.³⁷ Judicial independence is meant to empower the judiciary as the guardian and protector of rule of law. It is not merely for its honour, but essentially to serve the public interest and to preserve the rule of law. Providing constitutional and legal safeguards to secure independence of judiciary is only the first step, but lot more is required to be done, which depend largely on judges themselves. Apart from these, one thing must also be borne in mind by the judiciary itself that "*The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public.*" The present researcher concludes, by observing that, modern democracies are still struggling to achieve the independence of the judiciary to its fullest extent and in its real terms. Therefore a conclusion with an optimistic note is needed.

³⁷ Poonam kataria, *Judicial independence in India: An overview*, International Journal of Applied Research, 2015; 1(11)pp. 397-400

UNNATURAL OFFENCES UNDER NATURAL LAW THEORY

Shilpa Rao Rastogi*

Abstract

The term ‘unnatural offence’ in itself has generated much debate in the recent times. The law criminalizing homosexuality and the language incorporated thereof, suggesting consensual homosexual acts to be ‘crimes against nature’ or ‘unnatural acts’, has its roots in the Natural law theory. The major reason for the non-acceptance of consensual homosexual acts and its criminalization is Natural law theory, which suggests that consensual same-sex activity is against the order of nature and therefore considered to be immoral. More so, in present times, there are adherents of Natural law theory, who not only defend the ongoing discrimination against homosexuals but also make arguments against homosexual marriage. Criminal law in India criminalising homosexuality was drafted during the colonial period and since then such behaviour is condemned not only in the Indian society but also in the other former British colonies. The provision of law in India criminalising consensual homosexuality, i.e. Indian Penal Code based on British criminal law came straight from the Natural law theory. The reason lies in the fact that as per the natural law theory, the law is of divine origin and homosexuality is considered immoral according to Bible. And based on biblical notions, the same was also considered as a criminal offence, prescribed under archaic English law and practiced in the majority of States. Although, the legal system of the United Kingdom has evolved with time so as to decriminalise homosexuality, but the various commonwealth nations and old British colonies are still continuing with archaic laws which were initially developed under the influence of the English laws. Considering the continuing struggle for decriminalization of consensual homosexual acts in many parts of the world including India, it is important to critically analyse the arguments of Natural law theorists on the basis of which the same has been termed as ‘unnatural act’.

Keywords: Unnatural Offences, Homosexuality, Human Rights, Natural Rights, Natural Law Theory.

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NATURAL LAW BASED ON REASON OR ABSTRACT NOTION?

Natural law theory is pervasive in almost all the disciplines since the ancient period of Greek civilization¹. In fact, in the present times, it has formed an important instrument of justification and reasoning of various existing political and legal theories. Although, Natural law theory lost its significance in the 19th century with the popularity of Positivism, but the Natural law thinking revived in the 20th century and still remains an important weapon in the present ideologies.

In summary, Natural law theory asserts that the law is of divine origin and can be discovered by reason. During ancient times, the law was necessarily associated with the divine entity. The terms ‘Natural law’ and ‘Eternal law’, were considered as synonymous. Hesiod in his writings also pointed out that the chief of Olympian gods, Zeus, gave law to the mankind as his greatest gift². Natural law theory and its association with religion continued till the middle ages, where theological origin theory of law was further developed by St. Augustine and St. Thomas Aquinas. In the middle ages, the church was considered as the guardian of the law given by divine entity. The earliest premises of the Natural law thinking tended to link reason with some notions of theology³. St. Thomas Aquinas explained the law as an authoritative dictate of reason laid down by a person who has the charge of the perfect community⁴. Since God has the charge of the perfect community, the authoritative rule of action coming from him is law. Therefore, Natural law is not only to be understood as a religious notion but as the basis of living a rational life for the betterment of the community. Natural law simply draws a strict theoretical line between right and wrong acts. In simpler words, it talks about morality, i.e., ‘what ought to be’. For example, to violate the strictures of Natural law, such as by killing someone or by physically abusing others, is to commit acts which are not only immoral but also unjustifiable. Similarly, consensual same-sex activities were also considered as sinful and irrational. Therefore, such acts were also recognized as a criminal offence in most of the countries. The justification for criminalizing consensual same-sex acts was perceived to be religious norms prescribed in Bible and other forms of *lex divina*. Although, with the emergence of the gay liberation movement in the West, the perception of a considerable percentage of the population across the world, regarding homosexuality and

¹ Michael Freeman, *Lloyd's Introduction to Jurisprudence*, Thomas Reuters, 9th Edition (2014), p. 75

² Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, Harward University Press, Revised Edition (2013), p.4

³ Ian Mcleod, *Legal Theory*, Palgrave Macmillan (2005), p.55

⁴ *Id.* at p.52

other sexual minorities, has undergone a drastic change but the criminalization of consensual homosexual acts still remains the central issue of debate for various legal and political structures. In the given changing social order, it is pivotal to probe into the religious norms on the basis of which Natural law theorist support criminalization of consensual homosexuality.

The term ‘homosexuality’ originated in the 19th century, much subsequent to the era of Bible. It was coined by Karoly Maria Benkert, a German psychologist⁵. Therefore Bible and other holy scriptures do not explicitly use the term ‘homosexuality’, but condemn the similar sexual behaviour. Nonetheless, substantiating criminalization of homosexuality on the grounds of Natural law thinking of Middle Ages suggesting the law to be of divine origin, in it is contentious. In fact, many people contributed to the writing of Bible. And for other holy scriptures, condemning homosexuality, also owe its existence to human beings. Human writings are not free from flaws and there is a probability of errors in these Holy Scriptures too. Therefore criminalizing homosexuality on the basis of ancient holy texts is like being a mindless follower of a law without probing into the rationale behind such precept. More so, the term ‘homosexuality’ is not explicitly mentioned in any of the Holy Scriptures, therefore it is also asserted that the references to the same sexual behaviour in Bible and other holy texts are related to violence, idolatry, and exploitation based on same-sex behaviour. Therefore, what is condemned is not consensual homosexuality, but violent homosexual acts which are not consensual, fetishism and sexual abuses based on homosexual behaviour.

Sharia law or Islamic law is one of the oldest substantial legal systems and also influenced western penal law. It also condemns homosexuality as an immoral act. The punishment prescribed by the law includes death by stoning, mutilation of limbs, lashes etc., which are not approved by many developed nations. More so, Sharia law is derived from Quran and Hadith, which are not untouched by human intervention for its present existence.

Nonetheless, the contemporary Natural law thinking emphasizes practical reasons contrary to the speculative knowledge of nature. It is also advocated by many legal theorists that practical reason is the foundation of Natural law theory. For instance, practical reason is also the foundation of Kant’s moral philosophy⁶. The rationalistic version of modern natural law

⁵ Pickett, Brent, Homosexuality, The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), Available at: <https://plato.stanford.edu/archives/fall2015/entries/homosexuality/> (2015), (Accessed on 18.10.17)

⁶ Williams, Garrath, *Kant’s Account of Reason*, The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), Available at: <https://plato.stanford.edu/archives/spr2016/entries/kant-reason/> (2008), (Accessed on 18.10.17)

theory suggests that law is the dictate of practical reasons. Hugo Grotius, who laid down the ground for the secular and rationalistic version of the modern Natural law, asserted that natural law would subsist even if God did not exist⁷.

HOMOSEXUALITY: NATURAL PHENOMENON VERSUS UNNATURAL OFFENCE

The word ‘unnatural’ means different from what is normal or expected, or from what is generally accepted as being right⁸. It also implies phenomenon which is contrary to the ordinary course of nature; abnormal or not existing in nature⁹. This connotes that the ‘unnatural offences’ mentioned under Section 377 of the Indian Penal Code, covered under the sexual offences means those sexual behaviours which are contrary to nature. The said provision of law defines ‘unnatural offences’ as voluntary carnal intercourse ‘*against the order of nature with any man, woman or animal*’. The given definition of the same-sex sexual act has generated much debate in the present times. It poses a question on the criteria by which consensual same-sex sexual behaviour and acts are treated as against the order of nature. The current controversy related to the decriminalisation of consensual same-sex activities has also raised a question, ‘whether consensual homosexuality is a natural phenomenon or an unnatural act?’

The term ‘natural’ implies things existing in or derived from nature¹⁰. It is still presumed in many States penalising homosexuality that consensual homosexual acts are not ‘natural’ as they are not derived from nature and the same is explained in many legal systems including India. Section 377 under Indian Penal Code, 1860, which criminalises consensual homosexuality, is a product of British colonial-era law based on biblical notions. In the present legal scenario, consensual homosexuality is no more considered as against the order of nature under the English laws following *Dudgeon v. United Kingdom*.¹¹ In fact, in the year 2016, the nation had around more than 30 LGBT members of Parliament, which is

⁷ Edgar Bodenheimer, *Supra* note 2 at 35.

⁸ *Unnatural*, Oxford Advanced Learner’s Dictionary (8th ed. 2015)

⁹ *Unnatural*, English Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/unnatural>, (Accessed on 20.10.17)

¹⁰ *Natural*, Available at: <https://en.oxforddictionaries.com/definition/natural> (Accessed on 20.10.17)

¹¹ App No 7525/76 (Official Case No.) (1981) ECHR 5. In this case, European Court of Human Rights held that the law criminalising consensual private homosexual acts violated right to private and family life as enshrined in the European Convention on Human Rights

exceptional in the history of any other parliament around the world¹². However, criminalisation of the same-sex sexual acts has been retained in many nations including India, considering the same to be against the order of nature.

The old school Natural law thinkers considered ‘consensual homosexual acts’ as unnatural acts on the basis of no procreation generating from such sexual acts. The Natural law theorists’ emphasized procreation as the sole object of marriage and sexuality and for them, the sexual acts were to be generative in order to be considered not against moral principles. This implies that the sexual acts and marriage of infertile couples also fall under the category of ‘immoral acts’ or ‘unnatural acts’ because of non-generative sex, which is not true. In reality, the sexual acts in which both or one of the partners is infertile are considered morally good. Therefore, ‘non-generative sex’ argument as the basis of considering consensual same-sex behaviour as an unnatural act, in itself is contradictory. Procreation is not the only purpose of sexuality and marriage. The other objects of sexual acts include pleasure and biological instincts. According to ‘*Kamasutra*’, which is an ancient Hindu text on human sexual behaviour, written by Vatsyayana, there are four important goals of human life. These goals are *Dharma*, *Artha*, *Kama* and *Moksha*. ‘*Dharma*’ refers to virtuous living; ‘*Artha*’ refers to material prosperity, ‘*Kama*’ refers to sensual desires of life and ‘*Moksha*’ refers to liberation¹³. This further connotes that apart from procreation, sensual desire or pleasure is also one of the objects of sexual acts.

Homosexuality is animal species: Previously, it was widely believed that animals indulge into sexual acts for only procreation and not pleasure. However, the same does not hold true. In fact, many scientific studies suggest that all animals have sex for pleasure.¹⁴ It is also argued by many scholars, that most of the animals are not aware of the fact that sexual acts lead to procreation, and hence they do that for pleasure. In fact, masturbation is very common among a considerable number of animal species. There are also many species which are observed to be engaged in autoeroticism¹⁵. And also according to various research studies, homosexuality

¹² Matt Hooper, *The UK has more LGBT MPs than anywhere else in the world*, Gay Times, (Feb. 21, 2016), <http://www.gaytimes.co.uk/news/28378/the-uk-has-more-lgbt-mps-than-anywhere-else-in-the-world/>, (Accessed on 20.10.17).

¹³ Kaustav Chakraborty, Rajarshi Guha Thakurata, *Indian concepts on sexuality*, *Indian Journal of Psychiatry*, 55 (Suppl 2) (2013), S250-S255. <http://doi.org/10.4103/0019-5545.105546>, (Accessed on 20.10.17)

¹⁴ Cara Santa Maria, *Is Sex for Pleasure Uniquely Human?* Huffpost, (November 13, 2011), Available at: http://www.huffingtonpost.in/entry/sex-for-pleasure_n_1090811, (Accessed on 20.10.17)

¹⁵ Id.

has been observed in 1500 species¹⁶. Therefore, homosexuality in animals provides for the foundation of argument in favour of decriminalising consensual homosexuality in human beings and considering the same as a natural phenomenon. Homosexuality in animal species has also been cited by American Psychiatric Association and other groups in the United States Supreme Court for the case Lawrence v. Texas¹⁷ which quashed anti-homosexual laws of 14 states¹⁸.

CONCLUSION

The labeling of a ‘natural’ phenomenon as ‘unnatural’ is what that is causing hardship to the sexual minorities since ages. This labeling does not only lead to stigmatization but also discrimination based on sexuality. It further conveys that the homosexual behaviour is not acceptable in the society along with the person indulging in such same-sex acts and behaviour, as it is ‘unnatural’. Even though it has been scientifically proven and reiterated in the reports of various organizations that ‘homosexuality is natural’ and it is something, people are born with and not a disease, still the old draconian law criminalizing homosexuality and labelling it as unnatural, is still in force in many parts of the world including India. The law in itself is violative of the principles of natural justice and equality and also discriminatory towards homosexual and transgendered individuals. Thus, the law criminalizing consensual same-sex behaviours and acts between adults is contrary to the principles of the International Human Rights law which prohibits discrimination on the basis of sexual orientation.

Nonetheless, the Natural law argument against homosexuality has no substantial ground as such sexual behaviour is found in nature and prohibiting the same on the grounds of natural law argument is nothing but the misinterpretation of the Natural law theory. In fact, one can find arguments in support of decriminalization of the consensual same-sex acts between adults on the basis of Natural law theory.

Natural law theory basically provides that the law can be discovered by the reasons to be found in nature and decriminalization of consensual homosexual acts is based on the reasons

¹⁶ *Against Nature-An exhibition on animal homosexuality*, Natural History Museum (Feb. 25, 2009), University of Oslo, Norway, Available at: <http://www.nhm.uio.no/besok-oss/utstillinger/skiftende/againstnature/index-eng.html>, (Accessed on 20.10.17)

¹⁷ 539 U.S. 558, 558 (2003)

¹⁸ Brief for Amici Curiae, Available at: <http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf>, (Accessed on 20.10.17)

found in nature itself. Contrasting sexual orientations are found in the nature and punishing a person for something that he or she is born with is a gross violation of the basic principles of natural justice and equality. The law needs to be updated and transformed with the changing social order, where the individuals belonging to the sexual minorities have gained much visibility and cannot be ignored. It's high time when homosexuals should not only be acknowledged by the law but also protected against ongoing discrimination.

ANALYZING THE PASSING OF RISK UNDER THE CONTRACTS ON INTERNATIONAL SALE OF GOODS

Apeksha Chauhan*

Abstract

The allocation of risk is an issue which preoccupies equally both the seller and the buyer in an international sale contract, since it can affect the course and outcome of their transaction to a great extent. The rules on passing of risk answer the question of whether the buyer is obliged to pay the price for the goods even if they have been “accidentally” lost or damaged or whether the seller is entitled to claim their price. Because of its harsh and sometimes unfair consequences, the passing of risk forms a subject, which the parties specifically refer to in their contract in an attempt to avoid confusion and possible litigation. Owing to its importance, it could not be left out from the scope of one of the most successful attempts at unification of international sales law, which is the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). Analogous rules are included in the International Chamber of Commerce’s standard trade terms, INCOTERMS, which are widely used by commercial men and companies around the world. The present study will commence with some remarks on the history and scope of the Vienna Convention and some thoughts on trade terms and INCOTERMS. It will also examine the notion of risk and the theories on its transfer, which have been formulated in different legal systems. It will focus on the rules on risk allocation under the Vienna Convention and INCOTERMS 2000. Finally, the present study will conclude with an overall evaluation of the rules pertaining to risk allocation and a wish that soon satisfactory solutions will be found for the problems that trouble this area of law.

