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*Whom should we propitiate with
our oblations other than the one
whose majesty is manifested by
the snow-clad mountains, by
the mighty ocean, the reservoir
of rivers, whose arms are
directions; whose splendour is
reflected by the skies, the
earth the clouds?*

Rig Veda (X. 121, 4-5)

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Lex Revolution
Journal of Social & Legal Studies

Quarterly Published International Peer Reviewed Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.

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

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MESSAGE

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

We owe our sincere gratitude to Prof. Gopal Krishna Chandani & Prof. S. K. Gaur for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of Lawctopus and 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.

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CONTRIBUTION OF GREEN TRIANGLE AND GREEN TRIBUNAL TO THE INDIAN ENVIRONMENTAL LAW: AN OVERVIEW

Prof. S. K. Gaur*

INTRODUCTION

The words ‘Green Triangle’ and ‘Green Tribunal’ may have capsule form but they are loaded with so much meaning that their depth cannot be measured so is there spread. To understand their full implication scraping of their surface will not do. It has to be peeled out. They reveal less and conceal more. Both carry the hope of the victims of pollution and are intimately connected with environment. The word ‘environment’ possesses a broad spectrum which takes within its fold not only its basic and essential elements namely air, water and soil, but also inter relationship among and between them and human beings, living creatures and plant etc.. It also includes hygienic atmosphere and ecological balance free from pollution of air, water, etc.. It also takes within its sweep both man-made and natural environment. This pair has gained significant importance in environmental circles.

The architects of our Constitution were visionaries and had foreseen the inevitable modernization and problems of polluted environment ensuing therefrom. Through a constitutional amendment in the year 1976 two gems [Art.48-A & Art.51-A (g)] were set in our Constitution to give effect to the trans-boundary Stockholm Declaration of 1972 to which India was a party. They imposed two-fold responsibilities under Art.48A on the State on one hand and under Art. 51-A (g) on the citizens on the other to protect and improve the natural environment and natural resources.

Ever since the human beings came into being they started more misusing than using natural resources. It is painful to know that the children of Mother Nature themselves started looting the natural resources. The people of both upper and lower reaches of the society took unethical advantage of natural wealth. The poor belonging to the bottom of the socio economic structure of the society may have treated the natural wealth unfairly out of need, but the rich belonging to the top of the socio economic structure of the society misused it out of greed. The rich and affluent over exploited the natural resources in the name of development and modernization without regard to the incalculable harm that was being perpetuated to the posterity. The rich may have become richer but Mother Nature has become poorer. Water resources are drying up, mineral wealth is exhausting, plant and animal species are dying. This is resulting in the resource crunch which is reaching its flash point.

THE ‘GREEN TRIANGLE’

The aforesaid two Constitutional provisions along with Art.21 account for making the following Green Triangle. The angles of which are being recounted below.

THE FIRST ANGLE (ART.48-A: DIRECTIVE PRINCIPLE OF STATE POLICY)

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Art.48-A inserted by the Constitution (42nd Amendment) Act, 1976 provides: The State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife.

The word ‘endeavor’ refers to something which the State should try hard to do it. Thus Art.48-A is directed to the State and imposes a national duty upon it to make serious effort not only to protect, preserve, care, guard and ensure proper, clean and healthy environment against damage, it also expects the State to go beyond and make exertion for improving the environment. The word ‘improve’ provides dynamic connotation to the aforesaid provision to enable the State to take positive steps of imposing restrictions on the misuse of natural wealth of mankind which adversely affect the environment e.g. encroachment upon parks and green areas, soil erosion, deforestation and desertification. Depending upon this article the Supreme Court has done great service by issuing adequate directions in a number of cases to the State towards reducing pollution and eco-imbalance.

THE SECOND ANGLE (ART.51-A(G): FUNDAMENTAL DUTY OF CITIZENS)

Art.51-A(g) added by the Constitution(42nd Amendment) Act, 1976 states: It shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures.

While Art.48-A referred to above is addressed to the State, Art.51-A(g) is addressed to the citizens as everything relating to environmental matters cannot be left to be taken care of only by the State. While the word ‘endeavour’ mentioned in Art.48-A is something which one should try hard and make serious efforts by exerting power to do it, the word ‘duty’ mentioned in Art.51-A(g) is something which one is bound to do as a constitutional obligation. The architects of these two provisions wanted that protection and improvement of the environment should go side by side. Art.51-A(g) imposes a constitutional duty and imperative on every citizen to protect as also to promote and improve natural environment including natural resources which are gifts of mother nature namely forest, wildlife, lakes and rivers expressly mentioned therein. As in Art.48-A, the word ‘improve’ imparts positive content to Art.51-A(g) also. It is a constitutional mandate to the citizens to deliberately take positive and constructive steps for the betterment of the environment in pursuance to its positive perception. It infuses sense of positive constitutional commitment in them and gives impetus to take urgent correctional measures for keeping the environment healthy and hygienic and also for preventing damage to flora, fauna and environment. Art.51-A(g) does not stop here but goes much further than Art.48-A and casts a duty on every citizen to have compassion for living creatures. The framers of this provision with their prophetic sense could foresee the problem of ecological and environmental degradation and deliberately used the expression ‘compassion for living creatures’ which is in line with our culture and has a ring of the philosophy of Lord Buddha, Ashoka the Great and Lord Mahavir and also vegetarianism which is part of our cultural heritage. It expects citizens to be kind and give ethical treatment to animal kingdom and other life forms.

THE THIRD ANGLE (ART.21: FUNDAMENTAL RIGHT FOR THE PROTECTION OF LIFE ETC. OF PERSONS)

Art.21 guarantees a fundamental right to life etc. to all persons whether citizens or non-citizens. Its scope is more sweeping as compared to Art.51-A(g) which is limited to citizens only. In the starting phase the judiciary only scratched the surface of Art.21. As the time rolled by the active judges peeled out its surface and found the ‘protection of environment’ hidden in ‘protection of life’ mentioned therein. The Apex Court has time and again ruled in unbroken chain of cases handed down by it that right to ‘life’ means right to ‘quality of life’, right to live with ‘human dignity’ or right to ‘enjoy life fully’. Environmental pollution is detrimental to the ‘quality of life’ and compromises ‘human dignity’. Right to ‘enjoy life fully’ is possible only with the pollution free natural atmosphere. Thus the right to decent, healthy, wholesome and unpolluted environment has been read by enterprising judiciary in Art.21. Any interference in the elementary environmental elements namely air, water and soil impairs ‘quality of life’ within the meaning of Art.21. Due to judicial craftsmanship ‘protection of environment’ has found its way into ‘right to life’ guaranteed under Art.21 .

Earlier Art.21 which on plain reading was found colourless, hollow and like a dry bone has been clothed with flesh provided with the case law involving environmental issues. Lots of things for conservation and promotion of environment have been read in Art.21 by the activist judges and loaded it with great meaning. Therefore it has turned out to be having tremendous potential and has made more contribution to the improvement of environment and ecology as compared to the two preceding Articles 48-A and 51-A(g). Thus Art.21 marks the high point of the green triangle which has spread like drop of ink on the blotting paper due to high degree of judicial creativity. Its spread includes many rights relating to environment to give effect to which Green Tribunal has been established.

THE NATIONAL GREEN TRIBUNAL

The following description unfolds in abridged form the structure and functioning of the National Green Tribunal. It owes its origin to National Green Tribunal Act ,2010 passed by the Parliament. It is composed of full time (a) Chairperson and atleast (b) ten Judicial Members and (c) ten Expert Members. The Chairperson may invite any person having specialised knowledge and experience in a particular environmental dispute pending before the Tribunal.

The qualifications for being a Chairperson and Member are laid down in the Act. The Chairperson or Judicial Members are required to be serving or retired Chief Justice of a High Court or a judge of the Supreme Court of India. However, a serving or retired judge of even the High Court is qualified to become Judicial Member. An Expert Member should have besides other qualifications, experience of five years in the field of environment or dealing with environmental matters. The term of office of Chairperson and other Members is five years and they are not eligible for reappointment. However they may resign by notice in writing to the Central Government. Their salaries and other conditions of service cannot be varied to their disadvantage after their appointment.

The original jurisdiction of the Tribunal can be invoked on matters of ‘substantial question relating to environment’ in civil cases. Tribunal has the appellate jurisdiction against certain

orders etc. passed under various environment related Acts. However time limit of thirty days is prescribed within which the appeals may be filed before the Tribunal. The significant takeaway from the Act is that Tribunal is required to apply ‘sustainable development’, ‘polluter pays’ and ‘no fault’ principles while passing an order etc.. Any person aggrieved by an order of the Tribunal may file an appeal to the Supreme Court within ninety days but the Supreme Court can entertain appeal even after ninety days if the appellant satisfies the court by giving sufficient reasons.

The Tribunal is not bound by the Civil Procedure Code, 1908 and Evidence Act, 1872 but shall dispose of cases in line with the rule of natural justice. However the Tribunal shall enjoy the same powers as are vested in a civil court under C.P.C., 1908 while discharging the functions under this Act. The jurisdiction of the Tribunal has been insulated from the interference of civil courts. To say the other way, the civil courts are barred from entertaining any question which may be adjudicated upon by the Tribunals.

The normal and traditional judicial system (regular courts) has many unhappy aspects. It is incapable of giving that quantity and quality of justice which is the demand of the present time. The procedure of the court is surrounded with technicalities which make it move at snail’s pace and make the cost of litigation prohibitive. Once a person is locked in a legal battle he runs out of patience and is nearly ruined. The court also lacks expert knowledge. Leaving complex environmental matters to the court is like entrusting the work of surgeon to the barber. These factors have undercut the credibility of the court.

Unlike courts which decide all types of disputes, the new adjudicatory system of the Tribunal with its simple procedural technology is fully focussed on the environmental cases. It is on advantageous position over the courts in protecting the environmental rights of the litigants as it cuts short their time. The Tribunal administers cheap, quick, specialised and effective justice. It consists of persons of high status having experience and expertise in the field of environment. The Tribunal which is independent of pulls and pressures of the government of the day commands respect and credibility in view of these values it stands for. The people feel pretty comfortable with the Tribunal rather than court which is feared one.

Though the Tribunal has handled plenty of environmental matters, the cases relating to ‘Creation of Yamuna Conservation Zone’, ‘Cancellation of Clearance of Coal Blocks in Chhattisgarh Forests’, ‘Ban on decade old diesel vehicles at Delhi NCR to minimise Air Pollution’ and ‘Slapping of exemplary fines to polluters’ are landmarks. During the short span of five years the Tribunal has established a good track record and has become a trusted destination of the litigants.

CONCLUSION

The aforesaid pair of Green Triangle and Green Tribunal has great purpose to serve and holds out promise for remarkable results in environmental panorama of our country. Environmental law is experiencing upswing in its all aspects and giving rise to new and dynamic Green Environmental Jurisprudence. Nothing else could have done what this pair is doing for the cause of environment. This pair provides answer to those crying for justice against wrongs

done by polluters. It is doing the legendary work of changing the entire theatre of Environmental Law by bringing many victories to the common men who are suffering and are silent victims of pollution.

PROTECTION OF INDIGENOUS ART FORMS UNDER MODERN IPR REGIMES: ISSUES, LACUNAE AND POSSIBLE ALTERNATIVES

Akanksha Jumde*

Abstract

In many countries of the world, traditional arts and crafts, including handicrafts that have been practiced since time immemorial. However, these traditional handicrafts are being threatened by rapid and unchecked plagiarism, and unauthorized reproductions of local artworks are being exported to other countries, hampering the livelihood for communities that practice these forms of art.

Copyright law presents itself as one of the best possible mechanisms to protect these artworks. However, modern-day copyright regimes, based on western conceptions and notions of ownership, are not free from bottlenecks and the inadequacy of national and international copyright had led policy makers to look for possibly alternative frameworks to address and needs and interests of local artisans.

This paper seeks to examine the intersection between copyright law and indigenous art, and critically analyze the various drawbacks in applying current copyright laws to protecting indigenous art. The paper further seeks to explore proposed alternative mechanisms addressing lacunae in current copyright framework. The conclusion drawn by the author is that there is an urgent need for countries to develop alternative or supplemental frameworks to the current intellectual property regimes to protect the interests of the indigenous artists.

Research Methodology: Doctrinal

Keywords: indigenous art, copyright laws, culture, intellectual property rights, human rights.

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INTRODUCTION

The confluence of indigenous arts and crafts and intellectual property law represents issues with multiple layers and perspectives from various stakeholder groups.¹ Indigenous people which represent unique cultural heritage, understandably have legitimate rights to control, including restricting others rights to knowledge or information that derives from unique cultural histories, expressions, practices and contexts.² Of all the laws, intellectual property law seemingly is best suited to address the protection of their cultural rights.³ However, intellectual property law does not necessarily correspond or complement their interests and rights. Indigenous people's interests in intellectual property law raises issues that involve both legal and non-legal components.⁴ Issues faced by indigenous people are not only commercial in nature, but also involve ethical, cultural, historical, religious/spiritual and moral dimensions.⁵ For example, inappropriate use of sacred cultural artifacts, symbols, or designs may not cause financial loss but can cause considerable offense to the relevant community responsible for the use and circulation of that artifact, symbol or design.⁶

The recent years has seen much debate about the extent that intellectual property law could be utilized to protect indigenous people's knowledge, having also captured the attention of the World Intellectual Property Organization (WIPO).⁷ Since 2001, it has hosted the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), to discuss these issues.⁸

¹ Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* : Issues Paper, Duke University School of Law Center for the Study of the Public Domain, released under a Creative Commons Attribution-NonCommerciaL-ShareAlike 3.0 Unported License.

²*Id.*

³*Id.*; See FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES (Catherine E.Bell& Val Napoleon eds., 2008); TERRI JANKE, OUR CULTURE: OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS (1998)

⁴*Id.*; Several copyright cases in Australia illustrate this. In the US, questions around the use of Native American names and symbols for team names and logos by sports organizations raise similar issues about inappropriate use. For example, see *Harjo v. Pro-Football*, Inc., 30 U.S.P.Q. 2d (BNA) 1828 (TTAB 1994) and *Pro-Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009).

⁵ Anderson, *Supra* note 1; See Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D.L REV. 1 (1996). Also see Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM.L. REV.2004 (2007).

⁶*Id.*

⁷ One example of the increasing focus is the range of regional declarations on indigenous knowledge and intellectual property rights. See Declaration of Belem, Brazil, July 1988; Kari-Oca Declaration and Indigenous Peoples Earth Charter, Brazil, May 1992 (reaffirmed in Indonesia, June 2002); Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, New Zealand, June 1993; Julayinbul Statement on Indigenous Intellectual Property Rights, Australia, November 1993; Santa Cruz de la Sierra Statement on Intellectual Property, Bolivia, September 1994; Tambunan Statement on the Protection and Conservation of Indigenous Knowledge, Malaysia, February 1995; Suva Statement on Indigenous Peoples Knowledge and Intellectual Property Rights, Fiji, April 1995; Kimberley Declaration, South Africa, August 2002; See Brian Noble, *Justice, Transaction, Translation: Blackfoot Tipi Transfers and WIPO's Search for the Facts of Traditional Knowledge and Exchange*, 109 Am. Anthropologist 338 (2007). The authoritative power of WIPO is also examined as a form of regulatory governance, See Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (2007).

⁸ *Id.*; Anderson, *Supra* note 1, at 34.

However, despite these efforts, international consensus is yet to be reached on indigenous people's rights to the protection of cultural knowledge.⁹ Questions around indigenous people's concerns are not limited to one area but can stretch across every part of the intellectual property spectrum.¹⁰ For example, the protection of traditional Inuit amauti clothing, could include legal questions involving copyright, trademarks, designs, and/or confidential information.¹¹

Indigenous interests in intellectual property law can affect around 370 million indigenous people located in over 70 countries.¹² Besides, indigenous people themselves, there are a range of non-indigenous people that are also inextricably involved within the indigenous knowledge and intellectual property matrix. For instance, filmmakers¹³ draw upon indigenous people's cultural stories or songs; librarians, archivists, museum professionals and researchers¹⁴ who utilize any material about indigenous people contained in the vast ethnographic collections spread throughout the world's cultural institutions. Besides these, there are government agencies or government-funded research bodies¹⁵; corporations and other commercial or industrial entities¹⁶; publishers or designers who utilize indigenous motifs or symbols¹⁷, and non-governmental organizations representing indigenous peoples¹⁸, amongst others.

This paper explores the issues with European/American concept of copyright law and its conflicts with rights and interests of the indigenous people in greater detail, and attempts to suggest possible alternatives within and beyond the current intellectual property framework to address the issues confronted with indigenous people, with special reference to indigenous art forms.

⁹ *Id.*, For national initiatives, see, for example: New Zealand, Trade Marks Act 2002; Panama, Law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge 2000; Philippines, Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples 1997; Republic of Azerbaijan, On Legal Protection of Azerbaijani Expressions of Folklore 2006; United States of America Database of Native American Insignia, Trademark Law Treaty Implementation Act 1998.

¹⁰ *Id.*; Kaitlin Mara, "Turning Point" at WIPO Pulls Traditional Knowledge Debate Out at Eleventh Hour, INTELLECTUAL PROPERTY WATCH, Oct. 3, 2009, <http://www.ip-watch.org/weblog/2009/10/03/turning-point-at-wipo-pulls-traditional-knowledge-debate-out-ateleventh-hour/> [last accessed: 23 May 2015].

¹¹ *Id.*; See PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM (Catherine Bell & Robert K. Paterson eds., 2009).

¹² The Permanent Forum in Indigenous Issues is the central international co-ordinating body on indigenous peoples' issues. See <http://www.un.org/esa/socdev/unpfii/> [last accessed 20 May 2015].

¹³ Anderson, *Supra* note 1.

¹⁴ *Id.*; The problems for museums, libraries and other cultural collections are extensive and, depending on your perspective, fundamental. They involve questions about the origination (and legitimacy therein) of the collections as well as their treatment, and the effects of their archival treatment. See Henrietta Fourmile, *Who Owns the Past? Aborigines as Captives of the Archives*, 13 Aboriginal Hist. 1 (1989); Henrietta Fourmile, *Aborigines and Captives of the Archives: A Prison Revisited*, in ARCHIVES IN THE TROPICS: PROCEEDINGS OF THE AUSTRALIAN SOCIETY OF ARCHIVISTS CONFERENCE 1994 (1994); and Rebecca Tsosie, *Contaminated Collections: An Overview of the Legal, Ethical and Regulatory Issues*, 17 Collection Forum (2001) 14.

¹⁵ *Supra* Note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

THE INTERSECTION BETWEEN COPYRIGHT LAW AND INDIGENOUS ART

Modern Copyright law remains, till date, the best possible mechanism for protection of artistic works.¹⁹ However, it is equally true that international and domestic copyright regimes are based on western concepts of creation and invention, and ownership of such creations.²⁰ For instance, as a matter of generality, indigenous art or other forms of traditional cultural expressions are practiced and therefore, “owned” by families, who practice particular art forms through generations.²¹ Usually, the techniques and skills utilized for creating indigenous art form, is passed on from one generation to next generation, thus giving the community its own unique identity.²² Copyright Law, on the other hand, recognizes “ownership” over a single identifiable author, which may be a natural person, entity, a company or an organization.²³ However, this nodal requirement under copyright law creates difficulties for ascertaining “ownership” in indigenous art, as families or generations are involved.²⁴ Peculiarly, the individual nature of the copyright presents only one of the possible barriers to the protection of indigenous art and other forms of cultural expressions.²⁵

INDIVIDUAL NATURE OF THE COPYRIGHT LAW

In the Australian case of *Yumbulbul v. Reserve Bank of Australia*²⁶, epitomizes the conflict between individualistic inclinations of copyright law, and rights of indigenous peoples and communities, over their traditional expressions. In this case, an aboriginal artist, Terry Yumbulbul, sued the Reserve Bank of Australia because it had used the image of his sculpture on a new Australian ten dollar note issued to commemorate the bicentennial of the European settlement of Australia.²⁷ The Bank claimed that the artist, who had a valid copyright, licensed the Bank to use the image.²⁸ The artist claimed that he did not have the authority to grant such a license as approval was required, under traditional customary law, from the elders of the Galpu people, who whom the motif belonged.²⁹ Thus, under customary law, artworks are subject to layers of rights and many individuals may need to grant permission to use an image.³⁰ The Federal Court of Darwin dismissed the action. However, the Court also highlighted the inadequacy of Australia’s copyright laws to deal with community claims, and the need to recognize customary laws dealing with ancestral designs.³¹

THE REQUIREMENT OF ORIGINALITY

¹⁹ Rajat Rana, *Indigenous Culture and Intellectual Property Rights* 11 JIPR 132 (2006).