Keywords: International sale, INCOTERMS, CISG, International Business, Goods

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INTRODUCTION

The allocation of risk in a transaction relating to international sale of goods is one of the most significant factors involved between the buyer and the seller as it can bring alteration in the final outcome of their transaction to a huge extent. It is obvious that the goods are not only exposed to the risk of physical destruction or damage but other factors like governmental interference, vandalism, seizure due to export or import bans could also play a relevant role. *“Owing to its importance, it could not be left out from the scope of one of the most successful attempts at unification of international sales law, which is the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) ”.*

The general principle is that the CISG requires the identification of the goods for the risk to pass.¹ The theory of passing of risk that applies to the CISG creates a connection with regard to the passing of time and the time at which the goods are to be delivered. It is therefore an established fact that out of the parties, the one that has physical control on the goods would be the bearer of the risk when such type of a circumstance arises. This theory comes across as the most sensible and reasonable theory out of the lot, because the party which has the physical control of the goods is in a more feasible position to take care of them and prevent them from any damage and can also safeguard them.²

However, in cases with respect to the contracts dealing with the international sale of goods, the goods are not given to the seller in a direct manner, there is always an involvement of a carriage in between that is responsible for making the goods reach the buyer. This leads to the creation of a very confusing situation and both the seller and buyer are not in the possession of the goods, rather they are under the control of the carrier. Normally, in such circumstances the buyer bears the risk. This may seem to be unfair to the buyer, as he is not in direct control of the goods, and at the very same moment it is not in a position to protect and keep an eye on the carriage. Thus in such situations the bill of lading plays a very diligent role for the buyer.

“It is worth mentioning that very often the bill of lading is used for the payment of the price when a letter of credit is involved. However, in these cases, the bill of lading has proven to be a useful mechanism, which soothes the buyer’s unfavorable position of having to bear the risk for goods. Under a Letter of Credit transaction, the buyer and seller agree previously on

¹ Piltz, *Internationales Kaufrecht*, para 4-275

² The Theory of Risks in the 1980 Vienna Sale of Goods Convention

a sale contract, the buyer would provide instructions to its issuing bank to open a documentary credit in favor of the seller. The issuing bank then asks the bank in the seller's country to advise the seller of opening of credit. The seller is then able to collect payment only after providing all the correct documents referred to in credit, proving that he shipped the goods.³"

The provisions with respect to the passing of risk under the CISG Convention are exclusive and to the application of the given provisions in complete sense and Article 66-70 of the CISG provide for the regulatory provisions with respect to the concept of passing of risk. However, the CISG does not define the meaning of "risk" in any of its Articles. But the Convention does provide for consequences for its transfer and also discusses and examines the passing of risk in each individual case.

The rules on passing of risk do not involve risks that are created by the general fluctuations in an economy. For example, if a seller is not able to resell the goods because of the changes in the market environment or if there is fluctuations in the currency, then the deterioration or damage caused in such a situation would not be recovered by applying the rules of passing of risk. The rules of passing of risk merely provide for the point in time at which the goods had to conform to its respective contract.

CONSEQUENCE OF THE PASSING OF RISK- ARTICLE 66 CISG

Article 66 of the CISG Convention briefly mentions the implications of the risk on the parties of a contract by stating that the damage or loss of goods does not give the right to the buyer to not fulfill his obligations of payment. The buyer to whom risk has passed is still obliged to accept damage goods and make the payment for them as long as the loss or damage is accidental the buyer has to fulfill his obligations without having the right to claim that it is seller's non-performance. However, the wording of the Article 66 is not exhaustive. The Convention's notion of risk includes various forms and types of different circumstances of loss of goods like, theft, handing over the goods to the wrong recipient; even loss of weight of the goods also falls under the category of risk. "Article 66 does not require a breach of obligation but an act of omission on behalf of the seller."

³ *The Convention generally embraces the view that the party which should bear the risk of accidental loss or damage to the goods should be the buyer, since the loss or damage is usually revealed at the end of the day when the goods are in the buyer's hands.*

In the case of Piperonal Aldehyde⁴, “there was a contract between a Chinese seller and a buyer from US which contained the trade term CIF (Cost, Insurance, and Freight), under which the risk passes after the goods have passed the ships rail at the Chinese port. The seller was liable for being unable to provide the carrier with proper instructions regarding the temperature that had to be maintained when the goods are stored during carriage. The Chinese arbitral tribunal found the seller guilty for loss of the chemical goods by melting. The final phrase of Article 66 ‘unless the loss or damage is due to an act or omission of the seller’ is not limited to acts or omission of the seller that would breach his obligations under the contract; however such a proposal was rejected by the commission when the draft of the same was being discussed.⁵”

But in certain situations the actions of the seller that cause damage to the goods will not be constituted as a breach of contract. “The second part of Article 66 is of great significance, as even when the risk has been passed, the seller can still interfere with the goods so as to cause damage and the second half of the Article 66 makes it clear that the buyer would not have to pay the price when the damage is caused by an act of seller.⁶”

The CISG thus clearly covers the situations where the seller does not breach his contractual obligations but conducts a breach of legal duty, which might be unlawful under the law of torts but not under the law of contract.⁷

Following the basic concept of passing of risk that is so embodied in this Article, the seller retains the claim for the purchase price after the passing of risk, even if good have been lost or damaged. Where the competent court allowed denying the sellers claim under its own law, it would be allowed to do so also under the CISG. It is thus preferable to use a fair standard of reasonableness with relation to the passing of risk. The last part of this Article provides for the requirement that the loss or the damage of the goods must be coincidental. It is required that the loss or damage is not attributable to the seller.

PASSING OF RISK IN CASES INVOLVING CARRIAGE OF GOODS- ARTICLE 67 CISG

⁴ China International Economic and Trade Arbitration Commission (People’s Republic of China) 1999, Piperonal Aldehyde case, Clout case no. 683, Available at: <http://cisgw3.law.pace.edu/cases/990000c1>

⁵ B. Nicholas in C. M. Bianca and M. J. Bonell, Commentary, 485

⁶ X, UNCITRAL Yearbook VIII, New York, United Nations, 1977, pp. 527-528.

⁷ *Supra* note 5; See also, G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, Commentary, 925

Mostly all of the international sales contract involve sale by the way of carriage of goods. This Article provides for the very basis of passing of risk under the convention. The very first step that should be taken is to examine what is the exact meaning of sale of goods by the way of carriage. This can be meant to be that it is the liability of the seller to provide for all the facilities with respect to carriage of the goods at the same time it is his responsibility to make sure that the goods are reached safely to the buyer. All the activities between the buyer and the seller should take place in harmonization with the contract of sale. So as to make sure that the risk is passed on to the buyer from the seller, the seller should send the goods by the way of a third party carrier and not through its own personnel. The very simple logic behind this is to lower the chances of disputes and so as to save the cost of litigation.⁸

In case of multi modal transport, wherein goods are carried by way of more than one mode of transportation, the risk would pass at the time goods are handed over to the first carrier. In such cases, the buyer is always at a more meritorious position because he has the advantage of finding defects or any harm if has been exerted on the goods and can also claim for insurance for the same. Second part of Article 67 clearly states the need that the goods should be “clearly identified to the contract” so as to pass the risk from the seller to the buyer.

By the inculcation of this provision under the CISG the buyer is given protection from any false or fraudulent claims of the seller. “It is therefore, necessary that the goods are identified, according to the Article’s wording, when the seller marks the goods, when the goods are expressly indicated in the shipping documents, when the seller gives notice to the buyer, or in any other way, since the enumeration in Article 67(2) is not exhaustive. In the case of fungible⁹ bulk goods and of collective consignments create a special issue because in these cases are very complex it is very tough to ascertain the exact time of passing of risk.”

“This has been supported by different opinions,¹⁰ Cases of collective consignments (where this is permitted by the contract or a trade usage) include cases where there is one cargo of goods of the same kind (i.e. oil, wheat, natural gas), which is meant to cover several contracts of sale, by distributing parts of the cargo to several buyers. It is true, that the

⁸ *Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study* in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods

⁹ The meaning of ‘fungible goods’ is provided in Article 415 (Definitions) of the North American Free Trade Agreement (NAFTA) in Chapter Four (Rules of Origin), according to which ‘fungible goods or fungible materials means goods or materials that are interchangeable for commercial purposes and whose properties are essentially identical’. NAFTA (1992) 32 ILM 289 (1993)

¹⁰ P.Schlechtriem, op cit, Art 67, para 10a, S.Bollée, op cit, 256 and F.Enderlein and D.Maskow, op cit, 269

problem arising in passing of risk in cases of identifiable bulk goods is a peculiar one, and is still not clearly settled by the Convention.”

The sale of collective assignments and bulk goods requires very specialized policies and terms within the contract so as to make sure that the sale of such assignments is done with efficiency, thus all the parties that are involved in such trade are usually recommended to provide for each and every peculiar detail of the consignment.

For example, “let us presume that there is a ship loaded with 5,000 tons of wheat without any identification, that were meant to satisfy several sale contracts for various buyers, and out of which 3,000 tones suffered severe damage because of overheating before the division of the cargo. In such circumstances, one view suggests that ‘the identification of the goods to the contract needs to relate only to the collective consignment. The buyers bear the risk collectively. A partial loss is borne by them pro rata; if the whole consignment is lost, each party loses his entire share’. And the second view argues that the identification takes place only when the goods are divided among the various buyers with the taking over of the goods. Thus, if the goods suffer loss or damage before their division, the buyers will not have to pay the price.”

GOODS SOLD IN TRANSIT- ARTICLE 68 CISG

Article 68 deals with the sale of goods that are in transit, it is usually the case wherein the seller has already started his journey along with the goods without the full and complete knowledge about the buyer or the recipient. In such a case the contract will be said to have been concluded the moment the journey of the seller has begun, however the goods are still in transit¹¹. This is because such goods would be bought and sold many time before they reach their final destination. One of the drawbacks that Article 68 carries is that it provides for splitting of the risk that is there in transit. In majority of such circumstances, it is very tough to judge whether the loss had taken place before the final conclusion of the contract of sale or before.

In the second half of the Article, the risk passes retroactively from the time the goods were handed over to the carrier who is responsible for issuing the documents embodying the

¹¹ By sending to the buyers the relevant documents, for example the bill of lading (when there is carriage of goods by sea), the invoice, the insurance contract, the certification of quality etc.

contract of carriage. These documents must provide for evidence of the existence of the contract of carriage, since in a contrary situation the rule is inapplicable.

“The third sentence of Article 68 ‘introduces a proviso’; it provides for that when the seller had known or was supposed to know at the moment when the contract was concluded, that the goods had suffered damage or loss and did not provide information to the buyer regarding the same, then he bears the risk of the loss or damage. In case the seller is punished for his bad faith; the question that arises, is whether this sentence refers to both previous sentences or not. Furthermore, the third sentence of Article 68 involves further problems of interpretation; it states that the seller bears the risk of “the loss or the damage”, but does not provide for any further clarification. Another point unclear under Article 68 is whether it is necessary for the passing of risk in sales of transit goods, for the goods to be identified to the contract. The Article does state, the requirement of identification of goods.”

However there are a huge number of uncertainties as per the context, meaning and interpretation of Article 68 of the CISG, the practical relevance arises where there is an actual loss of goods.

THE RESIDUAL CASES- ARTICLE 69 CISG

Under the ambit of Article 69(1), “the risk is passed on to the buyer at the instance when the goods are in the control of the buyer. The goods are kept at the disposal of the buyer only when all the requirements are met with so as to gain physical control over the goods. Hence, if the goods are at the buyer’s disposal and he is delaying in taking delivery for a long time, so as to commit a breach of contract, then the risk passes to him just at the moment when the goods are placed at his disposal. If the place of delivery is any other place than the seller’s place of business then Article 69(2) comes into effect.

The third portion of Article 69 requires, “as a prerequisite for the risk to pass to the buyer, the clear identification of the goods to the contract. A very similar rule was encountered earlier in Article 67(2) and thus the same remarks would apply to both the provisions. The sellers is expected to then send a notice to the buyer to give him the information that the goods have been identified and are at his disposal; he would have then fulfilled his obligation to enable the buyer to take over the goods. In cases with respect to fungible goods there is a need for

required identification so as to make sure that the goods are on an acknowledgement, wherein the warehouse keeper has kept it on buyer's behalf.¹²

This Article deals primarily in situations where the buyer and the seller are at the same place. It requires the sale to happen when there the seller must bring the goods to the buyer at a place agreed upon. The buyer cannot prevent the passing of risk by delaying taking over the goods and thereby burden the seller continuously with the risk of loss or damage. The very central element of this Article is placing the goods at disposal rather than the delay in taking over of the goods. However in real life situations, the requirement of buyer's actual knowledge will in very rare circumstances give rise to difficulties. The notification provided by the seller to make the buyer aware of the fact that the goods have been placed at disposal is very significant.

RISK AND REMEDIES- ARTICLE 70 CISG

The need for this Article is felt when the seller commits a fundamental breach of contract with respect to passing of risk. Therefore, 'the buyer's remedies as per the account of the seller's fundamental breach of contract are taken at priority over the risk rules'. The significantly necessary prerequisite is the commitment of a fundamental breach of contract¹³ by the seller.

It is very obvious that the loss or the damage of the goods should not be caused by the reason of the seller's fundamental breach; rather it should be accidental, this is because in the former case we would not be talk about passing of risk, but about a breach of contract because of an act or omission of the seller.

Article 70 is silent on the relationship between the passing of risk and the breaches that are present at the time of passing risk, but which is below the threshold of Article 25. The provisions with respect to fundamental breach should not be misunderstood that in case when the breach so done is not fundamental, but still the remedies are triggered.

¹² Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery.

¹³ A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

"In a case opposite to the above situation, where the breach is not fundamental, the risk is passed normally to the buyer and he has at his own discretion only the remedies of repair, reduction in price and damages for the goods that were defective before the passing of risk. Moreover, he has to bear the risk of any damage or loss of the goods due to an accidental event. He would not have the discretion to declare the contract of sale avoided or ask for substitute goods, since these remedies are only available in cases of fundamental breach of contract."

CONCLUSION

Articles that are provided under the CISG Articles 66-70 provide the rules that are concerned with the passing of risk in the sale of goods in international manner. The parties that had drafted the convention were of the view that the practices that are included in the CISG should be with harmony with the principles of international customary law and as per the lex mercatoria. By providing special focus for the rules on the passing of risk that also includes carriage; they partly succeeded in this mission. If we carefully look into the various provisions of the part relating to the passing of risk, we can find that there are ambiguities that could have been avoided. There is no definition given to concepts such as 'handing over', 'the first carrier' and 'circumstances leading to retroactive risk passing.' The very lack of defining such important terms, leads to different opinions by different scholars, which is not supportive of the goal of the drafters to create a uniform law of sales. Furthermore, the drafting parties should have fixed the contradiction of Article 70, although the practical implications of this contradiction are rare.

The compromise that was reached in Article 68 is understandable taking into consideration the very difficulties encountered while negotiating. The choice of the drafters to add to this dispute-creating regime could have been avoided. The second sentence of the Article will however remedy this in most situations; nevertheless I think that the Convention should have better provided us with the circumstances for when retroactive risk passing occurs, for example the transfer of insurance policy, instead of using the vague wording it contains now.

COMPARATIVE ANALYSIS OF HACKING LAWS IN INDIA WITH UNITED STATES AND UNITED KINGDOM

Esmahan F. Alakab Khaniefr*

"When a man is denied the right to live the life he believes in, he has no choice but to become an outlaw."

- Nelson Mandela

INTRODUCTION

Crime, in modern times this term doesn't have any universally accepted definition, but one can define crime, also called an offence as an act harmful not only to some individual, but also to the community or the state also known as public wrong. Such acts are forbidden and punishable by law. What is a criminal offence is defined by criminal law of each country. While many countries have a crime catalogue known as the criminal code however in some common law countries no such comprehensive statute exists.

The state has the power to severely restrict one's liberty for committing a crime. Modern societies therefore adopt and adhere a criminal procedure during the investigation and trial of the offence and only if found guilty, the offender may be sentenced to various punishments, such as life imprisonment or in some jurisdictions like in India even death.

To be classified as a crime, the act of doing something bad also called as *actus reus* must be usually accompanied by the intention to do something bad i.e. *mens rea*, with certain exceptions like strict liability.

Cybercrime is any criminal activity in which a computer or network is the source, target or tool or place of crime. According to The Cambridge English Dictionary cybercrimes are the crimes committed with the use of computers or relating to computers, especially through the internet. Crimes which involve use of information or usage of electronic means in furtherance of crime are covered under the ambit of cybercrime. Cyber space crimes may be committed against persons, property, government and society at large.

HACKING & ITS TYPE

Hacking

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“An unauthorized user who attempts to or gains access to an information system is known as hacker. Hacking is a cybercrime even if there is no visible damage to the system, because it is an invasion into the privacy of data.”

- **White Hat Hackers**

“They are those hackers who believe that information sharing is good, and that it is their duty to share their expertise by facilitating access to information. However there are some white hat hackers who are just “joy riding” on computer systems.”

- **Black Hat Hackers**

“Black hat hackers cause damage after intrusion. They may steal or modify data or insert viruses or worms which damage the system. They are also known as crackers.”

- **Grey Hat Hackers**

“These types of hackers are typically ethical but occasionally they can violate the hacker ethics. They will hack into networks, stand-alone computers and software. Network hackers try to gain unauthorized access to private computer networks just for challenge, curiosity, and distribution of information.”

Indian Laws on Hacking

To sum up, though a crime-free society is Utopian and exists only in dream-land, it should be constant endeavour of rules to keep the crimes lowest.¹ Especially in a society that is dependent more and more on technology, crime based on electronic offences are bound to increase and the law makers have to go the extra mile compared to the fraudsters, to keep them at bay. Technology is always a double-edged sword and can be used for both the purposes – good or bad. Steganography, Trojan Horse, Scavenging (and even DoS or DDoS) are all technologies and per se not crimes, falling into wrong hands with a criminal intent who are out to capitalize them or misuse them, they come into the gamut of cybercrime and become punishable offences. Hence, it should be the persistent efforts of rulers and law makers to ensure that technology grows in a healthy manner and is used for legal and ethical business growth and not for committing crimes.²

¹ Aarseth, Espen. 1997. *Cyertext: Perspectives on ergodic literature*, Baltimore: Johns Hopkins University Press

² Abbate, Janet; *Privatizing the Internet: Competing visions and chaotic events, 1987–1995*. *IEEE Annals of the History of Computing* 32(1): pp.10-22

IT legislation in India: Mid 90's saw an impetus in globalization and computerization, with more and more nations computerizing their governance, and e-commerce seeing an enormous growth. Previously, most of international trade and transactions were done through documents being transmitted through post and by telex only. Evidences and records, until then, were predominantly paper evidences and paper records or other forms of hard-copies only. With much of international trade being done through electronic communication and with email gaining momentum, an urgent and imminent need was felt for recognizing electronic records i.e. the data what is stored in a computer or an external storage attached thereto. The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on e-commerce in 1996. The General Assembly of United Nations passed a resolution in January 1997 inter alia, recommending all States in the UN to give favorable considerations to the said Model Law, which provides for recognition to electronic records and according it the same treatment like a paper communication and record.

Objectives of I.T. legislation in India: It is against this background the Government of India enacted its Information Technology Act 2000 with the objectives as follows, stated in the preface to the Act itself. "to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto."³

CONSTITUTIONAL LIABILITY

Hacking into someone's private property or stealing some one's intellectual work is a complete violation of his right to privacy. The Indian constitution does not specifically provide the "right to privacy" as one of the fundamental rights guaranteed to the Indian citizens but it is protected under IPC.

Right to privacy is an important natural need of every human being as it creates boundaries around an individual where the other person's entry is restricted. The right to privacy

³ Bertsch, Gary K. (ed.). 1988. *Controlling East-West trade and technology transfer: Power, politics, and policies*, Durham: Duke University Press.

prohibits interference or intrusion in others private life. The apex court of India has clearly affirmed in its judicial pronouncements that right to privacy is very much a part of the fundamental right guaranteed under Article 21 of the Indian constitution.

Thus right to privacy is coming under the expended ambit of Article 21 of Indian constitution. So whenever there is some cybercrime which is related to the persons private property or its personal stuff then the accused can be charged of violation of Article 21 of Indian constitution, and prescribed remedy can be invoked against the accused.

CRIMINAL LIABILITY

Criminal liability in India for cybercrimes is defined under the Indian Penal Code (IPC). Certain Following sections of IPC deal with the various cybercrimes, Such as Sending threatening messages by e-mail (Sec .503 IPC), Word, gesture or act intended to insult the modesty of a woman (Sec.509 IPC), Sending defamatory messages by e-mail (Sec .499 IPC), Bogus websites, Cyber Frauds (Sec .420 IPC), E-mail Spoofing (Sec .463 IPC), Making a false document (Sec.464 IPC), Forgery for purpose of cheating (Sec.468 IPC) etc..⁴

The applications of these sections are subject to the investigating style of investigating officer and charge sheet filed by the investigating agency and nature of cybercrime. In India there are number of cases filed under these IPC provisions related to the cybercrime. According to the report of Home Ministry, in 2012 there are 601 cases filed under the various provisions of IPC.

UNITED STATES LAWS

Cybercrimes run the gamut-from student mischief to international terrorism. The increasingly severe penalties for these types of crimes serve as deterrents as more people become aware of the consequences they might face. Cybercrime causes major losses of time, money, and good reputations, and judges and prosecutors have no choice but to treat these crimes with utmost severity. Substantive laws include crimes such as online gambling, child pornography, theft of intellectual property, fraud, and identity theft.⁵

⁴ Ceruzzi, Paul E. 1996. From scientific instrument to everyday appliance: The emergence of personal computers, 1970–77. *History and Technology* 13(1): 1-31.

⁵ Id.

The Computer Fraud and Abuse Act (CFAA)⁶ was enacted by Congress in 1986 as an amendment to existing computer fraud law (18 U.S.C. § 1030), which had been included in the Comprehensive Crime Control Act of 1984. The law prohibits accessing a computer without authorization, or in excess of authorization.

The original 1984 bill was enacted in response to concern that computer-related crimes might go unpunished. The House Committee Report to the original computer crime bill characterized the 1983 techno-thriller film War Games in which a young Matthew Broderick breaks into a U.S. military supercomputer programmed to predict possible outcomes of nuclear war and unwittingly almost starts World War III-as “*a realistic representation of the automatic dialing and access capabilities of the personal computer.*”⁷

The CFAA was written to increase the scope of the previous version of 18 U.S.C. § 1030 while, in theory, limiting federal jurisdiction to cases “*with a compelling federal interest-i.e., where computers of the federal government or certain financial institutions are involved or where the crime itself is interstate in nature.*” In addition to amending a number of the provisions in the original section 1030, the CFAA also criminalized additional computer-related acts. Provisions addressed the distribution of malicious code and denial of service attacks. Congress also included in the CFAA a provision criminalizing trafficking in passwords and similar items.⁸ Since then, the Act has been amended a number of times-in 1989, 1994, 1996, in 2001 by the USA PATRIOT Act, 2002, and in 2008 by the Identity Theft Enforcement and Restitution Act.⁹

In January 2015 Barack Obama proposed expanding the CFAA and the RICO Act in his Modernizing Law Enforcement Authorities to Combat Cyber Crime proposal.¹⁰ DEF CON organizer and Cloudflare researcher Marc Rogers, Senator Ron Wyden, and Representative Zoe Lofgren have stated opposition to this on the grounds it will make many regular Internet

⁶ Jarrett, H. Marshall; Bailie, Michael W; Available at: www.justice.gov/criminal/cybercrime/doc/ccmanual.pdf; (Accessed on 03/06/2017)

⁷ *H.R. Rep. 98-894, 1984 U.S.C.C.A.N. 3689, 3696 (1984)*

⁸ Available at: <https://obamawhitehouse.archives.gov/the-press-office/2015/01/13/securing-cyberspace-president-obama-announces-new-cybersecurity-legislat> (Accessed on 03/01/2017)

⁹ Cooke, Claudia. 1983b. User of the month: Taking the strain out of calculating wages. Sinclair User, August, 78–79.

¹⁰ Available at: http://www.huffingtonpost.in/entry/obama-hackers_n_6511700 (Accessed on 30/01/2017)

activities illegal, and moves further away from what they were trying to accomplish with Aaron's Law.¹¹

UNITED KINGDOM

The hacking of computers is a crime which has increased exponentially since the inception of the internet. It takes many forms: from the defrauding of large corporations, the hacking of government databases to expose state secrets, to the identity theft of individuals.¹²

THE COMPUTER MISUSE ACT 1990

The Computer Misuse Act 1990 (CMA 1990) was introduced in August 1990 following a Law Commission report surrounding computer misuse which found that the UK was trailing behind many EU member states in relation to technological development.

WHAT OFFENCES WERE INTRODUCED BY CMA 1990?

CMA 1990 introduced the following three new offences into UK criminal law:

- unauthorized access to computer material;
- unauthorized access with intent to commit a further offence;
- unauthorized acts with intent to impair, or with recklessness as to impairing, operation of computer, etc. (as amended by the Police and Justice Act 2006).

UNAUTHORIZED ACCESS TO COMPUTER MATERIAL

The basic notion of hacking – whereby an individual causes a computer to perform a function when at the time he intends to access a program or data held in a computer – is covered by the offence of unauthorized access to computer material (s 1, CMA 1990).¹³

Does an individual have to know that his accessing the computer material is unauthorized?

¹¹ Available at: <https://www.usnews.com/news/articles/2015/01/27/obama-goodlatte-seek-balance-on-cfaa-cybersecurity>, (Accessed on 30/01/2017)

¹² Curtis, Glenn E. 1990. *Yugoslavia: A country study*. Washington, DC: Library of Congress, Federal Research Division.

¹³ Id.

For the offence to occur the access to the computer material has to be unauthorized and the individual gaining access has to be aware that his access is unauthorized.¹⁴

What is meant by computer material?

There is no definition of computer material within CMA 1990. This has allowed CMA 1990 to apply to new pieces of technology as and when they are developed.¹⁵ However, the accepted definition of computer being any device for storing and processing information can be found in the Civil Evidence Act 1968.¹⁶

UNAUTHORIZED ACCESS WITH INTENT TO COMMIT A FURTHER OFFENCE

Section 2 of CMA 1990 covers unauthorized access to computer material with the intent to commit or facilitate the commission of further offences. The basis notion is that someone guilty of an offence under sec. 1 of CMA 1990 will have further criminal sanctions imposed on him if this is done with the intention to commit or facilitate the commission of further offences.

What is meant by further offences under section 2?

Further offences under section 2 are those which have a sentence fixed by law or where an individual found guilty of that offence would be liable for a term of imprisonment of five years or more.

Examples of a further offence may be:

- fraud under the Fraud Act;
- forgery or counterfeiting under the Forgery and Counterfeiting Act 1981;
- theft under the Theft Act 1968;
- criminal damage under the Criminal Damage Act 1971.

¹⁴ Hafner, Katie, and John Markoff. 1991. *Cyberpunk: Outlaws and hackers on the computer frontier*, London: Touchstone.

¹⁵ Haddon, Leslie. 1992. Explaining ICT consumption: The case of the home computer. In *Consuming technologies: Media and information in domestic spaces*, ed. R. Silverstone and E. Hirsch, 82–96, London: Routledge.

¹⁶ Janjatović, Petar. 1998. *Ilustrovana Enciklopedija Yu Rocka 1960–1997*. Belgrade: Geopoetika

Unauthorized acts with intent to impair

Section 3 of CMA 1990 was amended by the Police and Justice Act 2006. Its aim was to tackle computer viruses and denial of service attacks, which can have devastating effects on the organisations targeted. The offence does not have to be against a particular computer, program or data and is committed even if, for example, the denial of service is only temporary.¹⁷

OTHER AMENDMENTS TO CMA 1990

The Serious Crime Act 2015 added a new offence (s 3ZA) of ‘unauthorized acts causing, or creating risk of, serious damage’. The territorial scope of computer misuse was also extended, meaning that a UK national is still committing an offence if the computer misuse happened outside the UK, as long as it was also illegal in the country where the hacking took place.¹⁸ The Police and Justice Act 2006 added a new offence of ‘making, supplying or obtaining articles for use in offence under ss 1, 3 or 3ZA’ (s 3A).

PENALTIES

Penalties for offences under CMA 1990 range from two years’ imprisonment and/or a fine for unauthorized access to computer material; up to five years and/or a fine for unauthorized access with intent to commit or facilitate commission of further offences; up to 10 years and/or a fine for unauthorized modification of computer material; and imprisonment for life and/or a fine for breach of s 3ZA.

OTHER LEGISLATION DEALING WITH COMPUTER HACKING*The Terrorism Act 2000*

When the Terrorism Act 2000 (TA 2000) first came into force it made the threat of or use of computer hacking a potential act of terrorism.

The use or threat of an action designed seriously to interfere with or seriously to disrupt an electronic system will be a terrorist action under TA 2000 only if both of the following

¹⁷ Janjatović, Petar. 1998. *Ilustrovana Enciklopedija Yu Rocka 1960–1997*, Belgrade: Geopoetika

¹⁸ Kent, Steven L. 2001. *The ultimate history of video games: From Pong to Pokémon and beyond: The story behind the craze that touched our lives and changed the world*, New York: Three Rivers Press.

conditions are satisfied, 1) It is designed to influence the government or to intimidate the public or a section of the public and 2) It is made for the purpose of advancing a political, religious or ideological cause.

TA 2000 does not, however, make for additional penalties for hackers who would be punished under the existing laws of CMA 1990.¹⁹

CONCLUSIONS

Cybercrime is a new form of crime that has emerged due to computerization of various activities in an organization in a networked environment. With the rapid growth of information technology cybercrimes are a growing threat. Technology has a negative aspect as it facilitates commercial activity. Ordinarily the law keeps pace with the changes in technology but the pace of technological developments in the recent past, especially in the field of information and technology is impossible to keep pace with legal system. An important concern relates to modernizing penal laws of many countries which predate the advent of computers. On the one hand, the existing laws have to be changed to cope with the computer related fraud such as hacking, malicious falsification or erasure of data, software theft, software attacks etc. and on the other, new legislation is also necessary to ensure data protection and piracy. The need for a law on data protection is paramount if India is to sustain investor confidence, especially among foreign entities that send large amounts of data to India for back-office operations. Data protection is essential for outsourcing arrangements that entrust an Indian company with a foreign company's confidential data or trade secrets, and/or customers' confidential and personal data.

Also in the above chapters we have talked about the Indian police system for cybercrimes which is subjected to the improvisation, and a new and clear specific legislation which can fight easily against the cybercrimes. Further the proposed initiatives and amendments by government to the IT act, which are likely to be implemented, soon will be implemented as soon as possible. The proposed amendments widen the liability for breach of data protection and negligence in handling sensitive personal information. Additionally, the Government of India, with the help of the Department of Information Technology, is currently working on a holistic law on data protection based on the European Union directive. Further, the

¹⁹ Kent, Steven L. 2001. *The ultimate history of video games: From Pong to Pokémon and beyond: The story behind the craze that touched our lives and changed the world*. New York: Three Rivers Press.

government plans to create a “Common Criterion Lab,” backed by the Information Security Technical Development Council, where intensive research in cryptography and product security can be undertaken. As Prevention is always better than cure, a smart internet user should take certain precautions while operating the internet and should follow certain preventive measures for cybercrimes; these measures can be considered as suggestions also:

- A person should never send his credit card number to any site that is not secured, to guard against frauds.
- One should avoid disclosing any personal information to strangers via e-mail or while chatting.
- One must avoid sending any photograph to strangers by online as misusing of photograph incidents increasing day by day.
- It is always the parents who have to keep a watch on the sites that your children are accessing, to prevent any kind of harassment or depravation in children.
- Web site owners should watch traffic and check any irregularity on the site. It is the responsibility of the web site owners to adopt some policy for preventing cyber crimes as number of internet users are growing day by day.
- Strict statutory laws need to be passed by the Legislatures keeping in mind the interest of netizens (cybercitizen or an entity or person actively involved in online communities and a user of the Internet).
- Web servers running public sites must be physically separately protected from internal corporate network.
- An update Anti-virus software to guard against virus attacks should be used by all the netizens and should also keep back up volumes so that one may not suffer data loss in case of virus contamination.
- It is better to use a security program by the body corporate to control information on sites.

- IT department should pass certain guidelines and notifications for the protection of computer system and should also bring out with some more strict laws to breakdown the criminal activities relating to cyberspace.
- As Cyber Crime is the major threat to all the countries worldwide, certain steps should be taken at the international level for preventing the cybercrime.
- Special police task force which is expert in techno field will be constituted.

TRENDS AND OVERVIEW IN MODERN INDIAN ENVIRONMENTAL INDUSTRIAL LAWS

Ridhima Verma* & Yuvraaj Paul**

Abstract

“Make in India” seems to be the battle cry of India as one of the world’s fastest developing economies. Demographically speaking the Indian subcontinent is and has always been a “go-to” location when it comes to investment for production and industrialization. Now, with ever growing focus of the government towards rapid industrialization the environment finds itself under a lot of burden. This paper attempts to cover all aspects of Indian environmental laws especially with a special focus on industries to be set up. Apart from that, eminent judicial pronouncements have been discussed so as to explain how the judiciary seems to view this balance between the two needs; (1) for industrialisation, (2) for environment protection. Initiatives by the Governmental as well as the Non-Governmental bodies have also been enumerated. Corporate-environmental trends as well as suggestions regarding the same conclude the paper so as to help both the environment enforcers and corporations alike.