²⁰ *Id.* at 135.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 134.

²⁶ (1991) 21 IPR 481.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Under the tenets of copyright law, originality means and includes work that is a product of original thought, skill, or labour of the artist.³² Copyright Law does not require absolute novelty, unlike patent laws, where novelty as against prior art is one of the threshold requirements for securing protection under the law.³³ Under copyright law, as long as the work evidences individual skill, and labor of the author, it will satisfy the “originality” requirement.³⁴ Where a work is based on pre-existing work, it must demonstrate substantial, and not merely trivial variation.³⁵

However, when it comes to artworks of indigenous people, there is a mismatch between the originality requirement of copyright law and art forms practiced by the indigenous people. Art forms of indigenous people and communities have been evolved over a period of centuries, or even thousands of years.³⁶ Thus, innovation, as understood, under modern copyright law, does not find a place under indigenous art. Under indigenous art, faithful reproduction is valued and it functions as historical and sacred text, drawing from experiences borrowed from everyday life, and incorporating local customs and traditions. As a result, the variations in the production of traditional art are often limited, as the subject-matter remains, mostly restricted and transgressing from the themes to be depicted, is generally discouraged by the community practicing the art forms.³⁷ Indigenous artisans and craftsmen are expected to reproduce faithfully and accurately themes that have been practiced through generations.

In another Australian case of *Milpurrurru v Indofurn Pty Ltd*.³⁸, also known as the Carpet Case, decided by the Federal Court of Australia, the friction between copyright law’s insistence on the originality and the indigenous people’s emphasis on accuracy in reproduction was quite evident.³⁹ In this case, carpets reproducing the works of several prominent indigenous artists were discovered by the National Indigenous Arts Advocacy Association (NIAAA).⁴⁰ An action was brought against Indofurn, a Perth-based import company, which imported the carpets from Vietnam.⁴¹ In June 1992, after the production and importation of the carpets had commenced, Indofurn sought advice on copyright permission from the Aboriginal Legal Service of Western Australia.⁴² When the information was received and the artists were contacted, they refused to let their work be used in that manner and sought assistance from NIAAA to take action against the illegal importations. NIAAA consequently, commenced action.⁴³

³² *Supra* Note 19; *Alva Studios Inc. v. Winneger*, 177 F. Supp 265, 267 (SDNY 1959).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ (1994) 130 ALR 659.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

The main issue before the Court was whether there subsists any copyright in the indigenous artworks? In other words, the issue was whether a work incorporating pre-existing traditional designs and images was original and therefore subject to copyright protection.⁴⁴ The Court held that copyright of the aboriginal artists had been infringed.⁴⁵ The Court noted that the altered images on the carpets, although not identical to the artworks, were centrally important to that particular artwork. This factor was significant in leading the Court to conclude that copyright had been infringed.⁴⁶

Fixation Requirement

Indigenous authors have also argued that the fixation requirement is a barrier to protection for indigenous art. Copyright law usually requires that an expression be fixed in a tangible medium.⁴⁷ Often, alternative forms of indigenous art are not able to fulfill this requirement because art forms may never be fixed. Song and dance, for instance, may be passed down from generation to generation through memorization, but never be recorded in any tangible form.

Duration of Rights

The duration of rights poses a significant problem in the protection of the traditional cultural knowledge such as folklore. In all Berne Convention (as incorporated in the TRIPS Agreement) member states, the term of the protection is the life of the author plus fifty years.⁴⁸

Under Section 22 of the Copyright Act, 1957, the term of the protection lasts for a period of 60 years after the death of the author.⁴⁹ However, many indigenous arts date back to thousands of years, thus many indigenous rights advocates argue that perpetual protection should be granted to folklore because “protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time”⁵⁰

DEVELOPING REMEDIAL MEASURES TO ADDRESS NEEDS OF LOCAL COMMUNITIES

As seen from the above discussion, national and international copyright law regimes have failed to address the *sui generis* needs and legal grievances of the indigenous people, and thus, they continue to face problems in a myriad of areas, especially while dealing with non-indigenous people and third party interests.⁵¹ In view of the above, there is a glaring need to

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Canadian Admiral Corp. v. Rediffusion Inc.* (1954) Ex. CR 382 (Can.).

⁴⁸ Overview: the TRIPS Agreement, available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last accessed: July 4, 2015).

⁴⁹ Section 22, Copyright Act, 1957

⁵⁰ Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (UNESCO-WIPO) 1985, p. 22; Anderson, *Supra* note 1.

⁵¹ Anderson, *Supra* note 1.

develop alternative strategies and mechanisms, within or outside the purview of intellectual property law, which appropriately address the needs of local communities and enable better protection of their creative efforts. The current proposals maybe grouped into five categories, and they reflect the efforts made at policy, local, national, regional and international level of governance.⁵²

UTILIZING CURRENT INTELLECTUAL PROPERTY FRAMEWORK

Using Labeling or Trademarks as Protection devices

Labeling has proven to be most useful for indigenous products that are already operating within the marketplace as (cultural goods).⁵³ The use of labels works and labels function as an indication of the originality and/or authenticity of the products.⁵⁴ Labeling systems that denote a product's indigenous origin, either in the context or personhood, enable indigenous works to be more easily identified and differentiated from non-indigenous works and/or copies that may be available.⁵⁵

Certification marks, and marks of origination, can work well for indigenous people when the value of the product is tied to its derivation within a particular context or by a particular group.⁵⁶

For instance, in Australia, many indigenous communities use specific marks on their goods to signal consumers that the works originate from a particular community.⁵⁷ This lends specificity and distinct identity that each community has from one another.⁵⁸ Labeling, thus, is an effective tool to affirm and re-affirm distinctness to the community and attribute collective identity.⁵⁹

However, labeling cannot stop counterfeiting of indigenous products, it does provide and advantage in the marketplace since labels provide the consumer with the ability to differentiate fake from genuine goods.⁶⁰

Labeling, when reinforced, can affect the aesthetic appeal of the works, and thus, directly denigrate the value of the goods in the market. For instance, following a workshop run by an

⁵² *Id.*

⁵³ Anderson, *Supra* note 1; In Australia, for example, Aboriginal communities developed the Labels of Authenticity and in New Zealand the 'toiiho' is a registered trademark for products of Maori origin. Unfortunately both of these initiatives are no longer in operation, with the 'toiiho' mark most recently ceasing operation due to high administrative costs. See *Tangata Whenua, ToiIho To Be Scrapped* (Māori News & Indigenous Views), Oct. 23, 2009 (available at: <http://Notes 65 news.tangatawhenua.com/archives/1456>) (last accessed 13 January 2015). For a further discussion about the reasons leading to the demise of the Labels of Authenticity in Australia, see JANE E. ANDERSON, LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW (2009).

⁵⁴ Anderson, *Supra* note 1.

⁵⁵ *Id.*

⁵⁶ Anderson, *Supra* note 1.

⁵⁷ *Id.* at p. 29.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

NGO for labeling in Indonesia, many women collectively started to weave large identifiable labels (with names of the families or communities, to which the design belonged) into their works. This significantly altered the aesthetic value of the works and also affected their market value, and thus, the livelihood of the artists.⁶¹

Moral Rights

Moral rights address the relationship between the creators/artists/authors and their work. Thus, there have been suggestions that moral rights could offer an effective means for protecting indigenous people's rights that utilize or derive from indigenous knowledge.⁶² Moral rights generally involve the right of attribution, and one of the issues of indigenous artists, *inter alia*, has been limited or false attribution associated with these works.⁶³ However, there is yet to be a case that utilizes current moral rights attribution. Therefore, it is not yet clear how moral rights could alter, or provide some remedy for this kind of scenario.

Moreover, moral rights are ineffective, for example, if an indigenous work is not recognized as a legitimate copyright subject matter. Also, moral rights only protect the rights of individuals not of communities or collectives.⁶⁴

Nevertheless, moral rights could answer many indigenous people's requests to be named and associated with works in whatever context they appear.⁶⁵ In many situations, moral rights could address specific issues about naming and having control over the integrity of a work, although this can only happen when the work meets the criteria for copyright protection.⁶⁶

Confidential Information

Laws protecting confidential information or trade-secrets are varied according to legislations across the world; however, they may be an effective tool for protection indigenous knowledge.

For example, in two cases⁶⁷ of 1980s and 1990s, related to publication of the book, *Nomads of the Desert*, by Anthropologist Charles Mountford, which released significant and secret confidential information of the Pitjanjatjara people. While the anthropologist was well-aware about the sensitivity of the information, he refused to withdraw the book from sale. The first case led to an injunction against the sale of the book. The Court recognized the legitimacy of the claim and that the disclosure of the information had serious and potentially damaging consequences for community social structures.

⁶¹ *Id.* at p. 30.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Foster and Others v. Mountford and Rigby Ltd* (1976) 14 ALR 71.

However, this area has not been used very often. Also, there are sometimes difficulties in satisfying the key elements that constitute a breach of confidence of the claim, such as those set out in the TRIPS Agreement.⁶⁸

Limitations and Exceptions to Existing Legislation

One approach could be incorporating limitations and exceptions to existing legislations, such as Copyright law.⁶⁹ One exception that could be developed within copyright law is to recognize indigenous people as specific kinds of users of cultural material.⁷⁰ Indigenous people often find themselves in the position of not being the ‘legal owners’ or ‘authors’ of their works, it is thus, important, that indigenous people are recognized as different kind of user group.⁷¹

This however, requires precise definitions, regulation and monitoring.⁷²

PROPOSALS OUTSIDE THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW

Protocols

Over the last ten years, there has been a steady increase in the development of protocols to deal with the issues of access, control and ownership of indigenous knowledge.⁷³ In general, protocols can be understood as context-driven policy.⁷⁴ They can be developed to address specific problems and provide guidance in relation to appropriate behaviour when it is required. Protocols can incorporate community perspectives and be targeted to particular issues. For example, protocols have been developed for libraries and archives, for visual artists, and for collaboration between filmmakers.⁷⁵ Protocols have become an important tool for changing attitudes and behaviour around indigenous knowledge access, use and management.⁷⁶

⁶⁸ Art. 39, TRIPS.

⁶⁹ Anderson, *Supra* note 1.

⁷⁰ *Id.* at p. 34.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Australia has led the way in the creation of cultural protocols, especially in the context of the arts and media. *In general*, see the work of Teri Janke and the Australia Council. See also http://www.abc.net.au/indigenous/education/cultural_protocol/resources.htm (last accessed July 15, 2015). The Hopi Tribe has an established set of protocols for researchers, see <http://www.nau.edu/~hcpo-p/hcpo/index.html> (last accessed: July 15, 2015). See also the Protocols for Native American Archival Materials, <http://www2.nau.edu/libnap-p/protocols.html> (last accessed: July 15, 2015).

⁷⁴ Anderson, *Supra* note 1, at 65.

⁷⁵ See, for example, Australian Library and Information Association, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services* (endorsed at the Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSLIRN) conferences, December 1994 and September 1995), available at http://www1.aiatsis.gov.au/atsilrn/protocols.atsilrn.asn.au/index0c51.html?option=com_frontpage&Itemid=1 (last accessed July 15, 2015).

⁷⁶ Anderson, *Supra* note 1.

They can be used to set community standards around knowledge circulation and use for outsiders as well as help change attitudes and set new standards.⁷⁷ Generally, protocols are flexible and can change over time.⁷⁸ It is important to see them as tools to help achieve certain goals that other areas of law have been unable to fulfil.⁷⁹ As formal or informal guidelines for behaviour, protocols can help build relationships and make new ones possible.⁸⁰

Sui Generis Legislation

Owing to the perceived difficulties of building new mechanisms that directly address indigenous peoples' needs and expectations about knowledge use and control within the current intellectual property law framework, suggestions for an altogether different approach have been made.⁸¹ *Sui generis* law means of its own kind, that is, it is a unique law complete unto itself and often created when current and existing laws are inadequate.⁸²

A significant issue in this area is that indigenous peoples must be constantly translating and transplanting their concepts into frameworks of rights that are not necessarily appropriate or that may not address their expressed needs.⁸³ To the extent that indigenous knowledge can be protected through laws of intellectual property, this is only possible through concepts including property, ownership, works, monopoly privilege, exclusive rights, originality and individual authorship.⁸⁴ Proposals for *sui generis* legislation for the protection of indigenous knowledge and indigenous rights are slowly being crafted.⁸⁵ Countries like Peru and Panama have been at the forefront of developing national *sui generis* legislation.⁸⁶

⁷⁷ *Id.* at p. 38; The word protocol derives from the Greek *protokollen* – meaning ‘table of contents’ or ‘first sheet.’ It is also understood to refer to the first sheet glued into a book to help direct or provide guidance to a reader in interpreting the document. The use of the word protocol in the contexts of indigenous peoples follows these very early understandings of the term – especially as the point of cultural protocols are to provide preliminary directions for conduct and/or behavior for those who might not know or have access to the appropriate rules. A protocol sits somewhere between formal law, regulation and policy. It is mainly informal but can be made formal. It is a very useful device for mediating behavior in and across culturally different contexts.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*; The success of the Internet Protocol in creating a form of governance for the Internet raises interesting points of similarity and convergence with the interests of indigenous people. Useful parallels can be drawn here. A helpful initial text focusing on protocols in the Internet context is ALEXANDER R. GALLOWAY, PROTOCOL: HOW CONTROL EXISTS AFTER DECENTRALIZATION (2004).

⁸¹ Anderson, *Supra* note 1.

⁸² Examples of *sui generis* legislation in relation to traditional/indigenous knowledge include the USA Indian Arts and Crafts Act 1990; Panama Law No. 20 (June 26, 2000) and Executive Decree No. 12 (March 20, 2001). Another example of *sui generis* legislation relating to indigenous peoples' rights is the Australian Native Title Act 1993.

⁸³ Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* : Issues Paper, Duke University School of Law Center for the Study of the Public Domain, released under a Creative Commons Attribution-NonCommerciaL-ShareAlike 3.0 Unported License.

⁸⁴ *Id.* at p. 44.

⁸⁵ TERRI JANKE, OUR CULTURE: OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS (1998).

⁸⁶ *Id.* at 45.

There is often confusion about *sui generis* legislation, particularly in relation to how it does or does not fit into an intellectual property regime.⁸⁷ The benefit of *sui generis* legislation is that it in no way has to resemble any current law, intellectual property or others.⁸⁸ Thus it offers an opportunity for participation by indigenous people and flexibility in developing frameworks that deal with knowledge control, use and sharing.⁸⁹

CONCLUSION: FUTURE POSSIBILITIES, ALTERNATIVES AND SOLUTIONS

Fundamental changes in the political will of the nation states and commercial attitudes are required on how we conceptualize indigenous art, how we share, use and appreciate the various traditional art forms.

There is an urgent need to for development of frameworks that embrace and embolden indigenous people's perspectives and participation in the law and legal systems and their interests in their own works. Not only is the development of these frameworks important for the welfare and protection of the indigenous people's themselves, but also the preservation of the unique identities and personalities of the diverse groups of people that inhabit the nations of the world. The unique culture, heritage expressed through art lends identity to a particular country itself.

One of the possible ways to reconfigure the existent intellectual property framework, which has hitherto excluded their interests, so that there is greater participation, collaboration and partnership of the indigenous people's themselves. Greater participation of the indigenous people themselves could be achieved by facilitating networks between indigenous people and local communities. This would facilitate better understanding of their problems, which are first hand experiencing problems across the spectrum of intellectual property and indigenous knowledge issues.

Moreover, there is a necessity to develop appropriate and practical industry guidelines, codes of conduct and/or ethical guidelines for the use of indigenous information. This complements the development of practical guidelines for institutions, universities, independent researchers and artists in the collection, documentation and archiving of indigenous knowledge.⁹⁰

There is an urgent need for an international alternative dispute resolution body for commercial and non-commercial disputes involving intellectual property and indigenous knowledge.⁹¹ Such a dispute resolution body must include indigenous peoples' involvement from the outset and develop the capacity to respectfully and appropriately engage with indigenous peoples and indigenous concerns, especially as these may involve ethical, political, and/or historical dimensions.⁹²

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Anderson, *Supra* note 1.

⁹¹ *Id.*

⁹² *Id.*

There is currently no dedicated service providing practical advice, information, suggestions and contacts for indigenous peoples and communities across the range of intellectual property issues that are emerging.⁹³ Priority should be given to establishing an international resource/education centre on indigenous/traditional knowledge and should include regional offices that would provide easier access to its resources.⁹⁴

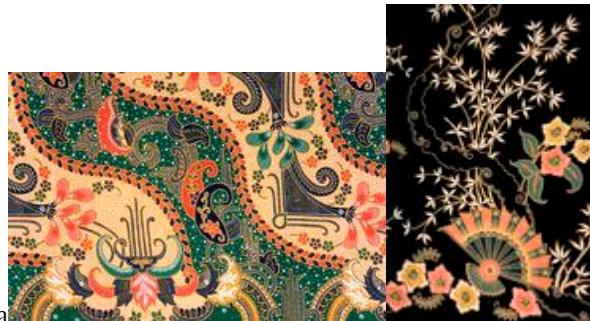
As one commentator states⁹⁵, advancing indigenous peoples' interests in intellectual property should not only be the responsibility of indigenous peoples since the issues are complex and the situation is complicated by history and politics. It is ironic that this is an area where innovation and imagination within intellectual property law must, most critically, emerge.

⁹³ Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* : Issues Paper, Duke University School of Law Center for the Study of the Public Domain, released under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported License.

⁹⁴ *Id.*

⁹⁵ *Supra* Note 83.

Case Study I



Batik Designs from Indonesia

(Image source: <http://www.dreamstime.com/photos-images/indonesian-batik-sarong.html>)

What is Indonesian Batik?

Dating back to thousands of years, Indonesian Batik is wax-resist cloth dyeing technique, historically based in Solo, Java. The Indonesian Batik cloth dyeing technique is the most intricate and highly developed art form, in terms of designs and workmanship, and has been practiced through generations among families in Indonesia. Indonesian Batik consists of a variety of techniques and patterns. Moreover, these patterns and techniques are infused with stories and meanings not readily apparent to the outsiders or people who purchase the Batik Cloth.

Recognized as a traditional art form by the Indonesian government, it sought to protect its indigenous art forms, including, Batik by developing a new legislation over the last five years, due to increasing instances of unauthorized reproduction of these designs over the last few years, within Indonesia and other neighbouring countries.

Strategy Adopted by the Government for its protection:

On a local level, the municipal government of Solo developed a system of design patents for the traditional arts. This program entails the registration thousands of batik designs with the local government office. Therefore, if the batik makers or outsiders wish to use these designs, permission needs to be taken from the local government office. To obtain registration, a fee is charged. “Ownership” of the registered design is then assigned to the company or family of producers which has registered the design with the government office.

Efficacy of the Strategy: Advantages and Loopholes

However, this strategy is not free from bottlenecks. Firstly, not all families can afford the registration fee, or the accompanying fee for using the designs. This, in turn, leads to hierarchy of access to the batik practice within the community. Thus, the registration process gives privileges to some producers over others.