Keywords: Make in India, Industrial Law, Environment, Corporations, Governmental Plan

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INTRODUCTION

With the rapid globalization and industrialization of the Indian economy over the previous two decades, concerns over the adequacy of the environment and industrial laws in India have become more vociferous. While there is ongoing debate as to how robust the environment jurisprudence can be allowed to become with respect to the priorities of a developing country, there is no doubt that the near future shall see the growth of more sophisticated substantive laws and enforcement mechanisms.

Article 48A of the Constitution of India, provides that the ‘State’ shall endeavour to protect and improve the environment, and to safeguard the forests and wild life of the country. Further, Article 51A (g) of the Constitution of India states that it shall be the fundamental duty of every citizen of India to protect and improve the natural environment. Separately, Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The Hon’ble Supreme Court of India has repeatedly held that the right to a clean environment is a fundamental right under Article 21 and citizens may approach the higher courts to get the same enforced against the State. For instance, in *Subhash Kumar v. State of Bihar*¹, the Hon’ble Supreme Court states, “*Right to life enshrined in Article 21 includes the right to enjoyment of pollution free water and air for the full enjoyment of life. If anything endangers or impairs the quality of life, an affected person or a person genuinely interested in the protection of society would have recourse to Article 32.*”

*Rural Litigation and Entitlement Kendra v. State of UP*², the Hon’ble Supreme Court of India for the first time dealt with the issue relating to the environment and development; and held that, it is always to be remembered that these are the permanent assets of mankind and or not intended to be exhausted in one generation.

Although, environment and its protection is principally a central subject, i.e. under the jurisdiction of the Central Government’s Ministry of Environment, Forests and Climate Change (MOEFCC), formerly known *Ministry of Environment and Forests, MoEF*, it requires a shared responsibility between the Centre and the States wherein under such Central laws,

¹ AIR 1991 SC 420

² AIR 1987 SC 1037

the State Governments formulate rules and regulations for a particular State concerned, which are implemented by the relevant State Departments.

Under Article 51(c) of the constitution of India, The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. In association with the same, it would be quintessential to highlight that India is a signatory to some important conventions that have a direct bearing on environment protection and conservation. Some of the important conventions are as follows:

- a) The Stockholm Conference 1972;
- b) The Rio Declaration on Environment and Development and the Agenda 21, which is the operational programme for sustainable development, 1992
- c) The Kyoto Protocol 1997;
- d) The World Summit on Sustainable Development 2002;
- e) Paris Agreement on Climate Change, 2015.

Currently, in India, Environment law derives its sources from various legislations, judicial pronouncements, activism and enforcement by administrative bodies.

DOMESTIC LAWS GOVERNING ENVIRONMENTAL REGULATION

- *The Environment (Protection) Act, 1986:* This is the umbrella legislation for environment laws and environmental protection in India. Under the EP Act, the Central Government has the power to frame rules and regulations regarding various environment protection issues.
- *Environment (Protection) Rules, 1986:* The EP Rules provides for certain restrictions on the location of industries and provide for prohibition and restriction on the location of industries and on carrying out operations in different areas. Further, it is pertinent to note that environmental audits have made been made a statutory requirement under the EP Rules vide an amendment in 1992³.
- *Environment Impact Assessment Notification 2006:* Environment Impact Assessment is a technique which demands that the objectives of environmental concerns to be taken into account whenever social or economic developmental plans are constructed.

³ GSR 329 (E) dated 13 March 1992.

The EIA Notification sets out a process, consisting of a maximum of four stages, for applying for an EC, and the same is summarized below:

- (i) *Screening*
- (ii) *Scoping*
- (iii) *Public Consultation*
- (iv) *Appraisal*

EIA has to be accepted as a pre-condition in every development project.

- *Air Act:* Under the provisions of Air Act, the CPCB has been entrusted with the responsibility of preparation of nation-wide plan for control of air pollution. The Air Act empowers the SPCBs to notify standards for emission of air pollutants into the atmosphere from industrial plants and automobiles, or any other source (not being a ship or an aircraft). Along with the Air (Prevention and Control of Pollution) Rules 1982, the Air Act is the main guiding framework for the preservation of air quality in India.
- *Water Act:* The Water Act lays down that no person shall without the previous consent of the State board, establish or take any steps to establish any industry, operation or process, or any treatment and disposal system, that is likely to discharge sewage or trade effluent into a stream, well or sewer or on land. The EP Rules set standards for certain pollutants in water. Under the Water Act, consent of the SPCB is mandatory for releasing emissions in the atmosphere. Like the Air Act, the consent is obtained in two phases, namely: ‘Consent to Establish’ and ‘Consent to Operate’.
- *HAZMAT Rules:* The HAZMAT Rules have been enacted in supersession of the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 to provide detailed guidelines pertaining to the handling, management, disposal of hazardous waste in India
- *Noise Pollution (Regulation and Control) Rules, 2000:* The Noise Pollution Rules were made to regulate and control noise producing and generating sources. Contravention of the Noise Pollution Rules leads to penalties stipulated under the EP Act. Noise was included under the definition of ‘air pollutants’ under the Air Act. The same was followed by the notification of ambient noise standards under the EP Act and the Air Act. Further, ambient standards in respect of noise for different categories areas (residential, commercial, industrial) and silence zones have been notified under

the EP Act. Regulatory agencies have been directed to enforce the standards for control and regulation of noise pollution.

- ***Waste Management and Handling Rules:*** In India, the four main categories of wastes is governed by separate rules: hazardous wastes, radioactive wastes, biomedical wastes and solid wastes. In exercise of the power conferred under Sections 5, 6, 8 and 25 of EP Act, the Government of India has framed the Bio-Medical Waste (Management and Handling) Rules of 1998, which have been superseded by the Bio-Medical Waste Management Rules, 2016 (“Bio Medical Rules”), to improve the collection, segregation, processing, treatment and disposal of these bio-medical wastes in an environmentally sound management thereby, reducing the bio-medical waste generation and its impact on the environment.
- ***E-Waste Rules:*** In addition to the above, the MOEFCC has recently notified the E-Waste (Management) Rules, 2016 (“E-Waste Rules”) (these rules supersede the E-Waste (Management and Handling) Rules, 2011), that recognise the producer’s liability for recycling and reducing e-waste in the country. The definition of ‘e-waste’ includes electrical and electronic equipment such as mainframes, personal computers, etc.
- ***The Plastic Wastes Management Rules, 2016:*** The Plastic Waste Rules (supersede the Plastic Wastes (Management and Handling) Rules, 2011), framed under the Environment Protection Act, 1986 (“EP Act”) have come into effect from March 18, 2016. The said rules are applicable to every waste generator, local body, Gram Panchayat, manufacturer, Importers and producer. By extending the concept of ‘Extended Producer Responsibility’ to plastic manufacturers, the Plastic Waste Rules seem set to achieve their goal.
- ***Forests:*** The Indian Forest Act, 1927 provides States with jurisdiction over both public and private forests, and regulates the extraction of timber for profit. The forests are divided into three categories: reserve forests, village forests and protected forests. Once an area is notified as a reserve forest, all previous individual and community rights over the forest will be extinguished, and access to the forest and forest products becomes a matter of State privilege.
- ***Costal Regulation Zone:*** The MOEFCC, pursuant to the Section 3 of the EP Act, has issued the CRZ notification dated February 19, 1991 with the aim to provide comprehensive measures for the protection and conservation of the costal environment. The CRZ specifies the activities permitted and restricted near the CRZ.

This regulated zone was further divided into four categories (CRZ I-IV) as per permitted land use.

- *Ozone Depleting Substances (Regulation and Control) Rules, 2000:* Under the Montreal Protocol, the MOEFCC pursuant to Section 6, 8 and 25 of the EP Act, has notified rules for regulation/control of Ozone Depleting Substances dated July 17, 2000 which has been amended by the Ozone Depleting Substances (Regulation and Control) Amendment Rules, 2014. As per the subsequent amendment certain restrictions have been imposed on the manufacturing, import, export and use of certain compounds.
- *Climate Change / Clean Development Mechanism:* India ratified the UN Framework Convention on Climate Change in 1993 and the Kyoto Protocol in 2002. Under the aegis of the MOEFCC, the Government of India has constituted the National Clean Development Mechanism Authority, i.e. the Indian DNA, for protecting and improving the quality of environment in terms of the Kyoto Protocol. The evaluation process of CDM projects in India includes an assessment of the probability of eventual successful implementation of CDM projects and evaluation of extent to which projects meet the sustainable development objectives, as it would seek to prioritize projects in accordance with national priorities.
- *National Environment Policy 2006 issued by the MOEFCC:* The National Environment Policy 2006 was approved by the Union Cabinet on May 18, 2006. The principal objectives of this policy are enumerated below:
 - Conservation of Critical Environmental Resources,
 - Intra-generational Equity,
 - Livelihood Security for the Poor etc.
- *Energy Conservation Act, 2001:* The EC Act provides for efficient use of energy and its conservation and for matters connected therewith or incidental thereto. The Bureau of Energy Efficiency was established on March 1, 2002 under the EC Act. The EC Act empowers the Central Government and, in some instances, State Governments to: specify energy consumption standards for notified equipment and appliances; direct mandatory display of label on notified equipment and appliances; prohibit manufacture, sale, purchase and import of notified equipment and appliances not conforming to energy consumption standards etc.
- *Twelfth Five Year Plan 2013-2017:* Environmental policies and perspectives have been a part of the Five Year Plans of the country, which have been adopted by the

Government of India since the 1950's for the socio-economic development of the country. The Twelfth Plan envisages on integrating environment considerations into policy making in all sectors of the economy – infrastructure, transport etc. However, Twelfth Five Year Plan 2013-2017 came to an end on March 31, 2017; and a six month extension has been given to the ministries to complete their appraisals. Further, the expert group on Low Carbon Strategies for Inclusive Growth appointed by the erstwhile Planning Commission had submitted an Expert Group report which includes an economy wise modelling and shall provide the policy norms required to implement the low carbon strategies up to 2030. The planning commission has also been replaced by the NITI Aayog, with Narendra Modi as its chairperson.

ACTIVE INITIATIVES

- *Odd-even & Diesel ban:* In view of the ever-increasing pollution levels in New Delhi the Government of Delhi took a land mark initiative to cure the same by implementing the odd-even rule, as per which private automobiles with an odd number as the last four digits could only be driven on odd dates and those with even number as the last four digits could only be driven on even dates. This experiment curb air pollution was largely a success and a significant drop was observed, it is expected to have long-term ramifications on the Indian automotive industry as well as reduce automobile pollution emission. The decisions as to the odd-even formula as well as the temporary ban on diesel cars in the national capital taken by the Delhi government and the Supreme Court and the NGT respectively, have upset powerful automobile lobbies.
- *India aims to become 100% e-vehicle country by 2030:* The Niti Aayog, having replaced the erstwhile Planning Commission proposed the New Green Car Policy, by virtue of which the aim is to make a switch from petrol and diesel run vehicles to electric vehicles and thus save the country \$60 Billion as well decrease carbon emission by an estimated 37%. NITI Aayog plans to achieve the target to make India a 100% e-vehicle country by 2030 included limits on the registration of gas cars, subsidies for the Electric Vehicles Industry (EVI), and use of taxes from gas car sales to create electric charging stations etc.
- *The Ganga Project:* PMO envisages a clean Ganga as his pet project. Only three days after swearing in as the 15th Prime Minister of India, decided to represent Varanasi in

order to serve ‘Ganga Maa’ and thus resigned from his original constituency of Vadodara. The Ganga Action Plan involves five ministries working in close co-operation and has in this light, been placed under the direct supervision of Water Resources Minister Uma Bharti.

- *Proactive Actions by NGT:* The NGT’s efforts and actions towards proactive protection of environment in India are commendable and noteworthy. *Suo moto* actions by the judicial bodies are cardinal in regulating and meeting the demands as well as the needs of the society. The NGT has passed various *Suo moto* actions which will have a long term effect on India’s environmental future. Some of them are:
 - *NGT at its own motion v. State of Himachal Pradesh & Ors.*⁴, Due to unregulated tourist activity in Himachal Pradesh and the consequent depletion of forest as well as problems with solid waste management the NGT took cognizance on its own motion. The court observed that vehicular pollution, high tourist activity and the subsequent deforestation require being compensated, maintained and restored in a manner that there is minimum degradation and damage to the environment. NGT ruled that to ensure hygiene, cleanliness and natural beauty of the glacier, it is cardinal that no commercial activity of any kind is permitted at Rohtang Pass Glacier.
 - *NGT at its own motion v. Ministry of Environment and Ors*⁵; In this case the Bhopal Bench of the NGT had instituted a *suo moto* case on the basis of a news article published by The Times of India in the Bhopal Edition dated April 10, 2013 published under the heading- *Dolomite mining a threat to Tiger corridor in Kanha- Foresters want ban on mining in Mandla District*. The Bhopal Bench of NGT in its judgment observed that ‘mining is required to be taken up only if it is compatible with the objective of protecting the environment.’
 - *Chandrapal Singh v. State of U.P. & Ors.*⁶, The NGT imposed a nationwide ban on extraction/excavation of brick earth or ordinary earth in any part of the country without obtaining prior EC from the competent authority.
- *Direct action by MOEFCC:* 2016 was a hectic year for The MOEFCC on the international as well as national fronts. While at the international level, India steered

⁴ (2015) SCC Online NGT 476

⁵ Original Application No. 16/2013

⁶ Application No. 38/2011

the negotiations on amendment in Montreal Protocol for amendment for phase down of HFCs at Kigali, Rwanda, at COP-22 in Morocco, the International Solar Alliance was signed.

STATUS OF ENVIRONMENTAL ENFORCEMENT

Environment enforcement in India is carried out by either the higher judiciary (the Hon'ble Supreme Court of India or the High Courts of various States) or administrative bodies. The NGT was established to hear all matters relating to enforcement of environmental laws and regulations. Primarily, the various administrative bodies enforcing environmental laws in India are the MOEFCC and the various State-level pollution control boards.

Further, the higher judiciary in India was, from the 1980's, involved in the evolution of environmental jurisprudence, even when the laws were at a nascent stage. This developed through the instrument of public interest litigation. The activism of the higher judiciary regarding the cases related with violation of environment and human rights has acquired the name of judicial activism. Some of such instances are stated below:

In the case of *M.C. Mehta v. Union of India*⁷ (Oleum Gas Leak case), the Hon'ble Supreme Court held that any enterprise that is engaged in an inherently dangerous activity is 'absolutely' liable to compensate all those affected by an accident. The key feature of the judgment was the principle of 'absolute liability'. This case occurred due to the leak of 'oleum' gas on the outskirts of Delhi, significantly almost a year after the Bhopal gas leak disaster.

In *Union Carbide Corporation v. Union of India*⁸, The then chief justice Ranjanath Misra, in his concurring judgment observed that the view of the Supreme court in the Oleum Gas leak case, as stated above, that in toxic mass tort actions arising out of hazardous enterprise, the award for damages should be proportional to the economic capacity of the offender cannot be pressed to assail the settlement reached in Bhopal disaster case. In case of mass tort action like this quantification of damages can be held without attaching much importance to individual injuries. But the court refused this principle of 'damages are proportionate to the superiority of the offence' as the amount of US \$ 470 million was a result of settlement between Union of India and Union Carbide Corporation.

⁷ AIR 1987 SC 965

⁸ 1991 (4) SCC 584

The Hon'ble Supreme Court held that the Polluter Pays Principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environmental degradation.

In the case of *M.C. Mehta v. Union of India*⁹ (Calcutta Tanneries case), the Hon'ble Supreme Court took cognizance of the various tanneries causing environment pollution and toxic effluents in Calcutta. The Hon'ble Court directed that the State Government should shift all tanneries from the area and also assist in the construction of a common effluent treatment plant. The Hon'ble Court also imposed a fine on the tanneries for polluting the area, based on the cost estimated by the State Government, under the polluter pays principle.

In *Sterlite Industries (India) Ltd. v. Union of India & Anr*¹⁰, the No Objection Certificate and the environmental clearances issued by the Tamil Nadu Pollution Control Board for setting up a copper smelter plant in Melavittan village, Tuticorin were challenged before the Madras High Court. A Division Bench of the High Court heard all the writ petitions and disposed them off with a direction to the Sterlite Industries (India) Ltd. to close down its plant permanently. The Hon'ble Supreme Court in its judgement overturned the decision of the Madras High Court. It stated that there was a misrepresentation and suppression of facts made by the Sterlite Industries (India) Ltd. but they could not order the appellants to close down the plant as the plant contributes substantially to the copper production in India and copper issued in defence, electricity, automobile, construction and infrastructure etc. However, it levied a fine of INR 1 Billion on the Sterlite Industries (India) Ltd.