DYNAMICS OF CORPORATE GOVERNANCE AND SOCIAL RESPONSIBILITY

Dr. C. P. Gupta*

INTRODUCTION

21st century civilization is marked by one of the greatest invention of mankind is Joint Stock Company. It is this very invention which is playing a major role in eroding the geographical boundaries of nations across the globe. As the mankind is making strides with the help of this very invention, care is also being taken that these organization fulfill this Objectives in the best possible manner. Today's company affects the average citizen's life directly and indirectly, in many ways he be its share-holder, employee, supplier, dealer, and customer and even if none of these, his life may still be affected by what the company does eg. Pollutions that its plant may create by the company's impact as the general economy. Thus proper governance of modern company's is legitimate social concern expressed these in both the undeveloped and the developing countries.

Corporate governance is considered as a system by which companies are directed and controlled. It is a set of standards which aims to improve the company's image efficiency, effectiveness and social responsibility. Sustainability ensures the long term financial and economic viability of corporate investments and requiring compliance with minimum environmental viability and social standards. This issue of corporate social responsibility is an integral part of corporate strategy, planning and operational performance for profitability should not be sole criteria of vision and vital factor in judging the company's performance but corporate should also focus on the responsibility towards society at large, corporate social responsibility is the commitment of business to contribute to sustainable economic development, working with the employees, their families, the local community and society at large to improve their quality of life including human rights, workers right, suppliers relationship etc.

Corporate Governance is a phrase which implies transparency of management systems in business and industry, be it private sector or public sector - all of which are corporate entities.

Corporate Governance is a set of standards, which aims to improve the company's image, efficiency, effectiveness and social responsibilities. In the words of Naresh Chandra' Former Cabinet Secretary, Maintaining governance standards requires accountability at all levels of management. Hence corporate conduct and culture, based on attributes of self-regulation and openness contribute most to the essence of corporate governance. In the present scenario of globalization and liberalization, the corporate sector at national and international level has no way but to seriously and continuously strive for 'Excellence in Corporate Governance" to the maximum possible extent. In this article an attempt has made to show how the concept of Corporate Governance has developed over a period of time at the national and international level and what direction will it take in the future.

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CONCEPT

The concept of ‘Corporate Governance’ has been defined at national and international level in various perspectives, some of which are reproduced as follows: ‘Corporate Cadbury Committee, U.K. has defined the term in the following manner. It is the system by which companies are directed and controlled.’ The committee also mentioned that ‘the role of corporate governance is to ensure that the directors of a company are subject to their duties, obligations and responsibilities, to act in the best interest of their company, to give direction and to remain accountable to their shareholders and other beneficiaries for their actions.

The Kumara Mangalam Birla Committee constituted by SEBI has observed *‘strong corporate governance is indispensable to resilient and vibrant capital markets and is an important instrument of investor protection. It is the blood that fills the veins of transparent corporate disclosure and high quality accounting practices. It is the muscle that moves a viable and accessible financial reporting structure.’*

After observing the above mentioned definitions, it can be said that corporate governance is concerned with the ethics, values and morals of a company, its directors and with the ways of bringing the interests of investors and management in tandem and to ensure that their interests are best served. Corporate governance practices promotes the conducting the affairs of a company in such a manner that ensures fairness to customers, employees, shareholders, fund providers and the society as a whole. Thus, the key aspects of good corporate governance include transparency of corporate structures and operations. The accountability of managers and the boards to shareholders and corporate responsibility towards stakeholders.

Major Developments at International Level the concept of Corporate Governance took roots in countries like US and UK and have subsequently spread to other countries. After 1990, the transition from central planning to market driven economies, particularly the privatization of state-owned companies, and the need to provide governance rules for the emerging private sector, brought the issue of corporate governance to the centre stage.

In the view of Sir Adrian Caebury, a code of corporate governance cannot be imported from outside; it has to be developed based on the country’s experience. There cannot be any compulsion on the corporate sector to follow a particular code. Equilibrium should be struck so that corporate governance is not achieved at the cost of the growth of the corporate sector.

Sarbanes-Oxley Act is a US law passed in 2002 to strengthen corporate governance and restore investor confidence. The Act was sponsored by US Senator Paul Sarbanes and US Representative Michael Oxley. Sarbanes-Oxley law passed in response to a number of major corporate and accounting scandals involving prominent company's in the US. These scandals resulted in a loss of public trust in accounting and reporting practices. In July 2002, the Sarbanes- Oxley Act popularly called ‘SOX’ was enacted. The Act made fundamental changes in virtually every aspect of corporate governance and particularly in the matters of auditor independence, conflict of interest, corporate responsibility and enhanced financial disclosures.

DEVELOPMENTS

United Kingdom - Hampel Report

The Hampel Committee was constituted in UK in 1995. The task of this committee was to consolidate the recommendations of the Cadbury Report in 1992 (focusing on financial reporting) and the Greenbury Report in 1995 (focusing on directors remuneration), and prepare a ‘Combined Code’ on corporate governance. The Code, published in 1998, was attached to the listing rules of the stock exchange with the requirement that in order to be listed, companies must either declare their adherence to its provisions or explain any deviation from them.

Higgs Report: Review of the role and effectiveness of non-executive directors. In April 2002 the Secretary of State (UK), Patricia Hewitt, and the Chancellor, Gordon Brown, appointed Derek Higgs to lead a short independent review of the role and effectiveness of non-executive directors. Derek Higgs published his report on 20th January 2003. The report reviewed the role and effectiveness of non-executive directors in the UK. The report includes: guidance for non-executive directors, guidance for chairmen and a proposal for a revised combined code. The Government warmly welcomed the recommendations of the Higgs Review.

The Combined Code on Corporate Governance. This UK based code supersedes and replaces the Combined Code issued by the Hampel Committee on Corporate Governance in June 1998. It is derived from a review of the role and effectiveness of non-executive directors by Derek Riggs and a review of audit committees by a group led by Sir Robert Smith.

United States: Blue Ribbon Report

Blue Ribbon Committee was set up by the Securities and Exchange Commission, in 1998. In February 1999, the Committee published the Report on Improving the Effectiveness of Corporate Audit Committees. The recommendations of the Blue Ribbon Committee were adopted and declared to be mandatory by the NYSE, the American Stock Exchange, Nasdaq and the American Institute of Certified Public Accountants. The recommendations are not mandatory for foreign issuers: these are subject to their own national laws.

Global Governance Principle

With the goal of encouraging a continual debate on best governance practices globally, in 1997 CalPERS’ Board adopted a set of Global Governance Principles. In late 1999, the CalPERS Investment Committee analyzed other newer global governance principles and with the goal of supporting a single set of global governance principles, the Investment Committee revised CalPERS Global Governance Principles to parallel the International Corporate Governance Network’s statement on Global Governance Principles.

The International Corporate Governance Network (ICGN) was founded with the objective to facilitate international dialogue and thereby helping companies to compete more effectively. The ICGN welcomed the OECD Principles as a remarkable convergence on corporate

governance common ground among diverse interests, practices and cultures. While the ICGN considered the OECD Principles the necessary bedrock of good corporate governance, it held that amplifications were required to give them sufficient force.

Europe: The European Corporate Governance Institute

The European Corporate Governance Institute (ECGI) was founded in 2002. It has been established to improve corporate governance through fostering independent scientific research and related activities. ECGI is founded on the ground that corporate governance is the basis of accountability in companies, institutions and enterprises, balancing corporate economic and social goals on the one hand with community and individual aspirations on the other. A proper governance framework is of fundamental importance in strengthening the performance of economies, in particular those in development and transition, and helping to discourage fraud and mismanagement.

South Africa: King Committee On Corporate Governance

The King Report on Corporate Governance for South Africa has been developed as an initiative of the Institute of Directors in Southern Africa. It represents a revision and update of the King Report first published in 1994, in an attempt to keep standards of corporate governance in South Africa in step with those in the rest of the world. All companies listed on the Johannesburg Stock Exchange have to comply with the provisions of the Report.

Australia: ASX Corporate Governance Council Report

On 15 August 2002, the ASX Corporate Governance Council was formed in Australia with the objective of developing and delivering an industry-wide. Supportable and supported framework for corporate governance. In March 2003, the ASX Corporate Governance Council released Principles of Good Corporate Governance and Best Practice Recommendations. Compliance with the recommendations was not mandatory, except for the recommendations dealing with Audit Committees, but from 2004 listed entities are required to report in their annual report on whether they have complied during the year the subject of the report, or if not the reasons for that.

CORPORATE GOVERNANCE - INDIAN DEVELOPMENTS

In India, a small beginning was made by the Confederation of Indian Industry (CII) in the field of good corporate governance which is explained below. Thereafter, various committees have been constituted to give recommendations in this regard viz.. Kumar Manglam Birla Committee, Naresh Chandra Committee, Narayana Murthy Committee etc. All these efforts focused the attention of the Indian corporate sector, on the imperative need to evolve new norms of governance to sustain and develop Indian industries on healthy lines and to constitute the corporate boards in such a manner that they manage the affairs of the corporate body with better accountability to shareholders and achieve transparency of operations with disclosure of both financial and non-financial data through annual and other periodical reports.

CONFEDERATION OF INDIAN INDUSTRY (CII)

In 1996, CII took a special initiative on Corporate Governance, the theme of such initiative was to develop and promote a code for Corporate Governance to be adopted and followed by Indian Company's, be it in the Private Sector or Public Sector, Banks or Financial Institutions, all of which are corporate entities. A National Task Force was set up with Mr Rahul Bajaj, as the Chairman and including members from industry. The legal profession, media and academia. This Task Force presented the draft guidelines and Code for Corporate Governance in April 1997 at the National Conference and Annual session of CII. After reviewing the various suggestions and the developments which have taken place in India and abroad, the Task Force finalized the Desirable Corporate Governance Code.

The next development is constitution of a committee by 'Department of Company Affairs' (DCA), headed by Shri Naresh Chandra, on August 21,2002. to examine various issues of corporate governance relating to statutory auditor- company relationship, rotation & statutory audit firm or partners, appointment of auditors and determination of audit fees, independence of auditing functions, certification of accounts and financial statements by management and directors role of independent directors etc. Many recommendations of the report were incorporated in the Company's (Amendment) Bill 2003, which is currently being reviewed.

Thereafter, SEBI constituted another committee called 'Narayana Murthy Committee' under the Chairmanship of N.R. Narayana Murthy comprising 23 persons, which included representatives from the stock exchanges. Chamber of Commerce, industry, investor associations and Professional bodies, for reviewing implementation of the corporate governance code by listed companies. Many of the recommendations made by such committee have been included in the revised Clause 49 of the Listing Agreement. The Narayana 'Murthy Committee attempted to promulgate an effective approach for successful corporate governance. The Committee submitted its final report on February 8, 2003. Corporate governance is beyond the realm of law. It stems from the culture and mindset of management and cannot be regulated by legislation alone. Corporate governance deals with conducting the affairs of a company such that there is fairness to all stakeholders and that its actions benefit the greatest number of stakeholders. It is about openness, integrity and accountability. What legislation can and should do, is to lay down a common framework- the form to ensure standards. The substance will ultimately determine, the credibility and integrity of the process. Substance is linked to the mindset and ethical standards of management.

MINISTRY OF COMPANY AFFAIRS

The Ministry of Company Affairs has also amended Company's Act at short intervals for bringing improvements in the corporations functioning various provisions concerning corporate governance has been inserted in the Company's Act, the duties and responsibilities of the directors in the company's as a step to improve the corporate governance. Subsequent to the passing of the Company's (Amendment) Act, 2000, Company's (Amendment) Act,

2002 and Company's (Second Amendment) Act, 2002 were passed. These Acts too have dealt with some aspects of corporate governance.

THE SECURITIES AND EXCHANGE BOARD OF INDIA

The major changes in the new clause 49 include amendments/additions to provisions relating to definition of independent directors, strengthening the responsibilities of audit committees. Improving quality of financial disclosures, including those related to related party transactions and proceeds from public/rights/preferential issues, requiring Boards to adopt formal code of conduct and requiring CEO/CFO certification of financial statements. etc. Such a step, if properly implemented, will go a long way towards ensuring good governance practices in Indian Corporate Sector.

THE INSTITUTE OF COMPANY SECRETARIES OF INDIA (ICSI)

The vision of ICSI is to be a global leader in development of professionals specializing in Corporate Governance. For promoting good corporate governance the mission of ICSI is to continuously develop high caliber professional ensuring good corporate governance and effective management and to carry out proactive research and development activities for protection of interest of all stakeholders thus contributing to public good. ICSI defines Corporate Governance as, the application of best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility, for sustainable development of all stakeholders”.

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

In the developed nations, high quality accounting standards reduce uncertainty and increase overall efficiency and investor confidence. The Accounting Standards issued by The Institute of Chartered Accountants of India (ICAI) serve this objective. The ICAI has issued 29 Accounting Standards covering, inter alia, disclosure of accounting policies, valuation of inventories, amalgamation, interim financial reporting, financial reporting of interest in joint venture, related party disclosures etc. Such accounting standards are based on the generally accepted accounting assumptions of going concern, consistency and accrual basis.

NATIONAL FOUNDATION FOR CORPORATE GOVERNANCE

Recently, the Ministry of Company Affairs has decided to have an umbrella agency of corporate governance which will set non-binding standards in line with the principles developed by the Organization for Economic Co-operation and Development (OECD). This is to advocate the ‘spirit’ of governance to the industry, which sometime gets lost as company's follow the market regulator's norms by the letter.

CONCLUSION

Good Corporate Governance is truly the need of the hour. The objective of corporate governance is not only to protect but also to enhance shareholder value, keeping in view the interest of other stakeholders & social responsibility. It is rightly said that corporate governance is a philosophy which touches every facet of the functioning of a corporate and its stakeholders. It is not an end in itself but a means to practice and bring about corporate democracy at all levels of the corporate entity.

Given this, corporate governance is now being increasingly recognized as an important aspect of sustainable economic growth & social responsibility. Strong corporate governance is critical for promoting growth, improving access to low-cost capital, ensuring appropriate risk management, and increasing overall productivity and competitiveness of the economy. In a world of highly integrated capital markets, it becomes imperative for individual countries to take constant initiatives in this regard and benchmark their corporate governance practices to the best corporate governance practices. Global best practices because of their characteristics like, adequate disclosures, focused approach, compliance with the laws etc. become sine qua non in the corporate for healthy growth of capital markets. Such practices increases the confidence levels of investors and in turn help corporate to access capital markets for their financial needs.

The Indian economy is going through a major transformation. Second phase of liberalization of the domestic economy as well as its globalization. On one hand these reforms have given freedom to management while on the other hand also put greater social responsibilities on them. The present scenario demands serious and continuous strive towards 'Excellence in Corporate Governance' by constantly improving and adopting business ethics at all levels.

The importance of maintaining high ethical standards by the corporate sector for ensuring its long term sustainable growth has been universally accepted. It is now a fact that a majority of investors factor in corporate governance when making investment decisions. This is a powerful argument for companies to seek excellence in corporate governance. It is in this context that the development of best practices of corporate governance and rating of companies is increasingly becoming very relevant'

Reviewing the progress made so far in India, many things have been done which have contributed in promoting the good corporate governance practices in Indian Corporate Sector, such as, various rules and regulations have been incorporated in the laws and statutes related to the corporate sector, several seminars, conferences and meetings are also conducted on such topics by various forums and various articles have been written and published in this connection. But these are all efforts towards preaching the benefits of corporate governance. When it comes to implementing the rules in practice, it is observed that such rules and regulations have remained on papers only and many companies are just following such rules in a very formal way. The need of the hour is to take some confidence building measures unilaterally to demonstrate that corporate governance is being followed in spirit and does not need regular impetus through legislations. These measures should aim to improve investor confidence, display courtesy, motivate devotion towards work and organization, encourage team spirit & social responsibility.

To make the mission of corporate governance meaningful the Board of Directors is desired to adopt a radical change in their perceptions. Company Directors in their new role as Corporate governors have to raise themselves above the personal urge and aptitude. They have to promote co-ordinations among various components of the organization for the long term survival, growth and prosperity of such organization. It has been rightly said that unless an atmosphere is generated to make the governing team enthusiastic and make them aspire for social responsibility, merely trying to ensure efficient corporate governance by amending the Company's Act. or enacting clauses like Clause 49, revising and rerevising it are all going to be hollow and ineffective exercise.

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LEGAL CENTRIC ANALYSIS ABOUT SPECIAL ECONOMIC ZONES IN INDIA

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The present paper deals with Special Economic Zones (SEZs) in Indian context. At the outset a general introduction of SEZ is given along with its objectives and entities involved in it. Then legislative framework for Special Economic Zones in India with reference to Act, Rules and authorities have been discussed and after that the procedure to set up SEZ and operations within it has been discussed. At last some issues like land acquisition, labour legislations etc. have been discussed that ends with concluding remarks.

INTRODUCTION

The Special Economic Zones play a significant role in the development of commerce and industry along with trade, as a result it is an instrumental in creation of the jobs as well as overall economic development of a nation and it increases its participation at international domain. In this context it is pertinent to mention that, India was the first country in Asia to recognize the effectiveness of Export Processing Zone (EPZ) model in promoting exports, and it established EPZ in *Kandla* in the year 1965,¹ although it was not the same as SEZ with respect to legislative framework, incentives and overall activities.² So before we discuss about SEZ it is pertinent to have some idea about it. To start it first we have to conceptualize it.

CONCEPTUALIZING SEZ

In order to have a better understanding about SEZ, it is proposed to conceptualize the meaning and types of SEZ. In general terms “*special economic zone is typically an enclave of units operating in a well-defined area within the geographical boundary of a country where certain economic activities are promoted by a set of policy measures that are not generally applicable to rest of the country.*”³ Basically set of fiscal and non-fiscal incentives are extended to SEZs to achieve the object.⁴ It is pertinent to mention here that, there are various types of SEZs depend on the nature or type of work which they perform like: Sector Specific SEZ, Multi-Product SEZ etc. Despite of the nomenclature, whatsoever type of SEZ were in existence before the commencement of the Act, they had option to change into SEZ to avail

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¹ Special Economic Zones in India, <http://sezindia.nic.in/about-introduction.asp> (last updated Sep. 15, 2015).

² From 1965 till 1999 various export processing zones were in India but they were not effective due to various reasons and in which major reason was the inward looking approach of government itself where opportunities were not extended to private and other players in this field. When the then Union Commerce and Industry Minister, late Murasoli Maran visited China then he was really influenced by the model of SEZ as it was there.

³ ARJYA B MAJUMDAR, SPECIAL ECONOMIC ZONES: POLICY AND PROCEDURE 1-3 (1ST ed. 2009). In simple terms we can say that SEZ means specifically demarcated area consisting of units subject to special laws that normally do not apply to rest of the country.

⁴ The object of the SEZ Act, 2005 is to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.

the benefits. That is why most of them have been changed like: Kandala SEZ, Noida SEZ, Falta SEZ etc. and many new SEZs came into existence.⁵ This is because of the *tangible*⁶ and *intangible benefits*⁷ which are attached to it.

As we have already mentioned the object of the Act is, “*establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.*”⁸ To achieve above-mentioned objectives basically there are three entities which are involved within SEZ. These are *Developer*⁹, *Co-developer*¹⁰ and *Unit*¹¹. As per the legislative provisions they can’t start to work as developer, co-developer and unit till the moment Letter of Approval (LOA) has not been granted to them for the mentioned purpose/purposes.

LEGISLATIVE FRAMEWORK

SEZs in India basically govern by the Special Economic Zones Act, 2005 and the Special Economic Zones Rules, 2006 as amended as and when required¹², SEZ notifications, SEZ instructions, SEZ press notes and various State SEZ laws. It is not possible to have a look of all these at this juncture, but it would be beneficial to have an overall idea about the Act. The Act consists of 8 chapters having 58 sections.¹³ There are three Authorities under the Special Economic Zones Act, 2005 which are basically responsible for establishment, development

⁵ For details refer, <http://sezindia.nic.in/index.asp> (last updated Sep. 16, 2015).

⁶ There are various tangible means direct or apparent benefits attached with the *establishment, development and management of the Special Economic Zones* like contribution in the GDP along with increment in the State’s GDP, development of world class infrastructure or we can say contribution in the upliftment of standard of living and the employment generation which is one of the most crucial task before the government which is supposed to be done by SEZs basically on the basis of PPP model.

⁷ There are various intangible means indirect benefits which are associated with tangible benefits like: transformation from rural towards urban societies, healthy competition which is important for consumers, technical advancements etc.

⁸ Supra note 5

⁹ As per Section 2(g) of the *Special Economic Zones Act, 2005* Developer means, “*a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of Section 3 and includes an Authority and a Co-Developer.*”

¹⁰ As per Section 2(f) of the *Special Economic Zones Act, 2005* Co-Developer means, “*a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (12) of Section 3.*”

¹¹ As per Section 2 (zc) of the *Special Economic Zones Act, 2005* Unit means, “*a Unit set up by an entrepreneur in a Special Economic Zone and includes an existing Unit, an Offshore Banking Unit and a Unit in an International Financial Services Centre, whether established before or established after commencement of this Act.*”

¹² In exercise of the powers conferred by Section 55 of the Special Economic Zones Act, 2005 (28 of 2005), the Central Government framed and announced the Rules which were recently amended in 2010 deal with procedural aspects regarding SEZs in India.

¹³ Chapter I of the *Special Economic Zones Act, 2005* i.e. Preliminary (Section 1-2), Chapter II deals with establishment of SEZ (Section 3-7), Chapter III deals with constitution of board of approval (Section 8-10), Chapter IV deals with development commissioner (Section 11-12), Chapter V deals with single window clearance (Section 13-25), Chapter VI deals with special fiscal provisions for SEZs (Section 26-30), Chapter VII deals with SEZ Authority (Section 31-41) and Chapter VIII deals with miscellaneous issues (Section 42-58).

and management of SEZs in India. These are Development Commissioner¹⁴, Board of Approval¹⁵ and Approval Committee¹⁶.

SETTING UP SEZ

There are various types of Special Economic Zones like: Free Trade Zones (FTZ), Export Processing Zone (EPZ), Enterprise Zone, Single Factory, Free Ports and Specialized Zone etc.¹⁷ They differ in purposes to be achieved and the incentives which are provided to them by the government to achieve those objectives. But this classification is not adopted in the Act in lieu of it, Act deals with Sector Specific SEZ, Multi Product SEZ and other SEZS. The Rule 5 of SEZ Rules, 2006 deals with minimum area requirement such as in case of multi-product SEZ 1000 Hectares, Sector-specific SEZ 100 Hectares etc¹⁸. These requirements are different in the case of Assam, Meghalaya, Nagaland, Arunachal Pradesh, Mizoram, Manipur, Tripura, Himanchal Pradesh, Uttaranchal, Sikkim, Jammu and Kashmir, and Goa or in a Union Territory¹⁹.

Here it is pertinent to mention that, when we are dealing with land requirement, as per Section 6 of the Act read with rule 11(10), total area which is supposed to be notified in the name of SEZ is further required to be demarcated into two distinct areas viz. processing and non-processing area.²⁰

PROCEDURE FOR SETTING UP SEZ (DEVELOPER/CO-DEVELOPER/UNIT)

Any person who intends to set up an SEZ may approach either the State Government {Section 3(1) of the Act} or the Board of Approval (BOA) {Section 3(2) of the Act} directly²¹. It means person is having two options at his discretion but in the case when application is forwarded to BOA first then concurrence of State Government is required within six months of formal approval and if application has been forwarded to State Government first then the same must be forwarded to BOA within 45 days of acceptance.

¹⁴ As per Section 2(h) of the *Special Economic Zones Act, 2005*; Development Commissioner means, “the Development Commissioner appointed for one or more Special Economic Zones under sub-section (1) of section 11.”

¹⁵ As per Section 2(e) of the *Special Economic Zones Act, 2005*; Board means, “the Board of Approval constituted under sub-section (1) of Section 8.”

¹⁶ As per Section 2 (b) of the *Special Economic Zones Act, 2005*; Approval Committee means, “an Approval Committee constituted under sub-section (1) of section 13.”

¹⁷ P. Pakdeenurit, N. Suthikarnnarunai Member, IAENG, and W. Rattanawong, *Special Economic Zone: Facts, Roles, and Opportunities of Investment*, available at

http://www.iaeng.org/publication/IMECS2014/IMECS2014_pp1047-1051.pdf (last updated Sep. 18, 2015).

¹⁸ See for details, Rule 5 i.e. *Requirements for establishment of a Special Economic Zone*, available at http://sezindia.nic.in/writereaddata/rules/SEZ_Rules_July_2010.pdf (last updated Sep. 19, 2015).

¹⁹ ibid

²⁰ As per Section 6 of the *Special Economic Zones Act, 2005*: the areas falling within the Special Economic Zones may be demarcated by the Central Government or any authority specified by it as-

(a) the processing area for setting up Units for activities, being the manufacture of goods, or rendering services; or

(b) the area exclusively for trading or warehousing purposes; or

(c) the non-processing areas for activities other than those specified under clause (a) or clause (b).

²¹ *supra* note 4, at 26

Now BOA may accept the proposal or reject it. But in case of rejection reasons are supposed to be given in writing (application of natural justice). In case of acceptance procedural requirements are supposed to be fulfilled like possession of land etc. but if these are not fulfilled till date still *in principle approval* may be issued on the satisfaction of BOA. This approval may be without modification in proposal or with modification. As the case may be after that it shall be forwarded to Central Government for the issuance of Letter of Approval (LOA). At this stage developer is supposed to furnish relevant information about the area of land and on satisfaction with furnished information Central Government notifies that area of land as an SEZ. The effect of such notification is that after notification of that notified area is not considered as a part of nation for economic measures or for reasons mentioned under Act and rules prescribed there under.

For setting up SEZ Unit proposal (in the form of consolidated application consists of various documents required to be checked for permission) for the same is submitted to the concerned development commissioner and the same is forwarded to the approval committee by development commissioner after initial scrutiny. While applying the principle of natural justice such proposal may be accepted or rejected by approval committee. In the case of rejection aggrieved party may file appeal to the Board of Approval.

MAJOR OPERATIONS WITHIN SEZ

The establishment of SEZ is mostly aimed to attract the investment from the foreign countries and enhance the growth of the country.²² It is possible only either by reduction or relaxation of various rules and regulations which are generally applicable across the country. A brief discussion is done under following heads:

Labour practices: After the wave of industrialization across the world labor practices have been evolved as major area of concern. In this context there are two enactments namely: Industrial Disputes Act, 1947 and Contract Labour (Regulation and Abolition) Act, 1970 which play crucial role to set a bargaining system in India. Now with respect to SEZs in India former law is applicable but the powers which are supposed to be exercised by concerned labor commissioner may be delegated to the concerned development commissioner and the effect of such delegation is that it speeds up process of dispute resolution. Another important point in this context is that, the state government may declare the activities in SEZ as Public Utility Services. This would mean that by virtue of Section 22 of the Industrial Disputes Act, 1947 all strikes in an SEZ without due compliance would be deemed as illegal²³.

Supply of goods from DTA: Under this head it is already discussed while conceptualizing SEZ (notified area of land) that it is not considered as a part of nation. So movement of goods from Domestic Tariff Area (DTA) to SEZ is considered as export for which DTA suppliers

²² *supra* note 18, at 3.

²³ *supra* note 22, at 63; also see rule 5(5) of SEZ Rules 2006

are eligible to export benefits.²⁴ Apart from this suppliers from DTA can claim for rebate on excise duty paid for movement of goods from DTA to SEZ²⁵.

Apart from abovementioned points in the case of SEZ procedure and formalities are comparatively relaxed under customs, excise, foreign trade and development rules and regulations etc. to facilitate export.²⁶

ISSUES TO BE RESOLVED: The main objective for the establishment and development of Special Economic Zones in India is the promotion of exports and for matters connected therewith or incidental thereto. But to achieve this objective there are other issues which are supposed to be addressed properly like:²⁷

- Issue of Land acquisition without adequate compensation
- Loss of Agricultural Land by increase in no. of SEZ
- Problem of food security which is interrelated with above issues
- Issue of employment generation
- Labour rights issues, and
- Loss to exchequer etc.

Though the paper has its limitations to discuss all the above mentioned issues but for reference if we talk about the first issue i.e. a major concern with respect to the set up of SEZ, which involves huge displacement especially of farmers or those who depend on agricultural land. Now the problem in Indian context is that basically compensation is allotted to only those who are the owners of land and current laws are silent about those who depend on agricultural land, but not the owner. Secondly, as per SEZ regulations a systematic approach is supposed to be followed in case of acquisition but data shows that approx. 54.5% land out of total acquired land till date in the name of SEZ belongs to agricultural land²⁸. Above mentioned second and third issues are interrelated. Establishment of SEZs facilitated with the presumption that it will help in employment generation but in last few decades if we look their role then it is apparent that they have done less than what was expected from them in this field i.e. employment generation and due to that state exchequer also affected. These issues require more concern for overall development of SEZ.

²⁴ As per rule 26 of SEZ Rules, 2006 benefits are extended on the basis on current FTP policy. It states that, supplies from the Domestic Tariff Area to a Unit or Developer for their authorized operations shall be eligible for export benefits as admissible under the Foreign Trade Policy.

²⁵ As per rule 18 of central excise rules, 2002 Rebate is provided on duty. It states that, Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.

²⁶ See, r 29 of SEZ Rules, r 9(1) of central excise rules and s 8(6) of CST Act, 1956 etc.

²⁷ Suresh Babu M, *SEZs in India: Some Issues*, available at <http://www.hss.iitm.ac.in/courses/sureshbabu/SEZ.pdf> (last updated Sep. 21, 2015).

²⁸ *supra* note 4, at 129-145 and for details see, <http://sezindia.nic.in/asez-sez-granted-under2005.asp> (last updated Sep. 21, 2015).

CONCLUSION

In concluding remark we can say that, in Indian scenario the institutionalization of the Special Economic Zones having potential to provide employment and improve the problem of balance of payments by increasing export. But we don't have to forget the issues related with it, which require enough concern and adequate remedy/procedural steps for its better and more workable existence and presence in India.

ENVIRONMENTAL OFFENCES: IDENTIFYING A JEOPARDY TO THE FUTURE GENERATION

Mayuri Gupta* & Aparajita Vardhan**

Abstract

The opportunities ecosystems provide for prospective development are threatened by serious and increasingly sophisticated transnational organized environmental crime, undermining development goals and good governance. The UN Convention against Transnational Organized Crime (UNTOC) identifies a transnational organized crime as any serious transnational offence undertaken by three or more people with the aim of material gain. ‘Environmental crime’ covers a broad range of specific offences where criminal acts or misdemeanors involve trade in environmental commodities or damage to the natural environment itself, such as pollution of air, water or earth and it may include illegal logging, poaching and trafficking of a wide range of animals, illegal fisheries, illegal mining and dumping of toxic waste. Indicators of serious, organized environmental crime include the presence of detailed planning, significant financial support, use or threat of violence, sophisticated forgeries and altering of documents, armed participants with modern firearms and opportunity for significant profit. It provides a serious threat to wildlife and plant species, ecosystems, their services, climate change and to good governance and millennium development goals and requires a multi-faceted response. The majority of environmental crimes are ‘series crimes’ and are motivated by financial gains. Legislation on environmental crimes in many countries is poorly developed due to which sentencing guidelines are not properly defined. Therefore, a coherent effort to fully address the multiple dimensions of environmental crime and its implications for development is needed.

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INTRODUCTION

“The natural resources of the Earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”¹

In recent years, with greater understanding of the need to protect the environment and a better appreciation of what the can and cannot sustain, regulation, and in some cases, criminalization of harm to the environment is becoming more accepted.² The word ‘Environmental Crime’ is a composition of two words ‘Environment’+ ‘Crime’. The term environment has been derived from the term ‘environ’ which means ‘to surround’, French ‘environner’, Latin ‘in-viron’. Etymologically environment means ‘surrounding conditions, circumstances affecting people’s life’.³ Thus it is defined as “our physical and biological system in which man and organism live as a whole and this system has many interacting components. These components of the environment generally include rocks, minerals, soils and water, its land and their present and potential vegetation, its animal life and potential for livestock husbandry, and its climate”.⁴ While the word ‘Crime’ has been derived from the ancient Greek word ‘krima’ from which the Latin cognate ‘cemo’ is further derived, typically referred to an intellectual mistake or an offence against the community, rather than a private or moral wrong. It is an act forbidden by law and which is at the same time revolting to the moral sentiments of the society.⁵ Hence, ‘Environmental crimes can be broadly defined as illegal acts which directly harm the environment.’⁶ They include acts or omissions related to illegal taking of flora and fauna, pollution offences and transportation of banned substances.⁷ Environmental crime has been identified as one of the most profitable and fastest growing areas of international criminal activity, with increasing involvement of organized criminal networks.⁸ It is widely agreed that this type of crime not only damages the eco-system, but also impoverishes so many countries where pollution, deforestation and population displacement trigger conflict and prevent reaching the Millennium Development Goals.⁹

¹ Principle 2, The Stockholm Declaration of 1972.

² Samantha Bricknell, “Environmental Crime in Australia”, Australian Institute of Criminology Research and Public Policy Series No. 109 (2010).

³ Collins. P. H (1990), “Dictionary of Ecology and the Environment” 7th edn, Wiley Online Library, 2012.

⁴ “The State of World Environment”, UNEP Annual Review 1980.

⁵ Stephen, ‘General View of Criminal Law of England’, (1863)

⁶ Environmental Crime: A Threat to Our Future, (Environmental Investigation Agency, 2008), available at: http://www.unodc.org/documents/NGO/EIA_Ecocreme_report_0908_final_draft_low (visited on May 19, 2015).

⁷ Heckenberg. D, “Studying Environmental Crime: Key Words, Acronyms and Sources of Information”, Willan Publishing, 2009.

⁸ According to the International Crime Threat Assessment, an estimated \$22-31 billion is made each year from illegal dumping of hazardous waste, smuggling of hazardous material and abuse of scarce natural resources year, available at: <http://www.fas.org/irp/threat/pub45270index.html> (visited on May 21, 2015).

⁹ Costa A.M., “Environmental Crime: A Threat to Our Future”, Environmental Investigation Agency, 2008.

However, environmental crime rates are believed to be expanding, constantly generating enormous revenues and causing irreversible destruction to the global environment.¹⁰ The spread of environmental crimes undermines the global efforts to achieve the development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.¹¹ Due to the complicated nature of environmental harms it is almost impossible to envisage the true effects and consequences not only for present but also for future generations.¹²

NATURE OF ENVIRONMENTAL CRIMES

Environmental crime is currently one of the most profitable forms of criminal activity¹³ and it is no surprise that organized criminal groups are attracted to its high profit margins.¹⁴ Estimating the scale of environmental crime is problematic but Interpol estimates that global wildlife crime is worth billions of dollars a year;¹⁵ the World Bank states that illegal logging costs developing countries \$15 billion in lost revenue and taxes. In the mid-1990s around 38,000 tonnes of CFCs were traded illegally every year – equivalent to 20 per cent of global trade in CFCs and worth \$500 million; and in 2006 up to 14,000 tonnes of CFCs were smuggled into developing countries. The ‘raw materials’ which live or grow freely can be harvested or poached at minimal cost. Organized criminals are adaptable and resourceful; they thrive in conditions where others would fail. With the collusion of corrupt officials, certification, concealment and transportation are easily facilitated. With this combination of huge profits, low risk of detection and ineffective penalties, environmental crime is extremely lucrative. Environmental crime is at least as serious as any other crime affecting society today. In contravention of numerous international treaties, the principal motive for environmental crime is, with rare exception, financial gain and its characteristics are all too familiar: organized networks, porous borders, irregular migration, money laundering, corruption and the exploitation of disadvantaged communities. Wildlife felons are just as ruthless as any other, with intimidation, human rights abuses, impunity, murder and violence the tools of their trade. The indicators of environmental crime are evident in many areas of international development activities. Significant global threats, including the challenges addressed through the Millennium Development Goals (MDGs) are connected to, and exacerbated by, environmental crime, “affecting development, peace, security and human

¹⁰ Comte. F, “Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action”, European environmental law review 190-231(2006).

¹¹ ‘Environment and Development: Our Common Future’, World Commission Report A/42/427, 1987, available at: <http://www.un-documents.net/wced-ofc.htm> (visited on May 25, 2015).

¹² Ibid 196.

¹³ Noemí Ramírez, “International Crime Threat Assessment”, National Commission on Terrorism: Countering the Changing Threat of International Terrorism Report, 2000, available at: <http://www.fas.org/irp/threat/pub45270index.html> (visited on May 28, 2015).

¹⁴ Debbie Banks, Charlotte Davies, et.al. (eds.), , ‘Environmental Crime: A threat to future’ (Environmental Investigation Agency (Eia), 2008)

¹⁵ Available at: <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime> (visited on May 21, 2015).

rights".¹⁶ These issues, some of which have been on the agenda for many years, are slowly starting to be addressed and only now are enforcement agencies worldwide beginning to recognise the role of organised criminal networks in environmental crime. Increasingly, illegal logging and wildlife traffics are driven by organised groups who exploit natural resources and destroy habitats: robbing communities of their livelihoods, compromising the wider economy and further endangering threatened species and ecosystems.

IDENTIFYING THE CRIME, THE CRIMINAL & THE SUFFERER

*"Global warming, oil spills, massive numbers of extinctions, reduction in bio-diversity, toxic environments, disappearance of Arctic ice, poisonous water, unbreathable air, burning of garbage, clear felling of forests, the list goes on as to how planetary well-being is being destroyed and diminished in so many different ways."*¹⁷

To begin with, crime is a wrongdoing which seriously threatens the security or well-being of the society.¹⁸ There is no universal definition stating which act is environmental crime and which is not. Heckenberg states, "*Environmental crime refers to the environmental harms that are deemed to be illegal according to the law. These include acts or omissions related to illegal taking of flora and fauna, pollution offences and transportation of banned substances.*"¹⁹

Five broad areas of offences have been recognized by bodies such as the G8, Interpol, EU, UN Environment Programme and the UN Interregional Crime and Justice Research Institute.²⁰ These are:

- Illegal trade in wildlife in contravention to the 1973 Washington Convention on International Trade in Endangered Species of Fauna and Flora (CITES);
- Illegal trade in ozone-depleting substances (ODS) in contravention to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;
- Dumping and illegal transport of various kinds of hazardous waste in contravention to the 1989 Basel Convention on the Control of Trans boundary Movement of Hazardous Wastes and Other Wastes and their Disposal;
- Illegal, unregulated and unreported (IUU) fishing in contravention to controls imposed by various regional fisheries management organizations (RFMOs);
- Illegal logging and trade in timber when timber is harvested, transported, bought or sold in violation of national laws.²¹

¹⁶ 'Environment Crime Now High On The World Agenda' (UNEP Press Release, 2008)

¹⁷ White, R, "Introduction: Environmental Crime and Eco-global Criminology", Willan Publishing, 2009.

¹⁸ Smith, J.C. & Hogan, "Legal Duties" 8th edn., B Criminal Law Dictionary 2003.

¹⁹ Heckenberg.

²⁰ 'International environmental crime', RIIA workshop Report, 2002.

Other environmental offences may share similar characteristics with these five accepted categories. These include:

- Biopiracy and transport of controlled biological or genetically modified material (a possible offence under the 2000 Cartagena Protocol on Bio safety to the Biodiversity Convention);
- Illegal dumping of oil and other wastes in oceans (i.e. offences under the 1973 International Convention on the Prevention of Pollution from Ships (MARPOL) and the 1972 London Convention on Dumping);
- Violations of potential trade restrictions under the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.
- Trade in chemicals in contravention to the 2001 Stockholm Convention on Persistent Organic Pollutants.
- ‘Fuel’ smuggling to avoid taxes or future controls on carbon emissions.