Further, in the case of *Vikrant Kumar Tongad v. Environment Pollution (Prevention Control) Authority & Others*¹¹, the NGT passed an order in relation to the adverse effects of burning of agricultural residue in various parts of the country which travels to NCT Delhi and pollutes the air and more specifically creates smog. The NGT issued various directions including the following:

- a) All the States which have issued notification prohibiting agriculture crop residue burning shall ensure that the notifications are enforced rigorously and proper action is taken against the defaulters.

⁹ (1997) 2 SCC 411

¹⁰ Appeal No. 2776-2783/2013

¹¹ OA No. 118/2013

- b) Any person or body that is found offending this direction would be liable to pay environmental compensation.
- c) In cases of persistent defaulters of crop residue burning, an appropriate coercive and punitive action could be taken by the concerned State Government including launching of prosecution under Section 15 of the Environment Protection Act, 1986.

The NGT covered new ground for the ‘polluter pays’ principle by invoking it in two landmark judgments are as follows:

- In the matter of *Srinagar Bandh Aapda Sangharsh Samiti v. Alaknanda Hydro Power Co. Ltd*¹², the NGT directed Alaknanda Hydro Power Co. Ltd., a hydroelectric power company, to pay Rs 9 crore as compensation to people affected by Uttarakhand floods in 2013 because the dam constructed by the company contributed to the flooding experienced by residents of the region.
- In the matter of *Samir Mehta v. Union of India & Ors.*¹³, the NGT imposed a fine of INR 100 crores on Delta Marine Shipping Co., a marine shipping company for the oil spill and ensuing ecological damage caused when one of the company’s ships sank off the coast of Mumbai in 2010.

These judgments set a precedent for shifting the monetary responsibility of rectifying ecological damage from the government to the private actors responsible for causing the damage.

CIVIL AND CRIMINAL PENALTIES OF ENVIRONMENTAL WRONGDOING

The Indian regulatory framework recognizes civil and criminal liability for environmental protection. Where the pollution leads to a “public nuisance” a remedy under the criminal law is also available under Section 268 of the Indian Penal Code, 1872. It should be noted that as per the provisions of Indian Penal Code, 1872, a common nuisance is not excused on the ground that it causes some convenience or advantage. Moreover, the Code of Criminal Procedure, 1973 is applicable with respect to powers of State Pollution Control Board officers, since it applies to searches and seizures under the authority of a warrant.

¹² Original Application No. 03 of 2014

¹³ Original Application No. 24 OF 2011 And M.A. NO. 129 OF 2012, M.A. NOS. 557 & 737 OF 2016

Further, the Public Liability Insurance Act, 1991, has provisions for issues connected with compensation and liabilities. In addition to the provisions under the Air Act, 1981, and Water Act, 1974, the Hon'ble Supreme Court has elaborated the doctrine of the polluter pays principle and absolute liability through a series of judgments starting from the *Bhopal Gas Leak* case where apart from civil proceedings, criminal proceedings were also initiated. The proceedings were initiated under Section 304 A, and Sections 336, 337, and 338 read with Section 35 of the Indian Penal Code. Section 304 A deals with causing death by negligence.

Further, Sections 336, 337 and Section 338 deal with the offences of endangering life and personal safety of others. This is read along with Section 35, which deals with the aspect of common intention. The accused were found guilty and were subjected to imprisonment and were also liable to fine.

However, in most cases it is seen that fines or compensation is considered enough penalty and the culprit does not usually face any imprisonment, unless such acts have endangered life per se.

NGO ACTIVISM AND ENFORCEMENT

Over the previous two decades, various Non-Governmental Organizations have taken up cudgels on environmental pollution and degradation in India as well as issues arising from the setting up of new plants in India, due to the perceived failure of the administrative machinery to enforce laws on environment in India.

Generally, NGOs working on environmental issues in India carry out their agenda in two ways:

a) *On-site actions*: This involves spreading awareness about environment issues arising from operations of established industrial units or units which may be established in an area. Once local support is obtained, the NGOs then protest against the management of the said units. Appeals are made locally and nationally and to executive authorities Some instances include:

- The *POSCO Pratirodh Sangram Samiti*, an NGO formed in Orissa is protesting the setting up of a POSCO plant in Orissa;
- The *Narmada Bachao Andolan* in Madhya Pradesh has led a long-drawn fight against the damming of the river Narmada;

- Other international NGOs have actively campaigned at the ground level in India, for instance, NGOs like Survival International and Action Aid International have campaigned actively in India and abroad for halting work on Vedanta projects in Orissa.
- b) *Filing petitions in courts:* Many NGOs also file PIL's in the various High Courts and the Hon'ble Supreme Court of India regarding issues of public interest including environmental issues and concerns. Some of the NGOs active in environmental litigations are the Indian Council for Enviro-Legal Action and the M.C. Mehta Foundation.

The NGT acting upon a *petition filed by the environmentalist Y. M. Sengupta*¹⁴, has restrained the Municipal Corporation of Shimla and the State Government of Himachal Pradesh from raising or permitting any construction in the areas covered under the Notification dated December 7, 2000. Accordingly, the State Government of Himachal Pradesh has been compelled to put on hold the proposal to relax the 14-year-old ban on construction in these belts.

MANAGING CORPORATE ENVIRONMENT RISKS AND LIABILITIES

The management and operational team of the facility must be pro-active in identifying potential environmental risks and liabilities faced by the industrial unit. Some of the measures that the management may carry out to minimize such risks and liabilities may be as follows:

- c) preparation of a comprehensive disaster management plan outlining, *inter alia* the identification of potential threats emanating from the units, measures for the health and safety of workers and the local community from the adverse effects of the said disaster and channels of communication with the local authorities;
- d) preparation of an internal environment management policy outlining the risk mitigation measures, measures to comply with the environment regulations and the stipulations stated in the various environmental approvals etc.
- e) obtaining adequate insurance policies to cover liabilities arising from industrial/environmental accidents; constant interactions and liaison with the local communities and creation of local social infrastructure and developmental activities as part of the corporate social responsibility of the facility, etc.

¹⁴ *Yogendra Mohan Sengupta v. Union of India & Ors.*, Original Application No. 121 of 2014

Lately, the Central Government, through the MOEFCC, initiated the mainstream integration of environmental concerns into corporate policy by publishing the Draft Concept Paper on Institutionalizing Corporate Environment Policy¹⁵. The DCP aims to cover projects, activities, expenditure and monitoring of environmental initiatives of business organizations.

COMPANIES (CORPORATE SOCIAL RESPONSIBILITY) RULES, 2014

Pursuant to the enactment of the Companies Act, 2013, the Ministry of Corporate Affairs has notified the Companies (Corporate Social Responsibility) Rules, 2014. As per the CSR Rules every company including its holding or subsidiary, and a foreign company, having its branch office or project office, which fulfills the threshold limits prescribed under Section 135 of the Companies Act is required to spend, in every financial year, at least 2% of the average net profits of the company made during the immediately preceding three financial years, in pursuance of its corporate social responsibility policy. Further, Schedule VII of the Companies Act provides for a range of activities for companies to pursue as CSR activities, which *inter alia* include ensuring environmental sustainability, ecological balance, etc.

Liability of Parent Company on default of its subsidiaries: Multinational companies operate in various jurisdictions via subsidiary companies incorporated in local jurisdictions. Generally, the subsidiary company is responsible for its own acts and/or omissions since the law is pellucid that only in exceptional cases will a parent company be held liable for the acts and/or omissions of its subsidiary company.

A foreign parent can be held liable for its subsidiary's activity. In the case of *M.C. Mehta v. Union of India*¹⁶ (also known as the Oleum Gas Leak case), lethal gas was released by an Indian subsidiary's factory. Several claims were filed in US courts against the US parent entity. The Hon'ble Supreme Court observed that both entities were liable as the US parent controlled and was responsible for the Indian subsidiary's affairs.

BEST PRACTICES FOR SUCCESSFUL MANAGEMENT OF ENVIRONMENT REGULATORY ISSUES

The processes for applying for approvals requires extensive documentations, preparations of reports and proposals including detailed project report (DPR), EIA report, environment

¹⁵ Office Memorandum No. J-11013/41/2006-IA.II(I), dated 18 May 2012

¹⁶ AIR 1987 SC 965

management plan, forest management plan etc. Such reports, besides providing the details of the facility to be set up/expanded, would also include detailed plans as to the manner in which the proponent carries out mitigation measures regarding the possible adverse effects on the environment. For successful management of the regulatory issues and risks associated with the setting up/expansion of the facility, from an Indian environmental law perspective, the following actions may be considered:

- a) engagement of experts to prepare such reports and proposals including environmental engineers,
- b) the manual for each sector includes a Model terms of reference, which should be used as the baseline while seeking environmental clearance.
- c) All impacts of the Project must be studied in detail and a Comprehensive but focused EIA Report should be prepared and submitted. The inclusion of environmental policies and programmes are now standard operating procedures for most corporate organizations. International agencies which provide standard compliance certifications, such as the International Standard Organization, have been engaged by a significant portion of the surveyed companies to implement and have been granted certifications such as the 'ISO 14001' system etc.

RIGHT TO PRIVACY WITH SPECIAL REFERENCE TO AADHAAR AND INFORMATIONAL PRIVACY

Aishwarya Pandey*

Abstract

As Black's Law Dictionary defines Privacy as the right of a person to go his own way and live his own life that is free from interferences and annoyances. The Indian Constitution does not grant to its citizens the "right to privacy" as a distinct fundamental right however, the right to privacy has been culled by the Supreme Court from the articles that lay the foundation of the Constitution itself, Article 21 and various other such provisions read with the Directive Principles of State Policy. The nine-judge bench judgment of the Supreme Court in a consequential decision has decided on the issue of privacy as a fundamental right inalienable from the right to life enshrined in Article 21 of the Indian Constitution. Historically, privacy was almost implicit, because it was hard to find and gather information. But in the digital world, whether it's digital cameras or satellites or just what you click on, we need to have more explicit rules - not just for governments but for private companies. - Bill Gates. In today's day and age, the generation of the millennials as many term it, it is imperative that one understands their right in a world where technology dominates their lives and impacts the government and its citizens alike. Through this paper, the author wishes to break down the nitty gritty of the right to privacy and its origins and highlights the impact of the ground-breaking judgment on informational privacy and how it affects the Aadhar card scheme.

Keywords: Privacy, Aadhar, Right to Life, Personal Liberty, Inalienable Rights

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“Now the right to life has come to mean the right to enjoy life, -- the right to be let alone.”

- Samuel Warren and Louis Brandeis.

ORIGIN OF THE DEBATE ON PRIVACY

*MP Sharma v. Satis Chandra, District Magistrate, Delhi*¹

In the Indian context, the right to privacy traces its origin from the judgment of MP Sharma which put over the Hon'ble Supreme Court a blanket of doubt as to whether the right to privacy is implicit from the prevailing Fundamental Rights. An eight-judge bench decided on the question of privacy and concluded that the lawmakers did not subject search and seizure as given under the Criminal Procedure Code to a fundamental right to privacy. The case of MP Sharma is one that does not unambiguously endorse privacy as a constitutionally guaranteed right.

The Central government had ordered for an investigation under the Companies Act into the dealings of a company which was in liquidation on the grounds that it made an attempt to misappropriate funds and also masked its true state of affairs from the share-holders. The company was also suspected to have carried out fraudulent transactions and falsification of its records. On this basis, search warrants were issued, records were seized. The Courts warrant was challenged on the ground that the search violates the fundamental rights guaranteed to the petitioners under Article 19(1)(f) and 20(3). The Hon'ble court only took into account the infringement of the petitioner's right under Article 20(3) and referred to the US Supreme Court judgment² where obtaining incriminating evidence by illegal search violates the guarantees enumerated under the Fourth and Fifth Amendments of the American Constitution. The stark contrast between the two cases is that in India unlike the United States, there is a legislative backing for search and seizure under the Code of Criminal Procedure therefore, search and seizure as under the Indian Constitution does not ride roughshod over the right guaranteed under Article 20(3) of the Constitution. The Court therefore observed that, *“A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy,*

¹ (1954) SCR 1077

² *Boyd v. United States*, 116 US 616 (1886)

analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.”

Kharak Singh v. State of Uttar Pradesh³

The six-judge bench presiding over the matter of Kharak Singh was of the opinion that unless the Constitution of India expressly lists down right to privacy as a fundamental right, it does not confer any constitutional guarantee for the same. The challenge posed by this case before the Hon’ble Court was whether the accused’s fundamental rights have been infringed owing to regular police surveillance. Brief facts of the case give a better context to the question of privacy that arose before the bench.

Kharak Singh was held in a case of dacoity in 1941 but was released for lack of evidence. The police made out a ‘history sheet’⁴ against the accused. Kharak Singh was subjected to midnight knocks and round the clock surveillance. Thus, he moved to the Court to seek relief from these surveillance practices and to uphold his fundamental right.

The judgment delivered by the Hon’ble Court struck down Regulation 236 (b)⁵ of the UP Police Regulations as it was violative of the fundamental right under Article 21 guaranteed to the citizens. However, the majority upheld that the right of privacy is not a guaranteed right under our Constitution.

Justice Subba Rao gave a dissenting opinion acknowledging the right as one inferred from the term “personal liberty” in Article 21 and stating that the rights in Part III are not placed in watertight compartments, they have overlapping areas. Though not expressly provided for in the Constitution, the right to privacy is an indispensable aspect of personal liberty. The minority opinion read as, “...*The scientific methods used to condition a man’s mind are in a real sense physical restraint, for they engender physical fear channelling one’s actions through anticipated and expected grooves. So also the creation of conditions which*

³ (1964) 1 SCR 332

⁴ Regulation 228 of Chapter XX of the UP Police Regulations

⁵ (a) Secret picketing of the house or approaches to the houses of suspects; (b) domiciliary visits at night; (c) thorough periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation; (d) the reporting by constables and chaukidars of movements and absences from home; (e) the verification of movements and absences by means of inquiry slips; (f) the collection and record on a history-sheet of all information bearing on conduct.

necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty..."

The judgment in MP Sharma has been overruled by the decision⁶ of the nine-judge bench comprising of Justice J.S. Khehar, R.K Agarawal, D.Y. Chandrachud, S. Abdul Nazeer, S.A. Bobde, Abhay Manohar Sapre, Rohinton Fali Nariman, Sanjay Kishan Kaul, J. Chamleswar with one accord. The bench revisited the facts of the case and the obiter dicta and concluded thus, the Indian Constitution does not recognize a right similar to the 4th Amendment of the US Constitution and therefore, the right to privacy cannot be a part of the provisions of 20(3) of the Indian constitution. The verdict did not distinctively pass judgment on whether the right to privacy would crop up from any of the other rights guaranteed under Part III principally Article 19 and 21. Consequently, the finding that privacy is not a guaranteed right under the Constitution stands overturned as it does not mirror the correct position.

In the case of Kharak Singh it has been appropriately held that the expression *life* does not under article 21 mean a person's bare existence and that *personal liberty* is an assurance against invasion into the sanctity of a person's home or an invasion into his personal space. Regulation 236 (b) which discredits domiciliary visits on the grounds that it invaded a person's privacy is an implicit recognition of the right under Part III of the Constitution. However, the other half of the ruling which states that the right to privacy is not an assured right is erroneous keeping in mind the decisions in Cooper⁷ and Maneka⁸. As a result, Kharak Singh stands overturned so far as it does not distinguish the right to privacy.

RC Cooper and Maneka Gandhi Case

The Fundamental rights penned down in the Indian Constitution are not a strait-jacket formula, they have overlapping areas. This observation was made by an eleven-judge bench of this Hon'ble Court in the case of Rustom Cavasjee Cooper. Justice J.C. Shah approved of Justice Subba Rao's dissenting opinion in Kharak Singh and vehemently opposed the

⁶ *Justice K.S. Puttaswamy And Anr. v. Union of India and Ors.* WP (Civil) no. 494 of 2012

⁷ *Rustom Cavasji Cooper v. Union of India* (1970) 1 SCC 248

⁸ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

Gopalan⁹ doctrine, which was that, the protection given to the citizens by a guarantee of personal freedom would be dependent on the object of State action in relation to the individual's right. The view adopted was that Article 22 was a complete code relating to the law of preventive justice and it didn't have to meet the criterion of Article 19 (1) (d). Justice Shah recognized the dissenting opinion of Justice Fazl Ali (Gopalan Case) and Subba Rao (Kharak Singh case) and held, "*The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.*"¹⁰

The seven-judge bench in Maneka reaffirmed the decision taken in the Cooper case and repudiated the Gopalan doctrine. The verdict in the case supported the idea of the overlapping nature of the constitutional provisions and therefore, reaching the logical conclusion. Thus, in accordance with the Maneka judgment the term "personal liberty" in Article 21 covers a wide variety of rights, some of which have also been granted a different standing and have been made a distinct fundamental right to which additional protection has been given under Article 19.

The relationship between Article 19 and 21 was founded on the majority verdict in Gopalan and that view presently stands repealed by the two important verdicts of Cooper and the subsequent doctrine recognised in Maneka. The right to privacy thus, traces its origins from sixty-three years ago when it came before the highest Court of order to rule over, till this date where it has been recognised by our Constitution as a right inalienable from Article 21 yet subject to reasonable restrictions like the rest. Therefore, putting the questions to rest and paving the foundation for what is now a settled position in constitutional law.

The fundamental rights stem from the notions of liberty and dignity; while some aspects of it have been distinctly protected under Article 19 it does not however strip Article 21 of its extensive domain. The cogency of a law which infringes an individual's right has to be tested on the grounds of its impact on the guarantees of freedom. Article 14 necessitates that state

⁹ A. K. Gopalan v. State of Madras AIR 1950 SC 27

¹⁰ Supra note 8

action cannot be arbitrary and must be reasonable therefore, imparting meaning to the constitutional guarantees under Part III of the Indian Constitution.

PRIVACY IS A NATURAL AND INALIENABLE RIGHT

Privacy is the right of an individual to exercise control over his inherent qualities of mind and character. There are certain rights which are natural and innate in a human being. Natural rights therefore, are sacrosanct because they purely cannot be separated from the human disposition.

Natural rights are not bestowed by the state on its citizens, as the term itself suggests it is an inherent right that human beings have because they're human. All human beings irrespective of strata, class or gender have certain rights that exist in them equally.

Declaration of the Rights of Man and of the Citizen which was adopted by the French National Assembly expressly uses the term “inalienable rights”. It reads as, “*For its drafters, to ignore, to forget or to deprecate the rights of man are the sole causes of public misfortune and government corruption. These rights are natural rights, inalienable and sacred, the National Assembly recognizes and proclaims them-it does not grant, concede or establish them-and their conservation is the reason for all political communities; within these rights figures resistance to oppression*”.¹¹

Black's Law Dictionary defines 'inalienable' in the following terms 'not subject to alienation; the characteristic of those things which cannot be bought or sold or transferred from one person to another, such as rivers and public highways, and certain personal rights; e. g., liberty.' All persons irrespective of their acts retain their inalienable rights. The right however, is not absolute and is subject to reasonable restrictions.

EVOLUTION OF THE NOTION OF PRIVACY IN INDIA

The question as to whether the right to privacy is recognized as a right accorded to the citizens under Part III of the Constitution gave rise to a plethora of judgments decided upon by smaller benches. Privacy as a matter of right can be claimed in all walks of life, the Courts thus, decided this question on case to case basis keeping in mind international precedents which gave rise to numerous judgments which cover the aspect of privacy as a right.

¹¹ Declaration of the Rights of Man and of the Citizen (1789)

In Gobind¹², a three-judge bench of the Supreme Court considered a challenge to the validity of Regulation 855 and 856 of the State Police Regulations under which a history sheet was compiled against the petitioner who was under police surveillance. It was a case similar to Kharak Singh so the bench referred to the decision given by the Court. The bench also adverted to the decision by the US Supreme Court in *Roe v. Wade*¹³ in which the Court upheld the right of a woman to terminate her pregnancy as her right to privacy. Justice Matthew who pronounced the judgment of the Court recognized the right to be let alone, and based his understanding of the concept of privacy on an ‘assumption’ that if there exists such a right it is a part of ordered liberty and yet a more scrutinized reading of the decision indicates that he too did not enter into the existence of a specific right to privacy as a fundamental right.

Smaller benches based their decisions on the ground that Gobind does recognize a right to privacy. As in the case of *Malak Singh v. State of Punjab and Haryana*¹⁴ though not explicitly yet implicitly has recognized the right to privacy as one emanating from the term ‘personal liberty’ under article 21 and the right to freedom of movement as under Article 19(1)(d). This case dealt with certain provisions of the Punjab Police Rules under which a register was maintained called the surveillance register of all convicts of a particular description and all other such persons who were believed to be habitual offenders irrespective of the fact that they have or have not been convicted.

The case of *Rajagopal*¹⁵ was one in which during its findings the court held expressly that the right to privacy is one which stems from the right to life and liberty as guaranteed by the Constitution under Article 21. The facts of this case are that a writ under Article 32 was sought for restraining the state and prison authorities from interfering with the publication of a convict’s autobiography in the magazine as it was against prison rules. The Court held, “*The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his home, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent...*”

¹² *Gobind v. State of Madhya Pradesh* (1975) 2 SCC 148

¹³ 410 US 113 : 35 L Ed 2d 147 (1973)

¹⁴ (1981) 1 SCC 420

¹⁵ (1994) 6 SCC 632

The Court however while summarizing their decision held that however, such a right is subject to reasonable restrictions. This decision thus, recognized privacy as a protected and guaranteed right while following it to its source, i.e., Article 21.

A number of cases involving different facets of privacy and Article 21 were decided upon yet a concrete decision of the Supreme Court was pending as to whether or not the right to privacy is a fundamental right which has now been settled by the Court in a unanimous decision by a nine-judge bench asserting that Right to Privacy is undeniably a Fundamental Right.

INFORMATIONAL PRIVACY AND THE AADHAR CARD SCHEME

The new epoch brings with it a more extensive and intensified Digital Age with wider internet use. We are at present living in an information technology age. The Digital Age is looking us in the eye from the near future and as man's brain advances; more intricate instances of digital technology will be seen in the day to day lives of people. Our very own Prime Minister Mr. Narendra Modi has made it his principal agenda to transform India into Digital India and his government has taken numerous measures to further this agenda. Cell phones are now equipped with finger print locks, voice recognition software and are able to send pictures wirelessly across the globe, the threat to information in this age of digitalization is real and immense. Digital information is in a much more malleable format as once the data is stored on servers the possibility for that data being used or misused are endless. The Digital Age as it is called is the future and also the demise of the human touch.

Everything that some individual accesses on the internet leaves electronic tracks. For instance, if one happens to make hotel reservations on the internet and searches for the best hotels in a particular city, for the next couple of days every time he/she uses the internet there will be ads for hotels in the place one wishes to visit. The electronic tracks left behind by individuals are means of information which provides knowledge about their interests and likes and dislikes alike. Cookies are installed by websites that provide browsers with an identification number unique to each individual which allows them to tag the users and their searches to create profiles of individuals. In a press release¹⁶ by the Telecom Regulatory Authority of India on 3 July, 2017 gives out numbers of internet subscribers both urban and rural and the trend seems to only increase.

¹⁶ Press Release 45/2017, Available at http://trai.gov.in/sites/default/files/PR_No.45of2017.pdf

Therefore, the Court addressed informational privacy along with other facets of privacy in the landmark judgment¹⁷ delivered on 24 August, 2017.

Talking of the contemporary world where humans are driven by machines and not machines by humans, the problem of data leak becomes even more potent, a meticulous plan to systematically adapt to these changes so as to prevent any data hampering or other allied obstacles, invoking the privacy of individuals. There needs to be equilibrium between both the development and what it brings at stake with making the data nakedly available for misuse. The definition of Privacy now entails much more than what it did decades back and shall now incorporate *prima facie* protection of data and information. It has become imperative that systems are put in place to protect the identity of individuals.

Aadhaar Card Scheme

The Aadhaar card scheme of the Central Government was instituted under the provisions of the Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. The chief objective behind issuance of Aadhaar was that one could link several government-run services with their 12-digit identification number. The identification number was provided to the residents of India after enrolling them in the system by means of a twofold enrollment technique which comprises taking of biometric data and an iris scan. If at all the database storing the biometrics – leaks, the penalties of the leak will be everlasting because biometric leak will be the ultimate privacy breach, one cannot modify their fingerprints unlike passwords which can be reset.

The Aadhaar card scheme right from its inception has faced a constitutional challenge involving the right to privacy and data protection with several leaks and flaws in the handling of data.¹⁸ News reports of Aadhaar card being issued to animals¹⁹ and an instance of issuance of the card to God himself²⁰ were reported. Thus, a petition was filed before the Supreme Court that the norms for and the demographic biometric data being collected by the Union Government under the Aadhaar Act, 2016 violated the right to privacy.

¹⁷ *Supra* note 6

¹⁸ Available at: <http://www.hindustantimes.com/india-news/right-to-privacy-a-fundamental-right-7-aadhaar-controversies-that-raised-concerns/story-UGTtXhgJDtaWrmyuli2LwO.html>

¹⁹ Available at: <http://indianexpress.com/article/trending/man-arrested-for-getting-aadhar-card-made-for-dog/>

²⁰ Available at: <http://www.thehindu.com/news/national/lord-hanuman-gets-aadhaar-card/article6401288.ece>

*In the case of Justice K.S.Puttaswamy (Retd) v. Union of India,*²¹ the Court addressed the constitutional challenges posed by the Aadhaar card for the first time. Initial benches of three judges were presiding over the matter but when faced with the quandary involving the interpretation of the backbone of the constitution, i.e., the fundamental right under Article 21, the bench on 11 August, 2015 decided to refer the matter to a larger bench. On 18 July, 2017 the Chief Justice chaired over a Constitutional Bench and considered it apposite that this issue must be determined by a Bench of nine judges who would put to rest all conjecture regarding whether or not the right to privacy emanates from Article 21.

DIFFERENT WAYS IN WHICH THE AADHAAR INTRUDES ON PRIVACY

The verdict of the Highest Court of Order is a very welcomed development by the people of India. Privacy has limits that one cannot fathom; it would mean different things for different people. One set of people might look at it from the perspective of ‘data protection’ as is also an important facet of privacy while others may look at it from the civil liberty point of view. The Supreme Court in its final verdict which is a landmark judgment has covered all facets of privacy and in perhaps one of the lengthiest judgments²² spanning over 547-pages has put to rest all complications.

The privacy concerns revolving Aadhaar:

- The ‘data security’ aspect of Aadhar is most widely questioned. The emphasis is on what data collected under the scheme needs to be protected and what will be the consequences of a breach in security. The UIDAI (Unique Identification Authority of India) claims that the data has been encoded using the highest standards and the access to the same is constrained. Experts on the issue of ‘data security’ believe that the issue is not whether it can be hacked, but when.²³
- The Aadhaar has flung open the doors to ‘Identity theft’ and ‘Banking Fraud’. Fingerprints can be easily replicated.²⁴ The Aadhaar number available on public

²¹ 2015 SCC OnLine SC 969

²² *Supra* note 6

²³ Available at: https://www.buzzfeed.com/pranavdixit/one-id-to-rule-them-all-controversy-plagues-indias-aadhaar?utm_term=.cs3qYwkDK#.hpWOY3E14

²⁴ Available at: <http://www.hindustantimes.com/mumbai-news/you-will-be-glued-to-this-mumbai-college-students-trick-biometric-system/story-W64f1jdMtecxKDml2DakeI.html>

domain²⁵ endangers an individual's bank account safety and increases the risk of banking frauds as the ever-emerging technology makes nothing impossible. Even if there is no breach in data, all these illustrations are a distressing breach of privacy.

- The biometric and demographic data is warehoused in a central database and in return individuals are allotted a unique 12-digit number. The unique number is added as a new data field with public and private database in the country. The data about an individual's life are kept in different data silos. The only person who can construct the deconstructed data available about oneself, is the person himself. If the unique identification number is available to every database it will integrate the data silo and construct it as one and information about an individual will be available to persons not authorised by the individual. This 'profile' that will be hence constructed will be accessible to persons beyond the individual's knowledge.

The Aadhaar card scheme which is claimed to be a 'welfare scheme' is essentially a surveillance and data-mining tool which endangers the freedom of the people of India and with the Supreme Court now expressly ruling it changes the entire debate altogether. What the current scenario of Aadhaar is with the government rolling it out as a mandate and the privacy concerns still looming over the scheme the current position is still vague.

PRIVACY LAWS IN OTHER COUNTRIES

Every country in the world is governed by their own history, their constitution and legal structure. However, what remains unchanged is that all laws revolve around the fundamental concept of 'human beings and their natural rights'. The privacy judgment which came like a knight in shining armour for the citizens of India has previously been recognised in several other countries whose cases have been referred to by our judiciary as precedents in the final verdict that declared to the citizens of India that their privacy is important and shall now be recognised as a fundamental right.

There are however, certain limits to a comparative approach which have to be kept in mind and foreign judgments must be read with caution ensuring that the matter is not isolated from the setting.

²⁵ Available at: <http://indianexpress.com/article/india/govt-admits-aadhaar-data-leak-critics-cite-civil-liberties-4639819/>

1. *United Kingdom:* Privacy as a right was fused explicitly under the British law only after the Human Rights Act, 1998 came into force. The incorporation of the right was based on the European Convention on Human Rights which pledges privacy as a fundamental right. Article 8 (1)²⁶ of the Convention defends the right to privacy. The Human Rights Act has clarified the existence of a right to privacy in UK and has also resolved the debate for the future.
2. *United States of America:* The Constitution of the United States of America does not contain a direct right to privacy like our Indian Constitution yet, the American jurisprudence guard's privacy under numerous amendments of the Constitution. The First, Third, Fourth, Fifth and Fourteen Amendments all play a key role in distinguishing the concept that is privacy. The Ninth Amendments' scope has been extended to include privacy in ways that it has not been protected by the previous amendments. The Courts have relied upon a 'reasonable expectation of privacy' theory while developing the concept of privacy.
3. *Canada:* The Canadian Charter of Rights and Freedoms of 1982 does not distinctly discuss privacy as a guarantee to their citizens. Section 7²⁷ and Section 8²⁸ of the Charter recognize the concerns regarding an individual's privacy. The Privacy Act, 1983 came into force to regulate how the government collects, uses and discloses personal information.²⁹ The Courts have used the Charter to extend the scope of privacy as more than just a physical right.

CONCLUSION

The architects of the Constitution had before them a rather monumental task of framing the laws for a country of 330 million at the time of partition. They had to take into account the rights of every individual who had been deprived of their rights and liberty under the British rule. The draftsmen were conscious of the ubiquitous abuse of human rights and the horrors

²⁶ Article 8 (1): Everyone has the right to respect for his private and family life, his home and his correspondence.

²⁷ Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

²⁸ Section 8: Everyone has the right to be secure against unreasonable search or seizure.

²⁹ In *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, (2002) 2 SCR 773, the Supreme Court of Canada recognised the Privacy Act as having a "quasi-constitutional" status, as it is "closely linked to the values and rights set out in the Constitution". The Court also stated that the "The Privacy Act is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society"

that India – Pakistan partition brought with it. With this context in mind, the makers had added pressure to formulate a law that would bring an end to injustice suffered by the people.

The content of the rights guaranteed to the citizens' evolved over the years with precedents set by the judiciary. Common law takes form in this style, progressively sprouting to harmonize new technologies and social patterns while remaining unswerving with the past from which it arose. The right to privacy developed in India over a period of six decades. With the landmark verdict in the case of K.S Puttaswamy v. Union of India³⁰ the judiciary made it crystal clear that the people are entitled to enjoy the right and it is an inalienable right.

Thus, the ruling has made way for a national dialogue discussing the right to privacy and what it means in the Indian context. A lot of homework and public education is now the need of the hour in order to educate the citizens about their right in a scenario where there has been uproar about beef, about a person's sexual orientation and other such sensitive issues. The status of Aadhaar and the right to information are all at stake with this judgment. The nine-judge bench with their decision has left a lot of questions unanswered, yet this is a start and it has set the stage for new beginnings and in the short term while this may seem as a victory, it has lead India into unchartered waters.