Grabosky says, ‘Greed’ and ‘ignorance’ are the foundations of environmental crime (2003). The former refers to individuals or organisations who understand that a considerable amount of money can be made or saved by committing particular types of environmental crime, as well as the individual or organisations who wants to avoid having to pay financial dispensations or increased costs for practices that used to be legal. ‘Ignorance’ covers genuine lack of awareness about environmental responsibilities (e.g. the subsistence poacher) or is the product of confusion about the intricacies of these responsibilities (e.g. the permit, licensing and record-keeping system required to breed and trade in native birds).²¹ Who are the criminals behind these environmental crimes causing harm and suffering to millions of animals, plants and human beings? As with other types of crimes there is no single profile of an environmental criminal. They might be local poachers, middlemen involved in transportation of illegal products or large multinational companies avoiding the costs of waste processing by dumping at sea. Even though crimes against environment may be committed at the local level, most of the profits do not end up into the pockets of local loggers, fishermen or poachers; those who profit the most are the people organizing the crime. The *United Nations Convention against Transnational Organized Crime* defines an organized crime group as a structured group of three or more persons committing serious crimes which are transnational in nature. Many eco crimes contain these elements, but they also share other indicators of organized crime such as use of gangs, violence, bribing of authorities, contacts with the business and the political worlds and large profits. The list of incidents harming the environment and its people could be continued for pages on end. *Environmental crimes often perceived as ‘victimless’ crime as victims of environmental harm are not widely recognized as victims of ‘crime’ and thus are excluded from the traditional view of victimology which is*

²¹ Currently there are no binding international controls on the international timber trade, with the exception of endangered tree species covered by CITES.

²² Samantha Bricknell, “Environmental crime in Australia”, AIC Reports Research and Public Policy Series 109, © Australian Institute of Criminology 2010.

*largely based on conventional constructions of crime.*²³ It do not always produce immediate consequences and the harm may be diffused or go undetected for a lengthy period of time. Environmental crimes have a far-reaching impact: not only do they ravage nature, demolish delicate ecosystems, threaten biodiversity and endangered species, and cause shortages of unpolluted land and water, but they also increase health problems, they promote corruption, hinder the rule of law and channel billions of dollars into the pockets of criminals, money which could be otherwise used for hospitals, schools and clean drinking water. With environmental crime, the victimization is often serious, not so much because any individual victim was seriously affected, but because numerous victims were affected by the crime. Individual victims might lose very little but the accumulative effect to the community and the environment can be considerable. Everywhere, it is the local citizens who are most affected by the consequences of eco-crimes, who bear the biggest losses and who suffer the most. Harming the environment can also have indirect impacts. It has been claimed that the issue of maritime piracy in the Somali waters off the Gulf of Aden has actually been initiated by the massive volumes of foreign illegal fishing and toxic waste dumping that have been destroying marine resources for years since, the collapse of the Somali regime in 1991.²⁴

OVERVIEW OF TYPES OF ENVIRONMENTAL CRIMES

The term ‘environmental crime’ covers a broad range of specific offences where criminal acts involve trade in environmental commodities or damage to the natural environment itself, such as pollution of air, water or earth. The actions conducted often cause harm that has an impact not only to wildlife and natural habitat but also pose a direct or indirect threat to human health, wellbeing, and security, or result in material loss to an individual or group. The words ‘illegal’, and ‘crime’ are used loosely since legislation and penalties vary considerably around the world. In one country an act may result in the offender being sentenced to a term of imprisonment, whilst in another, only a minor administrative penalty may be issued. The range between what may be considered acceptable and highly illegal is vast. *Environmental crimes include the killing or illegal trade in or taking of flora and fauna; illegal extraction of natural resources such as minerals and precious stones; trade in chemicals which harm the ozone layer, and pollution of the environment through inappropriate use or disposal of harmful waste or other pollutants.* The list is certainly not exhaustive, nor is this the only way to define environmental crime. Some of the most significant types of environmental crimes are:

1. **Trade in Fauna and Flora:** Animals, both wild and captive bred, are legitimately traded around the world as food, clothing and décor, for the pet trade, science and entertainment. International and national laws and regulations control trade in many species, often in order

²³ Toine Spapens, Marieke Kluin and Rob White, “Environmental Crime and its Victims”, Delft University of Technology & Police Academy of Netherlands Conference, September (2012), available at: <http://www.environmentalcrimesseminar.com>, (visited on May 26, 2015).

²⁴ Mohamed Abshir Waldo, “*The Two Piracies in Somalia: Why the World Ignores the Other?*”, Wardbeer News (Somali 8 Jan 2009), available at: http://wardbeernews.com/Articles_09/Jan/Waldo/08_The_two_pirates_in_Somalia.html, (visited on May 23, 2015).

to ensure that such trade does not adversely affect populations of species, but also to avoid the spread of disease that can be passed from animals to humans. Criminals, by contrast, trade animals around the world almost entirely for profit, with little regard for the dangerous externalities of their actions. Often overlooked in favour of protecting animals, plants are also traded in vast quantities for medicinal and horticultural use, and may also be sourced from the wild or cultivated stocks. Collectors strive to find the most rare and therefore potentially endangered species and will go to considerable lengths²⁵ to smuggle them across international borders.

2. Illegal Fishing : Generally referred to as ‘illegal, unreported and unregulated fishing’, the practice refers to fishing in waters where no fishing is permitted, or fishing quantities, species, age or size of fish which are prohibited by national and regional laws or regulations. The practice depletes fish stocks leading to species becoming seriously threatened, reduces biodiversity causing imbalance of species and adversely affects ecosystems. By far one of the most neglected areas of environmental crime, illegal fishing is also probably one of the most extensive in geographical terms. Estimates put the value of the global illegal fishing industry at US\$23.5 billion – around 20% of the value of world fish exports.²⁶ The depletion of certain species, such as Bluefin tuna²⁷, due to unregulated overfishing in turn affects the numbers of species they consume, unbalancing oceanic ecosystems. Such imbalance and depletion may lead to a reduction of human food sources due to lack of abundance of fish, as 75% of all fish production is for direct human consumption.²⁸ Approximately 50% of fish exports are sourced from developing countries, which are most at risk from illegal fishing.²⁹ The fishing industry is also linked to other serious criminal activities. The UN Inter-Agency Project on Human Trafficking suggests that trafficking into the long-haul fishing industry exemplifies the worst cases of labour exploitation.³⁰ Incidence of crews being comprised of victims of trafficking is well documented. There is evidence of widespread abuse of workers on fishing vessels, and cases of murder with the victims being disposed of by being thrown overboard.³¹ Human rights abuses and environmental crime often go hand in hand.

3. Forest Crimes and Illegal Logging: Forests are destroyed to supply a global wood products industry and to clear land for development or infrastructure and agricultural use

²⁵ Smuggling techniques for wildlife and ozone depleting substance are described in detail in guides for enforcement officers produced by the CITES Secretariat, INTERPOL, UNEP and the WCO.

²⁶ ‘Ending Illegal Fishing Project’ (The PEW Charitable Trusts, 2014), available at: <http://www.pewenvironment.org/campaigns/endingillegalfishing-project/>, (visited on May 23, 2015).

²⁷ ‘The Black Fish free hundreds of endangered bluefin tuna in the Adriatic Sea Campaign’ (The Black Fish website, 2014), available at: <http://www.theblackfish.org/bluefine>, (visited on May 22, 2015).

²⁸ ‘Utilization and Trade’, (United Nations Food and Agriculture Organization Report , 2010), available at: <http://www.fao.org/fishery/topic/2888/>, (visited on May 20, 2015).

²⁹ Agnew DJ, ‘Estimating the Worldwide Extent of Illegal Fishing’ (PLoS ONE Journal, 25 February 2009), available at: <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal> ,(visited on May 23, 2015).

³⁰ ‘Exploitation of Cambodian Men At Sea’(United Nations Inter-Agency Project on Human Trafficking, 2009), available at: http://www.no-trafficking.org/reports_docs/siren/siren_cb3, (visited on May 25, 2015).

³¹ ‘Human Trafficking in Thailand’s Fishing Industry’ (Environmental Justice Foundation, 2013), available at: http://ejfoundation.org/sites/default/files/public/Sold_to_the_Sea_report_lo-res-v2, (visited on May 21, 2015).

such as the growing of rubber, soya or oil-palm, used in hundreds of everyday products. Alongside the legitimate trade in timber comes an insatiable illegal trade resulting in deforestation on a massive scale, with timber traded in vast quantities, laundered through countries, relabelled and sold into industry across the globe. Illegal logging is estimated to account for between 50-90% of all forest activities in key producer countries and 15- 30% of all wood traded globally.³² Unsurprisingly, incidents of illegal logging correlate geographically with the world's remaining tracts of forest: mainly the Amazon basin, Central Africa and Southeast Asia. Found in developing countries, often with poor governance and corrupt businessmen and politicians, the scene is set for unscrupulous companies to take advantage, often with the greatest loss to the poorest of society who lose land and livelihoods. Rates of deforestation are estimated at around 13 million hectares per year (about the size of Greece)³³ while recent reports claim that in some regions, such as the Amazon, deforestation rates increased by 103% between 2012 to 2013,³⁴ figures supported by government data..³⁵

“We cannot live without forests. People will have to be in symbiotic relationship with the forests. When people preserve the forests, the forests will give back to people. The relationship between people and forests are interdependent.”³⁶ Forest crimes are also linked to destruction of habitats and killing of endangered species, and contribute to changes in climate, removing natural carbon dioxide sinks and warming the planet as a result of high levels of carbon dioxide released when trees are destroyed. The world's remaining forests are also home to indigenous communities and people who rely on them for food and shelter. These include over 100 tribes who have no contact with outsiders, such as the Awa people of Brazil.³⁷ Their future is directly affected by unsustainable and often illegal logging industries with effectively no avenues of recourse.

4. Hazardous Waste: The disposal of electronic, hazardous and other polluting waste is a global issue and one that is increasing with population growth and ever-increasing demand for consumable goods. Whilst many countries may have introduced effective and appropriate measures for national disposal of some waste, the export of other waste and transportation over long distances raises challenges to monitor its disposal. Criminals exploit these challenges by dumping waste in countries where monitoring and/or enforcement is ineffective. The consequences include: pollution to land as chemicals leach into soil and waterways; harm to people who come into contact with waste either deliberately or

³² ‘Project Leaf’ (INTERPOL, 2013), available at: <http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Leaf> , (visited on May 26, 2015).

³³ ‘Forests and the Planet’s biodiversity are disappearing’ (European Commission Climate Action Deforestation 2014), available at: http://ec.europa.eu/clima/policies/forests/deforestation/index_en.html , (visited on May 23, 2015).

³⁴ Butler. R ‘Deforestation rate doubles in the Amazon rainforest’ Mongabay News (California, 2013), available at: <http://news.mongabay.com/2013/0718-amazon-deforestation-doubles.html>, (visited on May 24, 2015).

³⁵ ‘Brazil confirms Amazon deforestation increase’ (Mongabay, 2013), available at: <http://news.mongabay.com/2013/0706-inpe-may2013-deter-deforestation.html>, (visited on May 22, 2015).

³⁶ Her Majesty Queen Sirikit of Thailand, 2009

³⁷ Earth’s Most Threatened Tribe, available at: www.survivalinternational.org/awa, (visited on May 20, 2015).

inadvertently; and damage to the atmosphere as a result of the release of chemicals as waste degrades or is burnt.

5. Ozone-depleting Substances: Ozone-depleting substances (ODS) are man-made chemicals used mainly as refrigerants but also for other purposes. They include chlorofluorocarbons, or CFCs, which gained notoriety in the 1970s when it was discovered that they contribute to the thinning of the ozone layer. Other ODS include halons, methyl bromide and hydro chlorofluorocarbons (HCFCs). International agreements have seen the phase out of the production and use of CFCs and more recently their harmful replacement, HCFCs. But these chemicals are still produced and traded around the world. Sophisticated methods of mass smuggling have been adopted by industrial criminals, including counterfeiting of legitimate brands by rogue producers. The most direct effect of this illicit industry has been seen where legitimate chemicals are mixed with banned ones. In 2011 explosions took place following the servicing of refrigerated containers in Viet Nam. As a result of deliberate contamination of refrigerant, three people died in the explosions that occurred in Viet Nam and Brazil.³⁸

THE CORRUPTION CONNECTION OF ENVIRONMENTAL CRIMES

Corruption facilitates environmental crime at almost every level. At the highest levels, state officials sell permits; land and extraction rights to individuals and companies based on the level of the kick back rather than the merit of the tender, or distribute them as gifts amongst favored cronies. Criminal justice and law enforcement officials are bribed to prevent convictions. Local and national officials permit illegal loggers and poachers to gain access to forests and protected species and in many cases provide false Customs declarations to allow the commodities to exit the country or region undetected. Pastoral communities, whose poverty and lack of legitimate economic opportunity present them with few alternatives, are either convinced or coerced to become supporters and proponents of this illicit trade in order to secure a livelihood. With profits escalating, individuals are being paid what may seem to them a fortune, just to provide information. Evidence of corruption exists in most forms of environmental crime, primarily in wildlife trafficking, extractive crime and illegal logging. There is also evidence of corruption in the trade in ozone depleting substances or hazardous waste. But greater research is required to fully comprehend the extent of the problem and develop solutions.³⁹ Corruption fundamentally undermines governance, statehood and the rule of law, and critically weakens institutions of the State and their capacity to deliver services to the people. This captures States in a vicious circle by which the increasingly interwoven nature of politics, organized crime and corruption poses a significant threat to the long-term development of democracy across the developing world. The seeming impunity (with some exceptions) of elites from prosecution and their ongoing connections to organized crime undermines citizens' trust in democratic institutions, and illicit profits may have

³⁸ ‘Refrigerated Container (Reefer) Explosion’ (United Nations Environment Programme Issue Paper , May 2012)

³⁹ Martini ‘Environmental Crime and Corruption’ (Anti-Corruption Resource Centre, 2012), available at: http://www.transparency.org/whatwedo/answer/environmental_crime_and_corruption, (visited on May 24, 2015).

bolstered some authoritarian regimes. Such trends, and their ability to perpetuate themselves, have long-term implications for future political and economic progress. The existence of national environmental enforcement agencies may be a welcome response, but there have also been cases where such agencies become magnets or targets for corruption. In June 2013, news broke that over 30 officers from the Kenya Wildlife Service had been suspended for corrupt practices, including their alleged involvement in poaching of wildlife.⁴⁰ Corruption while identified as a significant impediment to addressing environmental crime is still significantly under-discussed in international forum. It is occasionally mentioned but generally in passing as though continued discussion may lead to accusation or offence. In order for corruption to be addressed effectively, greater openness needs to exist within national and international meetings, so that the subject is discussed. Unless meaningful discussion takes place, and solutions found, other efforts to prevent environmental crime may be futile.

CONCLUSION AND SUGGESTIONS

The consequences of failing adequately to address environmental crime are potentially disastrous. Resourceful and adaptable criminal gangs are profiting from this particular brand of crime. They are forming ever-stronger networks in neighbouring countries and around the world. As they diversify from one form of organised crime to another, the threats to society increase. As the attention of enforcement agencies is sidetracked by long established enforcement efforts against trade in drugs, weapons and humans and against terrorism, criminals currently trading in environment commodities are building their capacity. To address a global challenge as formidable as environmental crime, an appropriate and commensurate response is required to reduce it to acceptable levels, where it no longer threatens the security of communities and the survival of wild species. Quantifying what that “acceptable level” of crime might be is difficult, but an adequate response may be one where all stakeholders are, as far as is reasonably practicable, doing all that can be done. So far, efforts to combat environmental crime fall short of this benchmark. Legislation is all too often inadequate; the existence of dedicated agencies, which could develop specialist knowledge of organized crime groups and methods, are a rarity. Those agencies which do exist are often under-resourced, poorly trained and lack an understanding of investigative strategies such as intelligence-led enforcement. This results in the mis-direction of resources and a reactive, unplanned approach to organised crime. It is imperative that environmental crime is acknowledged as a haven for corruption at all levels and that unless corruption is tackled, efforts to combat environmental crime will be frustrated. Bearing in mind that prevention is the most effective way to combat corruption, consideration should be given to administrative reform, particularly through the introduction of technology removing the direct human contact involved in areas such as trade in natural resources. On-line or audited CITES applications, financial administration and penalties are methods of distancing opportunities for corruption from the individual. Improved enforcement co-operation and

⁴⁰ ‘Senior Kenya wildlife officers may have turned into poachers’ (Global Travel Industry News, 2013), available at: <http://elephantleague.org/project/africas-white-gold-of-jihad-al-shabaab-and-conflictivory>, (visited on May 24, 2015).

political will is required to curb the growing threats posed by environmental crime. Parties, relevant government ministries, specialist organisations and enforcement agencies have a key role to play in addressing environmental crime across its range and should implement the following as a matter of urgency:

- Recognise that, unlike some other forms of crime, Environmental Crime is a time critical issue that urgently requires a substantial, committed and sustained global response.
- Acknowledge that environmental crime is a haven for corruption at all levels and that unless corrupt officials are tackled; efforts to combat environmental crime will be impeded. This fact should be acknowledged within cross-cutting resolutions on environmental crime and within the Convention against Corruption.
- Develop administrative reform to combat corruption, particularly through the introduction of technology to remove direct human contact involved in areas such as trade in natural resources.
- Commit to assisting those nations where the prevalence of crime is highest, and the resources are most lacking. Support Inter-Governmental Organisations such as the United Nations Office on Drugs and Crime (UNODC), Interpol and the World Customs Organisation (WCO) to develop projects to create and build the capacity of national and regional enforcement agencies, and provide technical assistance to units dedicated to investigating environmental crime.
- Develop greater synergy between mechanisms such as the Convention on Transnational Crime and the Convention on International Trade in Endangered Species of Wild Flora and Flora (CITES) in addition to the need recognized at the 15th Conference of Parties to CITES, for ‘closer international liaison between the Convention’s institutions, national enforcement agencies, and existing intergovernmental bodies...’

INDIA'S BLACK MONEY ACT: LIABILITY AND COMPLIANCE

Raumita Dey*

Abstract

When Finance Minister Arun Jaitley announced his intentions to pursue black money stashed overseas, he was only the most recent in a long line of government officials to denounce tax avoidance. However, when the government subsequently passed a black money law, and notified foreign asset disclosure rules in July, it signaled that time for *talking about* getting tough on off-shore accounts had run out. Finance Minister Arun Jaitley claims the new law would go a long way in dissuading Indians from keeping black money in foreign bank accounts.

On 11th May, 2015 the Lok Sabha passed the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015, which has become an Act that penalizes the concealment of foreign income and provides for criminal liability for attempting to evade tax on the foreign incomes of Indians. Thereafter, after the President's consent this Bill has become an Act, named as The Black Money (Undisclosed Foreign Income and Assets) Imposition of Tax Act, 2015 (the Act) or can be called as (the Black Money Taxation Act) which was enacted on 26 May 2015 and has been made effective from 1st July 2015.

Black money or 'black income', which is income on which taxes payable have been evaded, can be classified into two categories: domestic and foreign. The Finance Minister has clarified that the new law has nothing whatsoever to do with domestic black money (which is much greater than the quantum of foreign black money held by Indians, as we shall note)". The Black Money Taxation Act covers all persons who are resident in India in accordance with the provisions of the Income-tax Act, 1961 (the IT Act). However, individuals qualifying as '*resident but not ordinarily resident in India*' (RNOR) are excluded from the ambit of the Black Money Taxation Act. Any undisclosed foreign income and undisclosed foreign assets detected after 30 June 2015 will henceforth be taxed under the Black Money Taxation Act, and not under the Income Tax Act, 1961. Besides the stringent penalties and prosecution, the Black Money Taxation Act contained the provision of a onetime compliance opportunity to those who have undisclosed foreign assets. Where any disclosure is made under one time compliance window, the declarant is required to pay the tax @ 30% and an additional 30% as penalty, and no other penalty or prosecution under the Black Money Taxation Act will be launched in such cases.