³⁰ *Supra* note 6

CENTRAL INFORMATION COMMISSION: A TOOL OF DISPENSING JUSTICE IN INDIA

Gaurav Singh*

Abstract

Without openness and participation of citizens of the country, democracy is ineffective and worthless. To enable citizens to actively participate in governance, they should be provided with information regarding governmental activities, about their elected representatives, about bureaucrats, about benefits which are conferred on citizens in various walks of life and information about governance itself. Equitable, fair, transparent and justice ridden administration presupposes that persons be made aware of the Law, Rules, Regulations and Administrative guidelines by which their affairs will be governed. The Right to Information (RTI) Act, 2005 is designed to set up a practical regime for citizens to access information available with public authorities, in order to promote transparency and accountability in their working. The Act provides for the constitution of the Central Information Commission (CIC) to be responsible for the implementation of the Act, exercising powers conferred on it under Section 18 of the Act. The objective of the Research paper is, the need and importance of the right to information, And To examine the efficacy of central information commission as a body which lends force to the provisions of Right to information act and extent to which it helps in the dispensation of justice in cases of applicant seeking information from a recalcitrant body. Other objective is to see how far the central information commission has been played a vital or effective role in providing justice to the information seeker and to look into the role of Central Information Commission in implementation of Right to Information Act. The contribution of the Central Information Commission the development of RTI law is no less important. This has been elaborately discussed in paper with the relevant decisions handed down by the Commission from time to time. Central Information Commission is such a statutory body which creates system by which access to justice becomes accessible to people of this country. Access to justice is pre-requisite to administration of justice; hence Central Information Commission is a means to attain administration of justice in India.

Keywords: RTI, CIC, Administration etc.

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INTRODUCTION

The traditional state governance, Public Administration and mechanical application of laws in a routine way have now become completely irrelevant in the modern system of governance and public transactions. In the absence of access of information, the constitutional mandate for freedom of speech and expression enshrined in information was denied to the citizens, in the name of secrecy and confidentiality in government deal, which resulted in violation of basic human right of the people to have access to information which is implicit Article 21.

In a Democratic country ‘Right to information’ can be regarded as a paramount and cardinal principle of constitutional jurisprudence. Several democratic countries have enacted various rational and functional legislations towards the essential requirements to accelerate the momentum of right to information in purpose-oriented direction in Indian perspective, so there is an urgent need to provide for adequate and practical legislation on this pivotal issue of right to information.

At the International level, the Right to information finds articulation as an inalienable fundamental human right in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. At the regional level, there are numerous other human rights documents like, The Commonwealth, The African Charter on Human and People’s Rights, Council of Europe, which include access to information as a fundamental human right.

The growing importance of right to information as an inseparable from truly participatory democracy, led the Indian Parliament to bring out the Right in Information Act in 2005, which makes the beginning of a new era for appreciable scope of transparency and accountability in the administration system of government.

Central Information Commission’s vigil and promptness in handling RTI cases and their speedy disposal have substantially contributed to the development of the RTI Act. CIC is also playing a very significant role to achieve the goal of “maximum disclosure and minimum secrecy” in order to promote openness and accountability in administration.

A perusal of decisions and ruling of the CIC over the past 12 years would reveal that right to information means more opportunities for citizen to access to information. The RTI applications are often seen by the officials as attempts to expose corruption, poor governance,

mal-practice etc. It hardly needs to be stated that conferment of RTI by itself does not bring about growth and development of knowledge unless the process of dissemination of information is managed and monitored effectively. The Central Information Commission is handling this task with a unified approach to addressing concerns about the use and potential abuse of information dissemination.

The paper deals with the role of CIC to enforce the right to information and how it has helped in the dispensation of justice by its decisions.

OBJECTIVE OF THE RESEARCH

The study would an attempt to bring into sharp focus, the need and importance of the right to information, the way right to information has been chiselled and honed by the judiciary in Indian and the way it has been statutorily recognized in India by way of Right to Information Act 2005 And To examine the efficacy of central information commission as an body which lends force to the provisions of Right to information act and extent to which it helps in the dispensation of justice in cases of applicant seeking information from a recalcitrant body.

Other objective is to see how far the central information commission has been played a vital or effective role in providing justice to the information seeker and to look into the role of Central Information Commission in implementation of Right to Information Act.

RESEARCH METHODOLOGY

In this paper researcher has adopted Doctrinal methodology which is also known as non-empirical. Researcher has also adopted the Exploratory Research form in this thesis Various journals, websites, literature, directories has been referred for generating initial information on the subject. This study use basically Primary sources like, Constitution of India, Indian Statues, rules and regulations; reports of the Working Committees, decisions given by the information commission.

LITERATURE REVIEW

The literature reviewed under this section relates to the importance of Right to Information, role of various segments of government and society in its use and implementation, obstacles and challenges in its implementation; and suggestions for its proper and effective implementation. Various books, journal's, case laws have been analysed.

RESEARCH QUESTION

A sincere and dedicated effort has been made by the researcher to address the following questions in the current thesis which would be helpful in doing research and provide a framework.

- What is the contribution of Central Information Commission to implement and achieve the goal of RTI Act?
- Whether the process of Dissemination of information is managed and monitored effectively by the Central Information Commission?
- What is the scope of Public Authority under Section 2(h)? Whether political parties should be included under the scope of Public authority?

ROLE OF INDIAN JUDICIARY IN DEVELOPMENT OF RTI

Judiciary is the watchdog and custodian of Constitution also It draws the boundaries of the public authority functioning. There was no legal right to information and our Constitution as it does not use the expression 'freedom of information' in Art. 19. It was through a creative interpretation by Apex court of Article 19(1)(a) which carved out 'Right to information' as being implicit in the right to free speech and expression. Judiciary in several landmark cases has expressly held that 'Right to information' as natural concomitant of Article 19 (1)(a) and Article 21 of Constitution.

Supreme Court laid emphasis on the people's Right to know in case of *Romesh Thappar v. State of Madras*¹, The seeds of right to information were sowed in the landmark judgment of *State of Punjab v. Sodhi Sukhdev Singh*². The Supreme Court in a historical judgment provided the voter's right to know the antecedents of the candidates, which is utmost importance in democracy, in *Union of India v. Association for Democratic Reforms*³ In this case scope of Article 19 (1) (a) was widened and court affirmed that the right to know of the candidate contesting election to a House of Parliament or a state legislature or a panchayat or a municipal corporation is a precondition to the exercise of a citizen's right to vote. In, *Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd*⁴ court

¹ AIR 1950 SC 594

² AIR 1960 SC 554

³ AIR 2002 SC 2112

⁴ AIR 1988 SC 1208

recognized the right to know as emanating from the right to life and stated that, “We must remember that the people it large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age on our land under Article 21 of our Constitution”.

Judiciary can be said to be the backbone of the right to information in India as it has vehemently supported the principles of transparency and accountability in all spheres of governance and played a vital role in interpreting the right to information.

VARIOUS ASPECTS OF RTI ACT

The Right to Information Act which came into effect in October 2005 covers Governments on all levels, Central, State or local along with all bodies owned, controlled or substantially financed, including Non-Governmental Organizations directly or indirectly financed by Appropriate Governments. This revolutionary enactment aims to ensure transparency and accountability in the working of every public authority, the right of any citizen of India to request access to information and the corresponding duty of the Government to meet the request, the duty of the Government to pro-actively make available key information to all, citizens, Non-Governmental Organizations and media. However, there are certain items that would be exempt from disclosure, e.g. sensitive information, access to which could prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State relation with foreign States or lead to incitement of an offence.

This Act has a Preamble, six chapters divided into 31 sections and two schedules. Preamble along with the Statement of Objects and Reasons appended to it reflects the objectives of this Act.

- *Chapter-I* contains short title and dictionary clause.
- *Chapter-II* which is heart and soul of this Act contains Sections 3 to 11, which deal with citizens' right to information and obligation of public authorities.
- *Chapter-III* contains Sections 12 to 14, which deals with constitution of Central Information Commission, its terms of office, conditions of service and procedure for removal in respect of the Chief Information Commissioner or the Information Commissioner.

- *Chapter-IV* contains Sections 15 to 17, which similarly deals with constitution of State Information Commission at State level, its terms of office, conditions of service and procedure for removal in respect of the State Chief Information Commissioner or the State Information Commissioner.
- *Chapter-V* contains Sections 18 to 20, which describes the powers and functions of such commissions, procedure for appeal and power to impose penalties.
- *Chapter-VI* contains Sections 21 to 31, which contains miscellaneous provisions wherein Section 22 gives overriding effect to the provisions of this Act over any other law for the time being in force. Section 23 puts a bar on jurisdiction of Courts. Section 24 makes provisions for exemptions of certain intelligence and security organizations, which are specified in Second Schedule, from the provisions of this Act except information pertaining to the allegations of corruptions and human rights violation. Sections 27 and 28 empower the appropriate Government and competent authority respectively to make rules.
- The First Schedule contains form of oath or affirmation to be made by the Chief Information commissioner/The Information Commissioner/the State Chief Information Commissioner/The State Information Commissioner.

The Second Schedule contains the list of 22 intelligence and security organizations which are exempted from the provisions of this Act except information pertaining to the allegations of corruptions and human rights violations. Right to Information Act provides that all citizens shall have the right to information (Section-3 refers). Information according to its Section-2(f) means:- Any material in any form, Records, Documents, Memos, E-mails, Opinions, Advices, Press releases, Circulars, Orders, Logbooks, Contracts, Reports, Papers, Samples, Models, Data material held in any electronic form, and Information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

Right to Information Act, 2005, has been seen as the key to strengthen participatory democracy and promoting people-centric governance. It is a boon for a country like India which is having growth of corruption, lack of public accountability, bureaucratic indifference and numerous other ills. The main aim is to bring citizens close to governance by informed citizenry, transparency in administration as well as public accountability and minimizing corruption as under this Act every citizen has a right to receive and impart information. The

State is not only under an obligation to respect this right of the citizens, but equally under an obligation to ensure conditions under which this right can be meaningfully and effectively enjoyed by one and all. This right includes right to acquire information and to disseminate and it is necessary for self-expression, which is an important means of free conscience and self-fulfilment. It enables people to contribute on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can be circulated. Therefore, the Right to Information Act, if used and implemented prudently, has the potential to set good governance and to make the governmental system more responsive towards citizens of the country.

CENTRAL INFORMATION COMMISSION

The object behind the establishment of a Central Information Commission or the State Information Commission seems to be that proceedings in a Civil Court would be more time consuming and also keep the persons for whose benefit the Act is intended, engaged in the pursuit of litigation for a good part of their time, which they could have otherwise employed more usefully in their legitimate occupation and that such proceedings would be more expensive and would eat away the great part of the return of their labour. It is with this object of the Act to set up such a Commission which would create more confidence and a greater sense of security in the minds of the citizens. Chapter III of the Right to Information Act, 2005, deals with Central Information Commission at the Centre Level. The central organization which control and monitors all authorities created under the Act to make service of supplying information to the citizens is the Central Information Commission at the Centre Level and the State Information Commission at the State Level. The various provisions concerning the constitution of the Central Information Commission (CIC) are as follows:

Section 12(3) of the RTI Act provides that The Chief Information Commissioner and Information Commissioners shall be appointed by the President on the recommendation of a committee consisting of:

- I. The Prime Minister, who shall be the Chairperson of the committee;
- II. The Leader of Opposition in the Lok Sabha; and
- III. A Union Cabinet Minister to be nominated by the Prime Minister.

Section 12(5) of the RTI Act provides that the Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge

and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

It must not be forgotten that any legislation would fail if the enforcement mechanism is not fully equipped and is not given adequate powers. Without adequate powers, it would be like a paper lion or a toothless tiger. For the successful implementation of the RTI Act, it is very important that due care should be taken to maintain the integrity, sovereignty and independence of the Information Commissions and that they are provided adequate powers.

The petitions can be filed before the Information Commissions in two ways (i) as a complaint and (ii) as an appeal. The complaints are filed under section 18 and whereas appeals are filed under section 19(3) of the RTI Act respectively. Section 18(1) of the Act says that it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person. Moreover, the complaint is a kind of grievance filed before the Information Commission by the person, who had requested information under the RTI Act but has not been able to get it because of the Non Appointment of Public Information Officer, Refusal to Accept Application, Refusal to Access to Information, No Response to Request, No Proper Information has been provided.

Section 18(2) of the Act provides that the Central or State Information Commission may initiate an inquiry in respect thereof if he is satisfied that the reasonable grounds exist to inquire into the matter. The Central or State Information Commission, as the case may be, while inquiring into any matter under this section, shall have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:

- summoning and enforcing the attendance of persons and compel them to give oral Or written evidence on oath and to produce the documents or things;
- requiring the discovery and inspection of documents;
- receiving evidence on affidavit;
- requisitioning any public record or copies thereof from any court or office;
- issuing summons for examination of witnesses or documents; and any other matter which may be prescribed.

MAJOR DECISIONS OF CIC

Political party as a public authority

In *Subhash Chandra Aggarwal & Ors v. Indian National Congress (INC)/All India Congress Committee (AICC) Ors*⁵, the Commission held that INC/AICC, BJP, CPI, CPI (M), NCP and BSP have been substantially financed by the Central Government under section 2(h)(ii) of the RTI Act. The criticality of the role being played by these political parties in our democratic set up and the nature of duties performed by them also point towards their public character, bringing them in the ambit of section 2(h) of the Act. The constitutional and legal provisions also point towards their character as public authorities. Complaint No. CIC/MISC/2009/0001 and CIC/MISC/2009/0002 is hereby set aside and it is held that INC/AICC, BJP, CPI, CPI (M), NCP and BSP are public authorities under section 2(h) of the RTI Act. Besides, the Presidents/General Secretaries of the above mentioned political parties are also directed to comply with the provisions of section 4(1)(b) of the RTI Act by way of making voluntary disclosures on the subjects mentioned in the said clause. The Commission further observed that there is need for accountability and transparency in the functioning of the political parties.

It said that Political Parties are Substantially Financed by the Central Government because there was indirect financing of Political Parties by allotment of large tracts of land to them in prime areas of Delhi or state capital either, free of cost, or at concessional rates. There was accommodation facility at concessional rates and there was total tax exemption. Moreover, they play a critical role in our democratic set up and the nature of duties performed by them also point towards their public character, bringing them in the ambit of section 2(h). These are the unique institutions, as they come to wield directly or indirectly influence on the exercise of governmental power. It would be odd to argue that transparency is good for all State organs but not so good for Political Parties, which, in reality, control all the vital organs of the State.

Although the CIC directed the parties to appoint CPIOs within a period of six months, nothing as such happened. The battle for political parties to be included in the ambit of RTI has got little tougher. The central government has filed an affidavit before the Supreme Court that political parties need not be brought under the ambit of RTI act. The government has said that bringing parties in the ambit would lead to hampering of smooth functioning of the political parties. It also has submitted that order of the central information commission in

⁵ Complaint No CIC/SM/C/2011/001386 and CIC/SM/C/2011/000838, Dated 3rd June, 2011

2013 declaring political parties as public authorities under the RTI act was erroneous. All major political parties, except AAP, have also expressed similar views. The case is sub judice before the Supreme Court.

Regarding Degree of Narendra Modi

In *Neeraj Saxena v. District Election Officer, GNCTD*⁶ The Central Information Commission has directed the PIOs of Delhi University and Gujarat University, Ahmadabad to make best possible search for the information regarding degrees in the name of Mr. Narendra Damodar Modi in the year 1978 (Graduation in DU).

The educational qualifications related information about public authority or public servant or political leader occupying constitutional position is not hit by any exception under Section 8 of RTI Act. It cannot be stated as personal or private information also. In fact, the information about educational degrees of Prime Minister is already in public domain. It is a matter of profuse reporting in print, electronic and social media. In an interview to a senior journalist, Mr Rajiv Shukla, Mr Shukla, Mr Narendra Modi explained that he completed High School and on the advice of an elderly personality he obtained degree and PG through external examinations without stepping into the colleges". "Not prescribing the educational qualification for contesting electoral offices is one of the great features of Indian Democracy. What needed is education not degrees".

Consequently, The Central Information Commission (CIC) has slapped a fine of Rs 25,000 on the Central Public Information Officer (CPIO) of Delhi University (DU) for rejecting an RTI application seeking Prime Minister Narendra Modi's graduation degree. The Information Commissioner, M. Sridhar Acharyulu, in a recent order, pulled up DU CPIO Meenakshi Sahay had said the rejections reminded him of the saying "penny wise, pound foolish".

However, Delhi HC's stay order was passed after Delhi University filed a plea challenging the CIC order, on grounds that the order was "arbitrary and capricious (and) is also untenable in law". The university, represented by Additional Solicitor General of India Tushar Mehta, contended that inspection of the records cannot be allowed, as details of roll number, father's name and marks obtained is "personal information" that cannot be released to a third party.