The law provides for separate taxation of any undisclosed income from foreign assets and incomes; such income will henceforth not be taxed under the Income Tax Act, 1961. The strict monetary penalty and criminal prosecution proposed under the law has invited both appreciation and criticism. The law provides for the taxation of undisclosed foreign income

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and assets at a flat rate of 30 per cent. No exemptions, deductions, set-off or carry-forward of losses under the provisions of the Income Tax Act would be allowed.

The Government has recently notified the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 (**the Black Money Taxation Rules**) containing the timelines and procedures of the disclosure in relation to the undisclosed foreign assets.

Keywords: *undisclosed foreign income, one time compliance, assessed income, imposition of tax, assessment year.*

WHO IS LIABLE UNDER THIS ACT?

This Act applies to a person: (i) who is a tax resident of India as per the tests of the Income Tax Act, 1961 (**ITA**); (ii) who is not a person who is a ‘resident but not ordinarily resident’; and (iii) by whom tax is payable under the The Black Money (Undisclosed Foreign Income and Assets) Imposition of Tax Act, 2015 on undisclosed foreign income and assets or any other sum of money.

The term ‘person’ is not defined in the Act so its definition under the ITA must be adopted. As regards individuals, the ITA has a day-count test of physical stay in India. For companies, the test is whether the company is incorporated in India or is wholly controlled and managed within India. The Finance Bill 2015 has proposed to replace this with the standard of ‘place of effective management’ (**POEM**). A foreign company will be considered tax resident in India if its POEM is in India at any time in the relevant financial year. POEM has been defined to mean “a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made”. There is still not enough clarity on what would constitute the place where “key management decisions are in substance made” i.e. whether the residence of directors will be looked at, location of board meetings or other criteria such as expansive veto rights by Indian resident shareholders. If POEM does become the test for corporate residence in the ITA going forward, the impact of the Black Money taxation Act may have a wider scope than intended.

The Act imposes personal liability on manager (including a managing director) of a company to pay any amount due under this Black Money Taxation Act if the amount is not recoverable from the company. Partners in a partnership, members of an Association of Persons (**AoPs**) or of a Body of Individuals (**BoI**) have been made liable to pay any amount due under this Act along with the partnership, AoP or BoI.

The Act imposes liability for abetting or inducing another to wilfully attempt to evade tax or to make false statements/declarations in relation to foreign income and assets. The objective of this provision is to target professional advisors such as private banks, accountants, lawyers and other consultants whose actions may potentially be covered under ‘abetment or inducement’. This move is a good means to make the Act comprehensive in its scope. That said, it is bound to cause concern among practitioners as there is no clear guidance on what precautions or due diligence will be sufficient to indicate practitioners acted within their rights or that they did not breach their code of conduct. Imposition of such liability on professional advisors and intermediaries may adversely effect on boarding of Indian clients while practitioners may apprehend the risk of undue harassment at the hands of Revenue officials.

The Act levies a tax on any undisclosed foreign income assets and held abroad by a person who is ordinarily resident in India. Undisclosed foreign assets can include but are not limited to bank accounts, immovable property, jewellery, bullion, shares and securities, partnerships, archaeological collections and art work.

HOW IS TAX COMPUTED?

A flat rate of 30 per cent tax would apply to undisclosed foreign income or assets of the previous assessment year.

In computing the total undisclosed foreign income and asset of any previous year of an assessed,- (i) no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee, whether or not it is allowable in accordance with the provisions of the Income-tax Act; (ii) any income, (a) which has been assessed to tax for any assessment year under the Income-tax Act prior to the assessment year to which this Act applies; or (b) which is assessable or has been assessed to tax for any assessment year under this Act, shall be reduced from the value of the undisclosed asset located outside India, if, the assessee furnishes evidence to the satisfaction of the Assessing Officer that the asset has been acquired from the income which has been assessed or is assessable, as the case may be, to tax. The amount of deduction in case of an immovable property shall be the amount which bears to the value of the asset as on the first day of the financial year in which it comes to the notice of the Assessing Officer, the same proportion as the assessable or assessed foreign income bears to the total cost of the asset.

An undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer. The “value of an undisclosed asset” means the fair market value of an asset (including financial interest in any entity) determined in such manner as may be prescribed in the The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules 2015 (Rules).

An undisclosed asset located outside India (including a financial interest in any entity) will be valued at its ‘fair market value’. The valuation will be done on 1 July 2015 (in case of onetime compliance window) and 1st April of the relevant financial year in other cases. Fair market value shall be determined for various assets as tabulated below:

Sr. No.	Type of asset	Fair Market Value
1.	Bullion, Jewellery or precious stones	Higher of – <ul style="list-style-type: none"> ➤ Cost of acquisition; and ➤ The price that the asset shall ordinarily fetch, if sold in the open market on the valuation date¹.
2.	Archaeological collections, drawings, paintings, sculptures or any	

¹ The declarant may obtain a valuation report from a valuer recognised by the Government of a country or specified territory outside India in which the asset is located, or any of its agencies, for the purpose of valuation of the relevant asset under any regulation or law.

	work of art	
3.	Immovable property	
4.	Share and securities	<p>(A) In case of share and securities quoted on the established securities market² –</p> <p>Higher of –</p> <ul style="list-style-type: none"> ➤ Cost of acquisition; and ➤ Price as determined in the following manner – <p>The average of the lowest and highest price of such shares and securities quoted on any established securities market on the valuation date; - Where there is no trading on the valuation date, the average of the lowest and highest price of such shares and securities on any established securities market on a date immediately preceding the valuation date where such shares and securities were traded on such securities market.</p> <p>(B) In case of unquoted share and securities -</p> <p><u>Equity shares</u></p> <p>Higher of –</p> <ul style="list-style-type: none"> ➤ Cost of acquisition; and ➤ Fair market Value = $\frac{A+B-L}{(PE)} \times (PV)$ <p>Where,</p> <p>✓ A = book value of all the assets (other than bullion,</p>

² “Established securities market” means an exchange which is officially recognised and supervised by a Government entity in which the market is located, and that has a meaningful annual value of shares traded on the exchange.

“Meaningful annual value of shares traded on the exchange” with respect to an exchange means it has an annual value of shares traded on the exchange (or predecessor exchange) exceeding one billion US dollars during each of the three calendar years immediately preceding the calendar year in which the determination is being made.

“Meaningful volume of trading on an on-going basis” with respect to each class of share means - (i) trades in each such class are effected, other than in *de minimis* quantities, on one or more established securities markets on at least sixty business days during the prior calendar year; and (ii) the aggregate number of shares in each such class that are traded on such market or markets during the prior year are at least ten percent of the average number of shares outstanding in that class during the prior calendar year.

	<p>jewellery, precious stones, artistic works, shares, securities and immovable property) as reduced by -</p> <ul style="list-style-type: none"> (a) any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any, and (b) any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset; <p>✓ B = fair market value of bullion, jewellery, precious stones, artistic works, shares, securities and immovable property as determined in the manner provided in this rule;</p> <p>✓ L = book value of liabilities, but not including the following amounts, namely:-</p> <ul style="list-style-type: none"> (i) the paid-up capital in respect of equity shares; (ii) the amount set apart for payment of dividends on preference shares and equity shares; (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation; (iv) any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto; (v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities; (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares; <p>✓ PE = total amount of paid up equity share capital as shown in the balance sheet;</p> <p>✓ PV = the paid up value of such equity shares;</p> <p><u>Share and securities (other than equity share)</u></p> <p>Higher of –</p> <ul style="list-style-type: none"> ➤ Cost of acquisition; and ➤ The price that the shares or securities shall ordinarily fetch, if sold in the open market on
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		the valuation date .
5.	Bank Account	<p>Value of an account with a bank shall be –</p> <ul style="list-style-type: none"> ➤ The sum of all the deposits made in the account with the bank since the date of opening of the account; or ➤ Where a declaration of such account has been made under Chapter VI, and the value of the account as computed above has been charged to tax and penalty under that Chapter, the sum of all the deposits made in the account with the bank since the date of such declaration. However, where any deposit is made from the proceeds of any withdrawal from the account, such deposit shall not be taken into consideration while computing the value of the account.
6.	Interest of a person in a partnership firm or in an association of persons or a limited liability partnership of which he/ she is a member	<p>The net asset of the firm, association of persons or limited liability partnership on the valuation date shall first be determined and the portion of the net asset of the firm, association of persons or limited liability partnership as is equal to the amount of its capital shall be allocated among its partners or members in the proportion in which capital has been contributed by them and the residue of the net asset shall be allocated among the partners or members in accordance with the agreement of partnership or association for distribution of assets in the event of dissolution of the firm or association, or, in the absence of such agreement, in the proportion in which the partners or members are entitled to share profits and the sum total of the amount so allocated to a partner or member shall be treated as the value of the interest of that partner or member in the partnership or association.</p> <p>Explanation.- For the purposes of this clause the net asset of the firm, association of persons or limited liability partnership shall be – $(A + B - L)$, which shall be determined in the manner provided under section ‘shares & securities’</p>
7.	Any other asset	<p>Higher of –</p> <ul style="list-style-type: none"> ➤ Cost of acquisition or the amount invested; and ➤ The price that the asset would fetch if sold in the open market on the valuation date in an arm's length transaction.

WHAT INCOME OR ASSET DOES THE BLACK MONEY ACT COVER *vis-à-vis* SCOPE OF INCOME TO BE TAXED

The total undisclosed foreign income and asset of an individual would include:- (i) income, from a source located outside India, which has not been disclosed in the tax returns filed; (ii) income, from a source outside India, for which no tax returns have been filed; and (iii) value of an undisclosed asset, located outside India.

COMPLIANCE WINDOW PROCEDURES

The Act provides for a one-time compliance window for tax payers who have undisclosed foreign income and assets. The taxpayer is liable for the 30% tax on the fair market value of the assets and the penalty of 100% of the tax.

The compliance window expires on September 30, 2015 and the taxes must be paid by December 31, 2015. Taxpayers wishing to avail of the one-time compliance window should use Form 6, as prescribed in the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015.

Once the declaration is made and accepted, the amount of undisclosed income will not be included in the taxpayer's total income for the assessment year, the contents of the declaration cannot be used as evidence against the taxpayer under the Income Tax Act, the Wealth Tax Act, or FEMA, and the value of the assets will not be chargeable to wealth tax. If the tax payer fails to pay the entire amount of the tax or where the taxpayer misrepresents the foreign assets, the declaration under the tax compliance window will be void.

The Government has recently notified the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 (the Black Money Taxation Rules) containing the timelines and procedures of the disclosure in relation to the undisclosed foreign assets.

A. Who can make the declaration?

All resident persons (excluding RNORs) who have undisclosed foreign assets acquired from income chargeable to tax under the Act can make declaration under this compliance window.

B. Timelines

- The window to make disclosure in relation to undisclosed foreign assets is available up to 30 September 2015.
- The taxes and the penalty on such undisclosed foreign assets have to be paid on or before 31 December 2015.

C. What can be covered in the declaration?

The declaration has to be made in Form 6 before the designated Principal Commissioner or Commissioner of Income-tax (PCIT/ CIT). This can be made in respect of any undisclosed foreign assets acquired from income chargeable to tax under the Act for any financial year prior to 2015-16, for which:

- a) the declarant has failed to file the return or has filed the return but failed to disclose such income in the return and,
- b) such income has escaped assessment by reason of omission or failure to file return under the Act or failure to disclose fully and truly all material facts necessary for the assessment.

D. What cannot be covered in the declaration?

- (i) No declaration can be made by any: -
 - ✓ Person in respect of whom an order of detention has been made under the conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.
 - ✓ In respect of person notified under section 3 of the Special Court(Trial of Offences Relating to Transactions in Securities) Act, 1992.
- (ii) No declaration can be made in respect of any undisclosed foreign asset acquired from income for the financial year chargeable to tax under the Act for which: -
 - ✓ A notice under section 142, 143(2), 148, 153A or 153C of the IT Act has been issued on or before 30 June 2015 and the proceedings are pending before the tax officer in relation to such notice.
 - ✓ A search has been conducted under section 132, or a requisition has been made under section 132A, or a survey has been carried out under section 133A, and the time for issuance of notice under section 143(2), 153A or 153C for the relevant year has not expired.
 - ✓ Information in respect of such undisclosed foreign assets has already been received by the competent authority on or before 30 June 2015 under the Double Tax Avoidance Agreement (tax treaty) entered into by central government under the Act.
 - ✓ No immunity in relation to Prosecution for any offence punishable under Chapter IX (offences relating to public servants) or Chapter XVII (offences against property) of the Indian Penal Code, or under the Unlawful Activities (Prevention) Act, or under the Prevention of Corruption Act are pending.

E. Procedural aspects

- ✓ Upon receipt of declaration from the declarant, the PCIT/ CIT will issue intimation by 31 October 2015 in the prescribed Proforma to inform the declarant as to whether any information in respect of the declared assets has been received by the competent authority on or before 30 June 2015 under the tax treaty.
- ✓ Declarant shall then revise the declaration and exclude such assets, and file the revised declaration within 15 days of the receipt of the intimation from PCIT/ CIT.
- ✓ The declarant is required to pay the taxes and penalty on or before 31 December 2015, and intimate the payment to the PCIT/ CIT, who will then issue an acknowledgement in Form 7 within 15 days of receipt of intimation of such payment.

F. Invalid Declaration

Failure to pay taxes and penalty before 31 December 2015 and/ or any misrepresentation or suppression of facts or information will render the declaration void. In such a case, it shall be deemed as if the declaration was never made, and provisions of the Black Money Taxation

Act, including penalty and prosecution, shall apply accordingly. Further, there would be no refund of taxes and penalty paid.

G. Other Considerations

- ✓ Where an asset (other than a bank account) was transferred before the valuation date, the fair market value of such asset shall be the higher of its cost of acquisition and the sale price. However, where such asset was transferred without consideration or inadequate consideration before the valuation date, the fair market value of the asset shall be higher of its cost of acquisition and the fair market value on the date of transfer.
- ✓ Where a new asset has been acquired or made out of consideration received on account of transfer of an old asset or withdrawal from a bank account, then the fair market value of the old asset or the bank account, as the case may be, determined as per the rules above, shall be reduced by the amount of the consideration invested in the new asset.

IS THERE A TIME LIMIT FOR COMPLETION OF ASSESSMENT?

Yes, a time limit for completion of assessment and re-assessment has been provided under the UFIA Bill. Once the Revenue has issued a notice to a person for providing information, an order of assessment or re-assessment cannot be made after the expiry of two years from the end of the financial year in which the notice was issued. However, this period shall not include the time taken to receive information under the exchange of information process provided under a tax treaty or exchange of information agreement.

PENALTY FOR OFFENCES

Sr. No.	Offences	Penalty
1.	Undisclosed foreign income/assets	The penalty for nondisclosure of foreign income or assets would be equal to three times the amount of tax payable, in addition to tax payable at 30%
2.	Failure to furnish returns	The penalty for not furnishing income tax returns in relation to foreign income or assets is a fine of Rs 10 lakh. This would not apply to an asset, with a value of five lakh rupees or

		less.
3.	Undisclosed or inaccurate details of foreign assets:	If a person who has filed tax returns does not disclose his foreign income, or submits inaccurate details of the same, he has to pay a fine of Rs 10 lakh. This would not apply to an asset, with a value of five lakh rupees or less.
4.	Second time defaulter:	Any person, who continues to default in paying tax that is due, would be liable to pay an amount equal to the amount of tax arrears.
5.	Other defaults:	If a person fails to abide by the tax authority in (i) answering questions, (ii) signing off on a statement, (iii) attending or producing relevant documents, he is to pay a fine between Rs 50,000 to two lakh rupees.

PROSECUTION FOR CERTAIN OFFENCES

Sr. No.	Offences	Prosecution
1.	Failure to furnish return in relation to foreign income and asset.	The punishment is rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.
2.	Failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India.	The punishment is rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine

3.	Wilful attempt to evade tax.	The punishment would be rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine
4.	False statement in verification	The punishment is rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.
5.	Punishment for abetment	The punishment rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.
6.	Offences by companies.	For any offence under this Act, every person responsible to the company is to be liable for punishment. His liability is absolved if he proves that the offence was committed without his knowledge.

IMMUNITY FROM APPLICABILITY OF OTHER LAWS

The Black Money Taxation Act provides immunity from prosecution under the following five Acts –

- (i) Income Tax Act, 1961
- (ii) Wealth Tax Act, 1957
- (iii) Foreign Exchange Management Act, 1999
- (iv) Companies Act, 2013
- (v) Custom Act, 1962

It does not provide immunity from prosecution under any other Act.

WHO HAS THE BURDEN OF PROOF OF CULPABILITY UNDER THE BLACK MONEY TAXATION ACT?

The Black Money Taxation Act presumes that the accused has the required culpable mental state for an offence under the Act. That is, it is presumed that the accused had the intention, motive or knowledge of a fact or belief in, or reason to believe, a fact to commit an act considered an offence under the Black Money Taxation Act. The onus to prove non- culpability beyond reasonable doubt is shifted to the accused. Considering that penal consequences are being imposed, it is a cause of concern that legislators have sought to shift the burden of proof on to the accused.

HOW DO THE INCOME TAX ACT AND BLACK MONEY TAXATION ACT INTERSECT?

1. Terms that have been used in the Black Money Taxation Act but not defined in the Act shall, if defined under the ITA, adopt the ITA definition for the purposes of the Black Money Taxation Act.
2. If certain conditions are met, income or assets that are caught by the Black Money Taxation Act are excluded from the purview of the taxpayer's total income for the purposes of the IT Act.
3. The Black Money Taxation Act adopts the same tax administration authorities/structure and their jurisdiction as per the ITA. The appellate process is also similar. The Black Money Taxation Act specifies that appeals before a High Court must be heard by a minimum of two Judges.
4. All information submitted under the ITA can be used for the purposes of the Black Money Taxation Act.

CONCLUSION

The Modi Government's commitment to identify and stem the generation of 'black money' was in focus during the Budget with the Finance Minister stating that it was the "first and foremost pillar of his tax proposals". The Government has made good on its promise and if administered correctly, the Black Money Taxation Act may have a deterrent effect too. Safeguards have been provided in the Black Money Taxation Act by requiring mandatory issue of notice to the taxpayer, granting the taxpayer the opportunity to be heard and requiring the Revenue to give reasoned orders in writing and recording them.

The Black Money Taxation Act is comprehensive in its reach, impacting everyone from those returning to India after a stint abroad to those who are in India remitting funds abroad under the Liberalized Remittance Scheme; fund managers having carry structures to corporations having subsidiaries abroad. Considering the vast reach of the Act and its stringent consequences, it is unfortunate to note that the Black Money Taxation Act does not appear to make a distinction between legal and illegal structures. It would have been helpful if the legislation would have contained more guidance as to distinguishing factors. These could have served as useful reference points for the taxpayers, practitioners and the Revenue. As it stands now, it appears that the Black Money Taxation Act imposes its strict consequences

even where the structure has been set up in a legally compliant manner, if there has been a non-disclosure.

The Black Money Taxation Act also proposes to amend the Prevention of Money Laundering Act, 2002 (PMLA) by including the offence of tax evasion as a predicate offence under the PMLA, thus enabling the confiscation of foreign assets unaccounted for and prosecution of persons involved. In the Budget, the Finance Minister had also proposed that the Foreign Exchange Management Act, 1999 be amended to provide that foreign assets held in contravention of the exchange control rules contained in this Act could trigger seizure and confiscation of assets in India of equivalent value. In addition, such contraventions should be punishable with upto 5 years' imprisonment and penalty.