⁶ CIC/SA/C/2015/000275

Mehta also told the court that “universities hold the subject information in fiduciary capacity and as such the same is an excepted information under Section 8(e) and (j) of RTI Act”.

CONCERN OF CENTRAL INFORMATION COMMISSION ON DELAY IN SUPPLYING INFORMATION

In *Shri Amit Ghosh v. Department of Pension & Pensioners Welfare (DoP & PW), New Delhi*, a perusal of the comments submitted by both the CPIO and Appellate Authority, it is apparent that there is a comprehensive delay in responding to the request of the complainant. The Commission observed default in registering the application received under the RTI Act on the part of the CPIO, Ms. Geetha Nair, Under Secretary, DOP & PW. The Commission views this seriously. Nevertheless there is a reasonable cause for the delay resulting from an office lapse, and in the light of the implied acquiesce of complainant detailed in the 3 paragraph below, no penalty will lie. However, as assured by the CPIO and the appellate Authority, the Commission directed DOP&PW, to exercise greater care in processing such cases in future. On the other hand, the complainant has not filed any rebuttal to the plea taken by the CPIO and appellate authority, which may be presumed as an indication of the satisfaction.

In the case of, *Shri. P.H. Tare v. CPIO M/o Defence RTI Cell, DRDO, Armament Research And Development Estt. (ARDE), Pune, Maharashtra*⁷, The appellant levelled allegation against the then Director ARDE, Shri A M Datar of corruption charges.

During the hearing the appellant submitted that the then Director ARDE was involved in corrupt practices. Hence, information is disclosable. The CPIO claimed that DRDO is exempted u/s 24(1) of the RTI Act. There were Transport allowance claim of Rs 19,200/- for which he got exemption for Rs 4800 for the period of 2010-11 and again TA claim of Rs 19,200/- for which he got exemption for Rs 9600 for the year 2011-12. Therefore, the proviso to Sec 24(1) is applicable in this case as there was prima facie evidence of wrongdoing. In the decision ,Commission find it logical to direct the present CPIO, DRDO, Shri Kulkarni to provide point wise information as available on record to the appellant within 15 days from the date of receipt of this order.

INFORMATION OF PENSION FALL WITHIN AMBIT OF SEC 7(I)

⁷ CIC/CC/A/2015/001781-AB

In case of *Amrika Bai v. PIO, EPFO, Raipur*⁸, RTI applications seeking pension details should be replied to within 48 hours as it pertains to the '*life and liberty*' of the elderly, the Central Information Commission has held as it pitched for early redressal of such grievances. The Commission also directed that if an RTI application is a genuine grievance of a pensioner, steps should be initiated within 48 hours to redress it. The directive of Information Commissioner Sridhar Acharyulu will come to the aid of over 58 lakh central government pensioners.

Commission held that the information pertaining to pension of a person pertains to his/her life and liberty which is mandated to be replied to within 48 hours as per the Right to Information (RTI) Act. He said the moment an RTI application on pension issue is received, there should be a mechanism at the entry stage to discover and identify if it reflects a pension related grievance. He said it should be brought to the notice of the responsible officer by the CPIO on the same day and if it is a genuine case, the grievance should be addressed. The result should be communicated within 48 hours, followed by redressal within 30 days.

RECOMMENDATION

With the enactment of the RTI Act, India has moved from an opaque and secretive system of Government towards the greater transparency and accountability where the citizen will be empowered because by empowering the ordinary citizens a nation can progress. If the RTI Act has to fulfil its goal and not to become an ornamental document only, constant public vigilance on all important public matters would be essential. However, there are certain deficiencies in fulfilling the legal obligations by the Government and its Public Authorities have restricted the free flow of information. To make the law an effective instrument of empowerment and to usher in an era of transparency and accountability so as to fulfil the goals and objective of the Constitution, the some following Recommendations may prove to be useful:

- To ensure the independence, autonomy and competence of the Information Commissioners, the process of selection must be transparent. Specific qualifications like background of law should be mentioned under the eligibility conditions as is done in the appointments under other legislations. Commission is discharging a very crucial and key role, so it is become very essential that the members of the

⁸ CIC/BS/A/2016/001238

Commission must possess outstanding educational qualifications, brilliance and remarkable experience in the field of selection, administration and recruitment etc. Of utmost importance, they should work freely and without any political influence.

- The CIC or the SIC in its decision or in general can give directions to the public authorities to take such steps to secure compliance with the provisions of the RTI Act. A strict time limit should be for following those directions failing which some penalty should be imposed and there is also need to mention the time limit or certain date for suo moto disclosure of information by agencies as given in the Act.
- In order to make effective implementation of the RTI act there is a need to enhance the penalties and should be made deterrent provision for wilfully defaulting officer and PIO/APIO. The proper implementation of section 20 should be done by the Information commission in the cases of wilful defaulting and the quantum of fine should be raised from Rs.250 per day to Rs.1000 per day and maximum limit be raised from Rs.25000 to Rs.100000 which would secure the avoidance of the delay in information.
- Various departments of the central government are placed in across the country and in every state, so it easy for the SIC to provide support to CIC for the speedy disposal of the case. The cooperation between the information commissions would lead to in an effective result of knowledge delivery. There should be a mechanism by which the authorities and functionaries of the state and centre can be monitored effectively and in case of non-discloser of the information, responsibility may be fixed of respective authority. For developing better coordination and cooperation between CIC and SIC's there should be an appropriate institution be placed and annual meetings of these bodies may take place to discuss their issues.
- The culture of suo moto discloser of information by public authorities should be promoted and maximum information should be made available without any specific request of citizens. Each Government department and public institution must make available full, adequate and complete information about its structure, types of service, limitation of time in grievance redressal etc. Above said information should provide on its official website, notice board as well as via poster etc.
- For the grass root involvement of the citizens in general and deprived or disadvantaged people in particular Right to information cells with the government officials and with the help of civil society at the grass root level. These Designated cells should repeatedly crosscheck the methodology of public authorities function at

district level and concurrently introduce predictor of performance to the state government about curative action which requires to be taken periodically.

- CIC should be equipped with some more power like contempt of court, having consisted of eminent jurist and retired judges and for the speedy disposal of pending appeal more members can be introduced in SICs and CIC.
- It is pertinent to mention that the withdrawal of application must be restricted in the matter seeking information by a public authority, as it may lead to a miscarriage to a justice system so adopted, which may further lead to bargaining and in our judicial institution.

CONCLUSION

The RTI Act was enacted to secure access to information held by public authorities and government in order to enhance accountability and transparency. It enables to create accountable and responsible governance and also a mechanism to establish a better balance between power holder and controller of information vis-a-vis information seeking citizens who are both the beneficiary and author of democracy.

Central Information Commission has played a very vital role to minimize corruption as we have seen in many decision given by the CIC for example in Augstawestland chopper scam case, the order had been given by CIC to defence ministry to disclose paper of it .Further many scams have come into light by the relevant information enforced by CIC and it also bring the Political parties to within the ambit of ‘public authority’. However the case is sub judice in apex court.

A perusal of decisions of the CIC over the past 11 years would reveal that right to information means greater opportunities in order to access the information. The RTI applications are often seen by the public authorities as a step to expose corruption, poor governance, scams, mala fide practices etc. The conferment of RTI Act by itself does not evolve growth and development of information unless and until the process of dissemination of information is well managed and properly monitored. The Central Information Commission is performing the object of the aforesaid act with a dignified manner and unified approach in addressing concerns about the better use and likelihood abuse of information dissemination.

With the enactment of the Right to Information Act, India has taken a great leap forward to achieve real Swaraj. Active and Responsible citizens would be able to make optimum utilization of the aforesaid act. It is a significant step in the proper direction by opening windows for all. The Fragrance of it is bound to dissipate slowly but definitely, but the stink of confidentiality & abuse of power should not be too strong as the fragrance of Right to Information & transparency is not absorbed-in-toto. Its territorial jurisdiction should not be limited to only India, it must spread in Bharat also, then only difference between Haves vs. have not would be eliminated .That will ensure that the Government in this democratic set up is not merely '*of the people and by the people*', but is also consist of most essential part 'for the people'.

Therefore, "*Central Information Commission is the means and RTI is the end*". It is well known that the success of the end is depends upon the how fair and effective the mean is. To achieve pious objective of the RTI Act, CIC must be equipped as well as possessed with higher degree of transparency and autonomy in order to become a dignified statutory, quasi-judicial adjudicator.

Hence, having discussed and understood the various provisions of the RTI Act and the decisions given by the CIC, it is clear that the CIC is the base of the aforesaid act and it has properly provided the objective of Information disseminating system in order to dispense justice to the citizens. Further, for the better enforcement of the RTI Act, CIC has to be more strengthen.

CASE COMMENT: US - SHRIMP AND SAWBLADES (CHINA)

Shreya Mehta*

INTRODUCTION

Despite many legal rulings to clarify the WTO inconsistency of zeroing practices, in practically all aspects of anti-dumping proceedings, the United States declined to categorically rectify the illegal antidumping duties based on zeroing calculation methods. This dispute is merely example of a number of disputes where the US government had to exhaust the whole process for proper implementation of the WTO rulings under its domestic legal system. The US approach is starkly contrasted with the position taken by the European Union that categorically terminates zeroing practices pursuant to the WTO rulings. While the WTO system indeed recognizes individual Member's peculiar regulatory systems and policies during implementation phases, the current situation in which WTO Members must individually resort to the dispute settlement system in order to rectify the US zeroing practices raises a serious concern regarding the legitimacy and integrity of the WTO dispute settlement system. Maybe it is time for WTO Members to agree on better implementation mechanisms before more Members try to develop overly burdensome and complicated regulatory processes for compliance.

FACTS

China filed two separate requests for consultations under article 4 of DSU (Consultation) complaining about the United States' 'zeroing in' practice to determine anti-dumping duties which is inconsistent with the WTO Obligations (violation of article 6 of GATT);

28 February 2011: consultation request by China with respect to anti-dumping measures of certain frozen warm water shrimps;

22 July 2011: Consultation request by China with respect to anti-dumping measures of diamond saw blades. The United States was not happy with the complaint by China because US had already begun to end the practice of zeroing in;

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13 October 2011: China requested for the establishment of panel and also, China and the United States agreed on the procedures;

25 October 2011: The Panel was established according to Article 6 of DSU to discuss the issues raised upon by China upon UNDOC that UNDOC acted inconsistently with Article 2.4.2¹ of the Anti-Dumping Agreement by using zeroing in the calculation of dumping margins;

21 December 2011: The panel was officially composed;

08 June 2012: The report of the panel was circulated.

DECISION

The two complaints which china challenged against the US were;

1. UNDOC's use of "zeroing in" methodology in calculation of certain anti-dumping margins against the WTO obligations.
2. UNDOC's reliance upon the same dumping margins calculation with zeroing to establish the separate rates.

Based on the previous rulings on zeroing practices by the Appellate Body, China brought these disputes to the WTO dispute settlement system in order to rectify the existing anti-dumping.² The panel request made on 13 October 2011 led to the panel report which was adopted on 23 July 2012. The European Union, Honduras, Japan, Korea, Thailand, and Vietnam joined as third parties in the panel proceeding. In the anti-dumping investigation for shrimp, the US petitioners challenged exporters not only from China but also from Brazil, Ecuador, India, Thailand, and Vietnam. The dumping margins for Chinese exporters, however, were very high compared to those for other countries. When China brought this

¹ 2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

² The consultation request was submitted to the WTO DSB on 28 February 2011. WT/DS422/1 (dated 2 March 2011)

case to the WTO, the United States did not oppose China's arguments that the methodology applied in the anti-dumping investigations was '***substantially identical in all legally relevant respects***' to the methodology employed in United States – Final Dumping Determination on Softwood Lumber from Canada³. In fact, the panel explained that this case presented a similar situation with a few previous disputes such as US–Shrimp (Ecuador)⁴ and, subsequently, US–Shrimp (Thailand)⁵, US–Anti-Dumping Measures on PET Bags⁶, and US–Zeroing (Korea)⁷.

Given that the United States did not rebut the arguments and the evidence submitted by China, the panel found that the United States acted inconsistently with Article 2.4.2⁸ of the Anti-Dumping Agreementⁱ due to the USDOC's use of zeroing in the calculation of the dumping margins for Allied, Yelin, and Red Garden in the shrimp investigation, and of the dumping margin for AT&M in the diamond saw-blades investigation. In addition, the panel ruled that the calculation of the separate rate on the basis of these margins necessarily incorporated the WTO-inconsistent zeroing methodology.

ROAD MAP & ANALYSIS

This comment will presents the case in the context of all WTO zeroing disputes with respect to the United States anti-dumping policies.

Considering many previous zeroing disputes in the GATT/WTO system, this dispute does not make any additional legal contribution to the relevant jurisprudence.⁹ And yet, this case highlights the systemic problems of the WTO dispute settlement system in terms of implementation. Broadly speaking, zeroing disputes may be categorized into two groups:

- one group for setting forth important legal principles concerning zeroing practices, ‘principal cases’ and

³ DS264

⁴ DS335

⁵ DS343

⁶ DS383

⁷ DS402

⁸ *Supra* note 2

⁹ Regarding the concise overview of the zeroing jurisprudence, see Cho, Sungjoon (2012), *No More Zeroing?: The United States Changes its Antidumping Policy to Comply with the WTO*, ASIL Insights, 16(8) and Vermulst, Edwin and Daniel Ikenson (2007), *Zeroing under the WTO Anti-dumping Agreement: Where Do We Stand?*, Global Trade and Customs Journal, 2(6): 231-242.

- The other group for rectifying the existing illegal anti-dumping duties based on rulings of principal cases, ‘remedial cases’.

Also, four panel decisions directly attempted to reverse the Appellate Body rulings.¹⁰ Moreover, predominant numbers of the WTO jurists, i.e., panelists and Appellate Body members, manifested the disagreement to the Appellate Body rulings. Despite all these controversies, the WTO dispute settlement system has repeatedly confirmed the *illegality of zeroing practices in almost all aspects of the anti-dumping investigations*.

Notwithstanding a host of the Appellate Body rulings, the fact that there are many subsequent ‘remedial’ disputes manifested structural problems in relation to the implementation of the WTO dispute settlement adjudications. Unlike other WTO Members that readily modify or change administrative actions such as by imposing AD duties pursuant to the WTO recommendations, the United States has continued to maintain its regulatory procedures to incorporate the WTO rulings.

The United States has applied this regulatory procedure stringently by interpreting that the scope of the determination can be modified very narrowly. Thus, even after the panels and the Appellate Body ruled that the zeroing practices used in an anti-dumping investigation were not consistent with the WTO obligations, the implementation of the rulings was always confined to the specific anti-dumping investigation in respective disputes. This situation caused many other WTO Members to suffer from essentially the identical problems in the US anti-dumping actions and eventually led them to bring their own complaints to the WTO dispute settlement system, separately.

CONCLUSION

The World Trade Organization (WTO) cited the US for its ‘zeroing’ practices in a case brought by China against the United States on US antidumping tariffs. The US levied anti-dumping tariffs against Chinese warm water shrimp and diamond saw blades imports in the original antidumping investigation and in subsequent administrative reviews. In February

¹⁰ These cases are *US – Laws, Regulations and Methodology for Calculating Dumping Margins* (DS294), *US – Final Dumping Determination on Softwood Lumber from Canada* (Art. 21.5) (DS264), *US – Measures Relating to Zeroing and Sunset Reviews* (DS322), and *US – Final Anti-dumping Measures on Stainless Steel from Mexico* (DS344). Regarding legal disagreement between panels and the Appellate Body Members, see M. Lewis, ‘Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement’, 48 *Stanford Journal of International Law* 1 (2012)

2011, China requested consultations with the US in the latest case, and a panel was established in October 2011. The European Union, Honduras, Japan, Korea, Thailand, and Vietnam participated as third-parties in the case. In its report, the WTO panel found the US Department of Commerce's use of zeroing methodology in calculating US anti-dumping duties in three investigations was inconsistent with its obligations in the WTO Anti-Dumping Agreement. After the report of the panel, if no appeal is filed within 60 days, the Dispute Settlement Body will have to adopt the report. And hence, on 23rd July 2012, the panel report was accepted by DSB. The United States did not contest China's assertions nor was their request that the United States cease the practice the zeroing one of their ways of battling the predatory practice of dumping (until they got caught) easier to admit wrongdoing than to fight it. In practice, the US uses 'zeroing' to cancel out any sale where dumping does not occur, which result in a higher final anti-dumping margin. The United States use of 'zeroing' has been the subject of several antidumping cases.