On 21 May 2012, the then Government had released its report titled ‘White Paper on Black Money’ in which it had discussed amnesty schemes as an option to bring back black money into India. That said, ad hoc measures to crackdown on tax-evaded income sweetened by short voluntary disclosure schemes have been criticized as disincentivising honest taxpayers. The Government- appointed Shame Committee had also recommended that amnesty schemes be scrapped for this reason³. Instead of clean-up measures, it would be better to address the factors that incentivize people to take funds out of India and retain them abroad. For instance, further relaxation of capital controls (especially for transactions of individuals), greater clarity in tax laws from the beginning, efficient dispute resolution and positive engagement of the Revenue with the taxpayers are suggested as more durable measures to encourage a culture of compliance.

³ Taxpayers keep waiting for amnesty schemes to be announced and take advantage of these schemes to build their capital”. The Committee’s Third Report to the Government in December, 2014,http://articles.economictimes.indiatimes.com/2014-12-03/news/56684833_1_shome-panel-tax-amnesty-schemes-tax-administration-reform-commission.

A SOCIO POLITICAL STUDY OF THE DEMAND FOR GORKHALAND: CHALLENGE TO FEDERALISM IN INDIA

Tishta Tandon*

Abstract

Different dynamics have been involved in states' reorganization on the basis of language since passing of States Reorganization Act in 1956. While Administrative convenience, unity and integrity were the main interests in 1950s and 1960s, reorganization of northeastern states in 1980s was mainly due to security concerns.¹ However, the government has never expressly stated any basis or principle for formation of states. The demand for redrawing boundaries has been accepted in some cases and denied in others. This has laid down a ground for pressure politics as it has been observed that if a group can put the requisite amount of pressure on the government, its demand is conceded.² So when the central government acceded the demand for Telangana, the call for Gorkhaland gained ground. In a scenario where various ethno-linguistic communities are demanding statehood, it is essential to understand and analyze the impact secessionist movements have on federalism in India. This paper attempts to critically analyze the demand for statehood by a linguistic minority, understand its implications on the populace of a state and evaluate the interplay of state and central politics in shaping and then suppressing this demand.

The Gorkha leaders propose to declare Darjeeling hills and the adjoining areas of northwest Bengal as Gorkhaland, a separate union state. The alienation of Gorkhas in economic development and administration procedures of the state of West Bengal is the *prima facie* reason behind the uproar for creation of Gorkhaland. But the demand has cultural, historical and political reasons that are examined in the first part of this research paper to understand how regional estrangement of a community became an issue of national importance. The response of the central and the state governments to the movement is also highlighted to examine whether the agitation could be ascribed to the attitudes and actions of the governments in power. The second part presents the other side of the debate with respect to the Gorkhaland agitation. Subsequently, an attempt has been made to understand the significance of federalism in India and the impact which such separatist movements have on the unity of the country. The paper concludes with some recommendations on developing uniform and fixed criteria for reorganization of boundaries of states and some measures that could appease the gorkhas without dividing Indian landmass.

Keywords: states' reorganization, federalism, gorkhaland, alienation, linguistic minority.

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¹ Chadda, Maya, 'Integration through Internal Reorganization: Containing Ethnic Conflict in India', [2002], *The Global Review of Ethnopolitics*, vol 2, 44–61

² Partha Chatterjee, *A Possible India* (Oxford University Press 1997) 149

WHY GORKHALAND?

i) Emergence of the Demand

Darjeeling comprises of three hill sub divisions- Darjeeling, Kalimpong and Korseong and a subdivision in plains called Siliguri. The area was gifted by Sikkimputtee Rajah to the East India Company in 1835.³ The region had been a part of Nepal before being annexed by the rulers of Sikkim in 1817.⁴ Multiple tea, coffee and cinchona plantations were developed in Darjeeling as East India Company realized the enormous economic potential of such plantations. In order to increase productivity, the Britishers encouraged the immigration of Nepalis who generally took up plantation work in the hills as they were hardworking and could easily adjust to working at high altitude plantations.⁵ Immigrant Nepalis were also heavily recruited in the Gorkha battalions in the British Army.⁶ Nepali speaking recruits in the British army were known as gorkhas and Darjeeling was called the Old Gurkha station.⁷ Thus, it was the colonial encounter that shaped the idea of a nepali speaker in the region being a gorkha.

Demands for autonomy by the gorkhas emerged as early as 1907 when a memorandum was presented to the colonial government. The Hillmen's Association (formed in 1917 under the leadership of Nepali elite) submitted another memorandum demanding exclusion of Darjeeling from Bengal when Act of 1935 was passed. Realization and need for representation led to formation of All India Gorkha League (AIGL) in 1943. After independence, AIGL demanded regional autonomy and unification of Darjeeling with Assam and not Bengal.⁸ The death of AIGL head Deo Prakash Rai in 1983 paved the way for formation of Gorkha National Liberation Front (GNLF), a more militant group, under the control of Subhash Ghising.⁹

Estrangement and quest for establishing an Indian identity has been the centripetal force behind the Gorkhaland movement. Nepali speaking people have resided in West Bengal for centuries now but their status as Indian citizens has never been recognized by the Indian state.¹⁰ Article 7 of Indo Nepal treaty gives the Nepalis a right to move and trade in both countries.¹¹ By virtue of the treaty, gorkhas are recognized as 'reciprocal Nepalis' and regarded as foreigners in their native land. The extent of this belief can be gauged from former PM Morarji Desai's statement, "if you want Nepali, go to Nepal."¹² Even Vallabhai

³ Prabhat Datta, 'The Gorkhaland Agitation in West Bengal' [1991] The Indian Journal of Political Science, vol 52, 225

⁴ *Id.*

⁵ *Ibid.* at p 226

⁶ Atis Dasgupta, 'Ethnic Problems and Movements for Autonomy in Darjeeling' [1999] Social Scientist, vol 27, 54

⁷ *Ibid.* at p 49, 51

⁸ *Supra* note 3 at p 226-227

⁹ *Supra* note 6 at p 63

¹⁰ *Supra* note 2 at p 154

¹¹ *Supra* note 3 at p 228

¹² Anjan Ghosh, 'Gorkhaland Redux' [2009] EPW vol 44, 10

Patel had written to Jawahar Lal Nehru on 7th November 1950: “the people inhabiting this portion have no established loyalty or devotion to India. Even Darjeeling and Kalimpong areas are not free from pro-Mongoloid prejudices.” Such irresponsible and uncalled for statements by political leaders have been alienating the Gorkhas since independence.

GNLF took advantage of the situation when Nepalis were branded as foreigners and ousted from Meghalaya, under the pretext that they did not possess restricted entry passes.¹³ Ghising propagated the belief that Nepalis were no longer safe in West Bengal as the state government had refused to shelter thousands of Nepalis who had been evicted from Meghalaya.¹⁴ Posters were put up with messages like “Our future is in danger”, “We are stateless. We are constitutionally tortured” and “All are required to fight for Gorkhaland”.¹⁵ Abrogation of Article 7 of the Indo Nepal treaty was also demanded. It is important to note that all Nepalis were not in agreement with this demand. Such an abrogation would result in setting 1950 as the cut off year for acceding citizenship to Nepalis in India. The status of Nepalis in Assam and Mizoram, who became a part of the Indian Union subsequent to 1950, would become uncertain and so, abrogation has always been a contested issue.¹⁶

The primary occupation of the gorkhas as tea planters was also in jeopardy due to low productivity and shrinking tea gardens.¹⁷ Thus, when Ghising began perpetuating ideas of self-determination, the gorkhas were drawn to it because of their insecurity and disregard for a government that failed to protect their livelihood. GNLF worked both within and outside the democratic procedure by petitioning ministers and simultaneously fighting the police for their cause. From 1986-87, GNLF organized bandhs for 200 days. Its two-pronged strategy included non-cooperation and violence. To achieve their goals, GNLF’s leaders incited people to not pay taxes and refund all government loans. Between 1986-88, 200 people lost their lives in agitations and more than 400 got injured.¹⁸

ii) State’s Response

Unwilling to recognize the extent of alienation among the Gorkhas, the CPI (M) government in West Bengal termed the movement as anti-national and a law and order problem.¹⁹ Its accusation was based on the grounds that the GNLF boycotted national celebrations like Independence Day, Republic Day and contacted foreign countries for support. This was in response to a Memorandum that Ghising wrote to the King of Nepal, with copies sent to the UN and eight foreign governments.²⁰ CPI (M) also labeled the movement as imperialistic and a RAW manipulated conspiracy.²¹ CPI (M) argued that all linguistic minorities couldn’t form

¹³ *Supra* note 3 at p 228

¹⁴ *Ibid.* at p 229

¹⁵ *Ibid.* at p 228

¹⁶ GNLF Talks, ‘Basic Issues Untouched’ [1987] EPW vol 22, 158

¹⁷ *Supra* note 3 at p 229

¹⁸ *Supra* note 3 at p 230

¹⁹ ‘Short-Sighted in Darjeeling’ [1987] EPW 1097

²⁰ ‘Gorkhas’ Concern’, [1986] EPW vol 21, 1768-69

²¹ Ajit Roy, ‘Darjeeling: Hopeful Turn and Remaining Obstacles’ [1988] EPW vol 23, 1511

separate states, as this would divide the country into thousands of microstates. Regardless of the stern view taken by the party, the Darjeeling district of CPI (M) still supported the agitation.²²

In juxtaposition to the state government, the union government led by Mr. Rajiv Gandhi took a radically different view of the matter. Rajiv Gandhi didn't consider the movement as anti-national.²³ It is believed that he encouraged the Gorkhaland agitators for his own political gains. The common Nepali speaking people were not aware of the procedure for grant of statehood. So, demand for statehood that should have been raised against the union government got aimed at the state government. Rajiv Gandhi was however severely criticized for helping Subhash Ghising project himself as the spokesperson of 15 lakh gorkhas in the region and capitalize on this power tussle between the centre and the state.²⁴

Amidst the political power play, the then CM of Bengal, Jyoti Basu gave Gorkhas another reason for disgruntlement when he projected the issue as Bengali versus Nepalis. He said that the Gorkhaland agitators must remember that there were more Nepalis in the plains than there were Bengalis in the hills of Darjeeling.²⁵ These astonishing remarks clearly point out the threatening and insensitive manner in which the state sought to deal with the issue. The movement was violently repressed and even acts like burning of the 'sacrosanct' Indo Nepal Treaty were brutally suppressed by the police²⁶ and paramilitary forces. All this happened when it was ironically claimed about seven times in the state government's 'Information document' on the Gorkhaland movement that West Bengal is the only state in the country where minorities feel safe.²⁷

The Congress government at the centre was also displaying double standards. Mahendra Lama rightly said, "Historically, the role of the Congress has been one of unfulfilled promises and betrayal in the hills."²⁸ In view of Congress's sympathetic reaction to the movement, it was surprising that Rajeev Gandhi rejected the state government's proposal to grant gorkhas some regional autonomy, as provided to Mizos and other tribals in the region. Congress did not even accept the demand for inclusion of Nepalese in the eighth schedule of the Constitution. Thus, whichever the party, aspirations and needs of the gorkhas were measured on the scale of pressure they could exert on the people in the hills and any graveness in the matter was taken for a toss.

iii) A Compromise Reached

When faced with repeated protests, the state government, in order to pacify the GNLF supporters, requested for grant of Rs 30 crore for the hill areas of Darjeeling. It also allocated

²² 'Demands for Statehood' [1996] EPW vol 31, 3092-93

²³ *Supra* note 3 at p 231

²⁴ *India Today*, Editorial, (15 October 1986)

²⁵ 'Dangerous Twist' [1986] EPW vol 21, 1912-13

²⁶ 'Wrong Response' [1986] EPW vol 21 1331-32

²⁷ *Supra* note 25 at p 1912-13

²⁸ M. Lama, 'Unquiet Hills', *The Statesman*, (Calcutta, 20 April 1988)

9.2 crore for implementation of incomplete projects in the region.²⁹ In July 1988, a memorandum of understanding was signed between GNLF, the union government and the state government which stated, "In the overall national interest and in response to the prime minister's call, the GNLF agreed to drop the demand for separate state of Gorkhaland. For the social, economic, educational and cultural advancement of the people of the hill areas of the Darjeeling district, it was agreed to have an autonomous Council to be set up under the state act."³⁰ Subsequently, a Darjeeling Gorkha Hill Council (DGHC) Bill was passed by the state legislature. The basic task of the council was to formulate and implement development plans and schemes.³¹ The powers are wide ranging and include allotment or setting aside of land for agricultural or non-agricultural purposes, management of forests, collection of fees and rates, supervision of panchayats, provision of education et cetera. This compromise formula was severely criticized by the militants campaigning for Gorkhaland. They saw it as abandoning the call for a separate state by Ghising. Some also argued that regional autonomy had been achieved to some extent but, other significant matters like citizenship, language and the desire for self-determination remained unresolved.

A lot of hopes were pinned on this proto federal innovation, which was formulated to appease an ethnic group aspiring for separation. It was heralded as an example for all Indian states because it was devised when separatist forces were trying to threaten the unity of the nation.³² Contrary to the high expectations placed on DGHC, the council disappointed the gorkhas, people of West Bengal and Indians at large. The working of the Hill Council was dominated by GNLF and Ghising was its chairman for four years. It did provide some self-sufficiency to the Gorkhas, but allegations of corruption and nepotism, failure to steer economic and social development or significantly improve the status of Gorkhas, water crisis, problems in education, health and sanitation marred its existence. There were accusations against Ghising in financial matters. He neither gave any statement of expenditure of the money that he received for the council from the state government, nor conducted proper elections or auditing.³³ It was alleged that Ghising did not follow proper procedure for calling tenders and awarding contracts, which were even given to activists in the movement.³⁴

iv) Revival of the demand

By 1991, there was growing resentment among the people against GNLF and Subhash Ghising. To maintain his political supremacy and divert attention from ground issues and unmet promises, Ghising wrote a letter to the Prime Minister in January, 1992 in which he enquired about the legal status of Darjeeling.³⁵ In 1999, Ghising approached the International Court of Justice for arbitration on the issue. Seeing that such measures failed to break ice with the public, Ghising went to Delhi with new demands of recognition of gorkhas as a

²⁹ *Supra* note 19

³⁰ *Supra* note 3 at p 237

³¹ *Ibid.* at p 238

³² *The Statesman*, (Calcutta, 22 December 1990)

³³ *Supra* note 22 at p 3093

³⁴ *Supra* note 3 at p 239- 240

³⁵ *Ibid.* at p 235

scheduled tribe and inclusion of DGHC under Sixth Schedule of the Constitution, in order to establish a local self-government in the region. All these desperate attempts by Ghising were in vain as discontent had proliferated among gorkhas.

Bimal Gurung had been a lieutenant in the Gorkha National Volunteer Force under Ghising who had been his mentor. Due to differences of opinion with Ghising, Gurung kept himself apart from the DGHC's working. He rose to popularity in 2007 when he campaigned for Prashant Tamang who was an Indian Idol contestant and also a native of the region. He founded Gorkha Janmukti Morcha (GJMM) soon after that in October 2007. Its main agenda was a separate state for the gorkhas and the first movement that Gurung initiated was to oppose the demand raised by GNLF, that is, inclusion of the hill council under Sixth Schedule of the Constitution.³⁶ GJMM also called for numerous peaceful bandhs and hunger strikes in May-June, 2008. Things turned sour when a GNLF activist allegedly killed a GJMM supporter during a procession. Public anger brusquely drove Ghising out of Darjeeling in July 2008. Thus, the stage was set for the new leader, albeit with the same objectives and demands.

Meanwhile, the state government had remained elusive to the creation of a separate state, but it principally agreed to grant Schedule Six status and more regional autonomy to the gorkhas. However, with a new government being formed in Bengal under Trinamool Congress, a new hope arose for the issue reaching an amicable solution.

A tripartite agreement was signed between GJMM, government of West Bengal and central government on 18 July, 2011 for the creation of Gorkhaland Territorial Administration (GTA) as replacement for DGHC. Mamata Bannerjee proclaimed this pact to be the end of demand for Gorkhaland.³⁷ Bimal justified his stance by saying that GTA was imperative to create employment, empower the youth and develop infrastructure during the agitation, so that the proposed Gorkhaland does not become an underdeveloped area and deprive the younger generation of its rights. He asserted his intention of pressurizing the Central government for statehood while developing the region through GTA.³⁸

When the central government acceded the demand for Telangana while gerrymandering in 2013, the call for Gorkhaland again gained ground.³⁹ Bimal Gurung even resigned from his post of chief executive officer of the GTA as part of the revived agitation for Gorkhaland.⁴⁰ However, he resumed office after five months and with the softening stand of GJMM, skepticism remains about his commitment to give the Gorkhas a state of their own.⁴¹ Gurung met Narendra Modi recently and reminded him about the electoral promise Modi made in

³⁶ *Supra* note 6 at p 12

³⁷ Paranjay Guha Thakurta, 'Gorkhaland struggle may not end with Mamata's deal' (*First Post*, 20 July 2011) <<http://www.firstpost.com/blogs/politics-blogs/gorkhaland-struggle-may-not-end-with-mamatas-deal-44913.html>>

³⁸ *Id.*

³⁹ Suhrid Sankar Chattopadhyay, 'Echo in other States', *Frontline* (23 January 2013) 1

⁴⁰ Suhrid Sankar Chattopadhyay, 'Helsman Bimal Gurung', *Frontline* (24 January 2014) 4

⁴¹ *Id.*

Siliguri while campaigning for the Lok Sabha elections to sympathetically examine the demand for Gorkhaland. He had said that Gorkhas' dream is my dream and this gave a lot of hope to the people in the region⁴² but nothing has been done yet to respect their aspiration.

UNDERSTANDING INDIAN FEDERALISM IN THE LIGHT OF GORKHALAND MOVEMENT

i) India's Emergence as a Federal Polity

The term 'federal' is derived from latin 'faeder', which means compact or contract between nations or states that recognize central jurisdiction over common affairs exercised by a federal government 'distinct from the governments of the individual states.'⁴³ Federalism in India has the unique privilege of serving the second largest population in the world, with an unmatched plethora of cultures, religions, languages, and ethnicities. Provisions of Indian federalism were laid down by the Constitution in 1950. The federal design of the Constitution was imbibed from the Government of India Act, 1935.⁴⁴

Indian leaders were also aware of the threats that could be posed by federalism to national unity, in the form of ethnic secession and balkanization of the state. Ambedkar rebutted such concerns when he said in the Constituent assembly, "though India was to be a federation, the federation was not the result of an agreement by the states to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it."⁴⁵ Indian federation was formed only for ease of administration and was not intended to jeopardize the national integration in any manner. Accommodation of a variety of ethnic and cultural communities without letting anyone group dominate over others at the state or national level was the main advantage of federalism in India, as envisaged by the Constitution makers. Efficiency of the center in managing conflicts in the states was also envisioned as it was presumed that cultural clashes of one state would remain within that state and not spread to other states, thereby making it easier for the centre to deal with dissensions.⁴⁶

In tune with the expectations of leaders of newly Independent India, federalism has enabled the development of a 'polycentric polity' by devising a way to share and divide sovereignty. Traditionally, Indian constitution and political system was described as 'quasi federal' due to

⁴² 'Demand for Gorkhaland: Gurung meets Modi to resume talks on Statehood' *The Indian Express* (Kolkata, 20 March 2015)

⁴³ *The Living Webster Encyclopedic Dictionary of the English language*, (Delair Publishing Company Inc. 1981)

⁴⁴ RAJEEV DHAVAN and REKHA SAXENA, 'Republic of India' in Katy Le Roy and Cheryl Saunders (eds), *Legislative, Executive and Judicial Governance in Federal Countries*, (Queen's University Press 2006) 165

⁴⁵ Dasgupta, Jyotirindra, 'India's Federal Design and Multicultural National Construction' in Atul Kohli (ed), *The Success of India's Democracy* (Cambridge University Press 2001)

⁴⁶ Hardgrave Jr., Robert L., 'India: The Dilemmas of Diversity' [1993] *Journal of Democracy*, vol 4, 54-68

greater parliamentary politicization.⁴⁷ However gradually, especially since 1990s, India has been moving towards greater federalization.⁴⁸ To ensure that the ‘idea of India’⁴⁹ as a nation does not fall apart, the Constitution gave extensive powers to the Union government, thereby underscoring a degree of supremacy of Union over the state governments. One such power was to entirely rewrite the boundaries of Indian mainland to create new states, including carving them out of existing ones. A bill to alter the boundaries can be introduced in parliament after the state legislature has expressed its views on it. However, such views are not binding on the union legislature.⁵⁰ This power bestowed by Article 3 of the Constitution of India, has been considered as patently unfederal, as the only obligation on the centre is to ‘consult’ the states and not obtain their assent while reorganizing their boundaries.⁵¹

The debate in India over centralization or more federalism reflects strain between two versions of pan-Indianism, one totalistic and the other diverse. Unlike pan-Indian consciousness, the regional consciousness manifests itself as cultural nationalism that seeks to preserve uniqueness and protect homeland vis-à-vis other identities in the nation.⁵² It emerges by virtue of sharing a distinct culture, history, language and territory, within federalized units in the country.

ii) Challenges Posed by separatist movements like Gorkhaland to Federalism

The dilemma confronting the union is whether all ethnic groups that demand separation are acknowledged. If such a demand were given assent, then how would the state control the inevitable domino effect of such accession? Wouldn’t the unity of India as a nation be threatened? At the same time, it can be equally perilous to leave such matters at the helm of the state government since they can even lead to balkanization of the union.⁵³ An unresolved ethnic issue like Gorkhaland can be catastrophic as it can endanger India’s relations with Nepal and even the Gorkha regiment, which comprises of fifty-sixty thousand of our best fighters.⁵⁴

As Stepan puts it, “in a robust democratic federal political system, the more citizens feel a sense of allegiance to both of the democratically legitimized sovereignties, each with its constitutionally guaranteed scope of action; the more democratically secure the federation.”⁵⁵ The Indian governments, both at the central and state level have failed to inculcate a sense of

⁴⁷ K.C. Wheare, *Federal government* (4th edn, Oxford University Press 1964)

⁴⁸ M.P. Singh, ‘From Hegemony to Multi Level Federalism? India’s Parliamentary Federal System’ [1992] Indian Journal of Social Science, vol 3

⁴⁹ Sunil Khilnani, *The Idea of India* (Hamish Hamilton 1997)

⁵⁰ Ramachandra Guha, *India After Gandhi* (Picador, 2007) 225

⁵¹ Parmanand Parasher, *Public Administration: Indian Perspective* (Sarup & Sons 1997) 168

⁵² Subrat K. Nanda, ‘Cultural Nationalism in a Multi-National Context: The Case of India’ [2006] *Sociological Bulletin*, vol 55, 29

⁵³ Romesh Thapar , ‘Smaller States?’ [1986] EPW, vol 21, 2023

⁵⁴ *Id.*

⁵⁵ *Supra* note 51 at p 11

loyalty and security among the gorkhas and they were never politically integrated into the Congress or the CPI (M).⁵⁶

The dissension between the union and state governments, a characteristic of the Gorkhaland agitation also affected federalism. Centre-state relations had been organized in 1950 in accordance with an equilibrium model in which homogenous states on the one hand and centre on the other acted as countervailing forces.⁵⁷ In the Gorkhaland movement, the union government manipulated ethnic group of gorkhas for its narrow partisan interests. It wasn't really sympathetic to the demands for autonomy raised by the gorkhas. The centre just saw this movement as an opportunity of weakening CPI (M). This led to embitterment of centre-state relations, which is dangerous for a federal polity like India.

From the violent repression of the agitation by the state government in Bengal, it has been observed that the outcome of using coercive authority is disastrous. Over centralization of power aggravates the appeal for autonomy.⁵⁸ Nevertheless, as Partha Chatterjee says, all is not yet lost as a new and more flexible federal arrangement to accommodate such separatist tendencies will not weaken the unity of the country, but reinforce it.⁵⁹ Small states can better satisfy ethno-nationalistic aspirations, enhance administrative efficiency and strengthen federalism by participation of stakeholders in provincial development and giving opportunities for good governance.⁶⁰ Hence, grant of statehood may lead to effective management of ethno-linguisic diversity and separatist challenges that lead to violence and conflict and undermine socio-economic development of the country.⁶¹

In this case though, further division of northeast on ethno-linguistic lines is not advisable. Union governments have created 'mini-states' in the region, giving in to populist pressure, only to realize later that it was financially unviable.⁶² These mini states are totally dependent upon the central government for funds, which makes them susceptible to union intervention in their decisions and daily affairs.⁶³ The regional autonomy granted to Darjeeling within the DGHC in 1988 was seen as a clever and unique appeasement strategy. Conferring even more autonomy under the purview of the Sixth Schedule seems to be a viable option with the state government.

There are huge social and economic disparities within and across states, with more and more communities staking a claim for some measure of autonomous governance along linguistic,

⁵⁶ Partha Chatterjee (ed), *State and Politics in India* (Oxford university press 1998) 362

⁵⁷ *Ibid.* at p 250

⁵⁸ *Supra* note 3 at p 235

⁵⁹ *Supra* note 50 at p 149

⁶⁰ Rajat Ganguly, 'Identity Politics and Statehood Movements in India' <<http://cfsindia.org.in/pdf/Identity%20Politics%20Statehood%20Movements%20in%20India.%20Ganguly.%20Draft%201.pdf>>

⁶¹ *Id.*

⁶² Sachdeva, Gulshan, *Economy of the North-East: Policy, Present Conditions and Future Possibilities*, (Centre for Policy Research 2001) 60-61

⁶³ Sanjib Baruah, 'Nationalizing Space: Cosmetic Federalism and the Politics of Development in Northeast India' [2003] Development and Change, vol 34, 925

ethnic, tribal, caste, and community lines, in ways that will continue to alter Indian federalism. Unique propositions like granting regional autonomy can lead to greater satisfaction of ethno-nationalist aspirations, economic and administrative efficiency, democratic deepening and strengthening of federalism, stakeholder participation in local/provincial development, and opportunities for delivering good governance.⁶⁴ C.D. Deshpande has suggested formation of a second reorganization commission to recreate boundaries of states that have been facing separatist movements.⁶⁵ This can also be a viable option to counter the belief that new states have been created in an ad hoc manner and to give a reasonable basis for redrawing boundaries of the Indian mainland. Till an amicable solution is reached, the issue would remain contentious but, the governments at the state and the centre should nonetheless continue with developmental measures in the region so that this phase of protests does not mar Darjeeling with an unprecedented backwardness.

⁶⁴ *Id.*

⁶⁵ C. D. Deshpande, *India: A Regional Interpretation* (Indian Council of Social Science Research 1992)

RIGHTS OF ANIMALS-THE QUESTION IS NOT ‘CAN THEY REASON?’ NOR ‘CAN THEY TALK?’ BUT ‘CAN THEY SUFFER?’

Torsha Sinha

Abstract

Do animals have rights for themselves? Almost everybody believes in rights for animals, although in minimal sense. The question is what that expression actually means. While exploring the question, it is feasible to provide a clear sense of the lay of the land to show the range of possibilities, to delve into the issues, the theory and fact of the separate reasonable people. On a careful thought, the spotlight must be placed squarely on the issues of suffering and wellbeing. The stance requires rejection of some of the most root claims by advocates of animal rights, particularly those who stress the autonomy of animals to any human control and use of it. But the status has intrinsic implications of its own. It strongly recommends that there should be extensive regulations of the use of animal in scientific experiments, agriculture and entertainment. It also recommends that, there is a strong debate in principle for bans on use of animals.

Keywords: Animal Rights, Suffering and wellbeing, Autonomy, Human control, Regulations.

CATS AND DOGS PRINCIPLE

There are more than 60 million domestic dogs across the globe which is owned by over 36 million households. Among these over half of them give Christmas presents to their dogs. Millions also celebrate their dog's birthday. Now if a family's dog were forced to live a painful and short life, the family would feel some combination of rage and grief. What is said about dog owners is also said about cat owners who are still more numerous. But through their behavior, people who love pets and care about their welfare help ensure painful and short lives for billions of animals that cannot be distinguished from cats and dogs. Now should people change their behavior? Should the animals have legal rights? Should law promote animal welfare? In order to answer these questions, there is a need to step back a bit.

There are many people who think that the idea of animal rights is implausible. Recommending that animals are neither self-aware nor rational, Immanuel Kant said of animals as 'man's instruments', which deserves protection only to help human beings in their relation. The one who is cruel to animals becomes hard also in his dealings with men.¹ Jeremy Bentham had a different approach which suggests that mistreatment of animals was akin to racial discrimination and slavery. A day might come when the rest of the animal creation might acquire those rights which never could have been retained from them but by the hand of tyranny. It has already been discovered that the blackness of the skin is no excuse why a human being should be deserted without redress to the caprice of a tormentor. A grown-up dog or a horse is beyond comparison a rational as well as conversable animal than an infant of a day, a week or a month old. Now suppose the case was otherwise, what would it provide? The question isn't, if can they talk? Nor if can they reason? But if can they suffer?² Then John Stuart Mill agreed to repeat the analogy to slavery.³ Many people reject that analogy. Since past 10 years, the question about animal rights has to move from the periphery towards the center of legal and political debate. It is an International Debate. In the year 2002, it was Germany that became the first European Nation to vote to assure animal rights in its constitution, which added the word 'animals' to a clause that obliged the state to protect and respect the dignity of human beings.⁴ A great deal was done by the European Union to reduce animal suffering. In the United States consumer pressures have been improving their conditions for animals that are used as food.⁵ Regardless of growing appeal, the notion of animal rights has been rejected with extraordinary intensity. Some animal rights advocates are of the opinion that their rivals are cruel, selfish, unthinking and morally blind. Those who oppose animal rights are of that the advocates are bizarre and fanatical willing to trample on human interests for the sake of rats, mice and salmon.

WHAT RIGHTS ANIMALS MIGHT ENTAIL?

¹ Immanuel Kant, lectures on ethics, trans. Louis Infield (New York: Harper Torch books, 1963), at 240

² Jeremy Bentham, the principles of morals and legislation, Chap – XVII, section IV (1781)

³ John Stuart Mill, Where well on moral philosophy, in John Stuart Mill & Jeremy Bentham Utilitarianism and other essays 228, 252(Alan Ryan ed., 1987)

⁴ John Hooper, German Parliament votes to give animals constitutional rights, the Guardian (London) May 18 2002, the Guardian home pages, pg-2

⁵ Chicago Tribune, June 26, 2002, p.9, John Kiel Man, Food Retailers Press for Human Farming, Industry Animal Activists reaching some suppliers

Status Quo

When we comprehend ‘rights’ to be legal protection against harm, then animals already do have their rights, and the notion of animals is not controversial. Now when we take rights to mean a moral claim to such protection, it is a general acceptance that animals have rights of certain kinds. There are some people including Descartes are of the opinion that animals are like robots which lack emotions and that people should be allowed to treat them however they choose to.⁶ And then again to some people including sharp critics of animal rights movement, this stance seems unacceptable. Many people accept that people should not be allowed to torture animals and to engage in acts of neglect and cruelty. We can build on existing laws to define a minimal position in favor of animal rights. The law must prevent acts of cruelty to animals.

State Anticruelty Laws in the United States, prohibits beating, injuring and imposes affirmative duties on people with animals in their care. Then in New York, there is a representative set of provisions. Penalties are imposed on the people who transport animals in an inhuman and cruel manner or in a way which is subject to suffering and torture.⁷ People who transport animals on railroad and car are required to let the animal out for relaxation, feeding and water every five hours.⁸ The non owners who have confined an animal are expected to provide food, shelter, water and good air.⁹ People who abandon an animal in public places including pets face criminal penalties.¹⁰ Also a separate provision forbids people from killing, maiming, beating and torturing any animal.¹¹ It is generally a crime not to provide necessary sustenance, shelter, food, water and protection from severe weather.¹² Like most other states, New York also forbids overworking an animals or using it for work when he or she is not physically fit.¹³ California statute imposes criminal liability on neglect, international overworking, overdriving and torturing of animals.¹⁴ Torture is not defined in its layman language but includes any act or omission whereby unjustified or unnecessary suffering or physical pain is caused or permitted.¹⁵

If it is all taken seriously, then the provision of this kind would do a great deal to protect animals from injury, suffering and premature death. But the animal rights recognized by the state laws are limited for two major reasons-

- 1) Enforcement can occur only through public protection. For example – if cows and horses are being beaten at a farm and if greyhounds are forced to live in small cages, protection will only come if the prosecutor decides to provide it. Indeed, prosecutors have limited

⁶ Gray B. Introduction to Animal Rights 2, 73 (2000)

⁷ NY AGRI & Mkt. 359

⁸ NY AGRI & Mkt. s 359

⁹ NY AGRI & Mkt. 356

¹⁰ NY AGRI & Mkt. 355

¹¹ NY AGRI & Mkt. 353

¹² Griffith v. State, 43 SE 251 (1903); Commonwealth v. Lufkin 7 Allen 579; State v. Gross Close, 171 (1946); Reynolds v. State, 569 (1991)

¹³ Commonwealth v. Wood, 111 Mass 408 (1873); State v. Goodall, 175 p. 857; State v. Prince 94A 966

¹⁴ Cal. Penal Code 597b

¹⁵ Cal. Penal Code 599b

budgets and animal protection is a high priority thing. So, ultimately the result is that violation of state law takes place every day and there is no way to prevent it.

- 2) The Anticruelty provisions of state law contain extraordinary huge exceptions. They do not forbid hunting and also do not regulate hunting designed in a way to protect the animals against suffering. They are not applied to the use of animals for scientific and medical purposes. Also to a larger extent, they do not apply to the use and production of animals as food. In the U.S, this exemption is the most important. Around 10 billion animals are killed for food annually. 24 million chicken and around 323,000 pigs are slaughtered every day.¹⁶ At the state level, the abusive and cruel practices which are generally involved in contemporary farming are largely unregulated.¹⁷ The coverage of anticruelty law is actually very narrow because the overwhelming majority of animals are used and produced for food.

Enforcement of existing laws

If the suffering of animals really matters and every reasonable people seems to give a thought that it does, then when should be highly troubled by such limitations and the least controversial response would be to narrow the enforcement gap, allowing private suits to be brought in cases of neglect and cruelty. Reforms must be adopted with finite purpose of stopping conduct that is against the law. Here again we can find a minimal understanding of animal rights. According to this, representatives of animals must be able to bring private suits to assure that anticruelty and other related laws are actively enforced.

In a sense, it would be a dramatic proposal as it might well be understood to intend that animals should be allowed to sue in their own name and whosoever is the nominal plaintiff, there should not be any question that the suit was being brought to protect animals and not human beings. The idea might seem absurd, but it is more simple and conventional than it appears. This is true that any animal will be represented by human being just like any other litigant who lacks ordinary competence.

It might make sense to build on the idea by allowing suits on behalf of animals too. A question arises that why should anyone object an effort to encourage greater enforcement of the laws already in existence by supplementing the prosecutor's ability with private lawsuits. The best answer lies in a fear that many of those lawsuits would be frivolous and unjustified. Representatives of animals would bring a flurry of suits not because of neglect, cruelty or any kind of violation of law, but because of some form of ideological commitment for improving animal welfare, such that, it might go well beyond what law actually means. If this is genuinely a risk then it might make sense to respond by not banning those lawsuits but by forcing those who bring inappropriate ones to pay the defendants' attorney fees. Though there might be issues in deciding the selfhood of representatives as well as choosing the people who would pick them, yet, we are not in controversial territory. Those who ridicule the idea of

¹⁶ David Wolf Son, Animals, AGRI Business and the law: A modern American fable, Forthcoming in animal rights: Law and Policy

¹⁷ Peter Singer, Animal Liberation- 95-158 (revised ed. 2002)

animal rights believe in anticruelty laws and they should support efforts to guarantee that those laws are actually enforced.

Increased regulation of farming, hunting, science and more

We should not just focus on the enforcement gap but also on the areas where existing laws offer little or no protection. In other words, law should impose further regulation on scientific experiments, hunting, entertainment and farming to ensure against animal suffering. It is so convincing to think of some initiatives that would do a great deal and indeed the European Nations have just moved in this direction.

Federal laws might require scientists to justify experiments on animals by showing it before some kind of board or committee that-

- i. Such experiments are actually promising or necessary and that
- ii. Animals involved will be subjected to minimal and less suffering.

Steps have already been taken in this direction, but it would be satisfactory to go much further. Like for example- if chimpanzees or dogs are to be used to explore some kind of medical treatment, then it should be necessary to assure that they would be decently housed and fed. Some similar controls might be imposed on agriculture as well. If hens, pigs, cows are going to be raised for the use as food, then they should be decently treated in terms of space requirements, food and overall care. The European Nations have taken some significant steps of this sort. For example- it has decided to ban wire cage for hens and for that they be provided with access to perch and nesting box for laying eggs.¹⁸ Now if we focus on sufferings that I believe we should, as it is not impermissible to kill animals and use them as food but it is entirely impermissible to be negligent of their interests while they are alive, which is also applicable for animals in farms too when they are being used for benefits of human beings. For example- If sheep is going to be used for clothing then their conditions must be conducive to their welfare. We must ban hunting altogether if its sole purpose is human reaction. Should animals be killed and hunted simply because people enjoy killing and hunting them? This issue might be different if killing and hunting could be justified as having important functions such as protection of human beings against animal violence or control of population.

As a small reform step, it would even be possible to think of a system in which industries disclosed their practices either as a part of mandate or voluntarily. Industries that protected animals from suffering and neglect and assured decent conditions might publicize the fact and attempt to receive a market boost from the practices.

I believe that such reformation steps in this direction might make a great deal of sense. But things become far more controversial here. Why is this so? Partly it might be because of sheer ignorance or the part of the people about what actually happens to animals in for example scientific experimentations and farming. I am confident that greater regulation would be

¹⁸ Peter Singer, Animal Liberation (revised ed. 2003)

actively sought if existing practices were widely known. The controversy is a product of political power of relevant interests which intensely resist regulation. Then again, some legitimate questions might be raised about these regulatory strategies. The legitimate interests of human beings and legitimate interests of animals are in conflict in some of the areas. Like elsewhere, here additional regulation would be burdensome and costly. It is possible to fear that regulating the scientific experiments on animals would lead to minimal scientific experiments on animals and hence to minimize in the way of medical and scientific progress when farms will be regulated, the prices of meat will increase and people will be able to eat less meat. Therefore, it is necessary to weigh the gain to animal welfare against the human harms. If the human health could be seriously compromised by regulating the experiments on animals, then there is some balancing before supporting the regulation.

Eliminating the practice of meat eating

Now turning to some radical suggestions, if we continue to believe that animal suffering is the issue that should bother us that we want to use the law to encourage animal welfare. Certain practices cannot be defended and not be allowed to continue in practice. Mere regulation will inevitably be insufficient and in practice if mere regulation that the level of animal suffering will remain very high. For such arguments to be convincing, it would be helpful to argue not only the harms to animals are serious but also the benefits to human beings of the practices are too small to justify the continuation of those practices. People who urge radical steps, one who think for example- people should not eat meat, do so because they are of the opinion that without such steps the extent of animal suffering will be severe.

To evaluate such arguments, there is no other choice but to go area by area. Considering greyhound racing, they live in miserable condition, and many of them are put to death after their career in racing is over. If possible, then I believe that the preferred step should be to use the law to assure that greyhounds are given decent lives and also to hope that the racing industry will agree with law that has the goal. But, then if it proves to be impractical for a law to guarantee that greyhounds live minimally decent lives, then I believe that greyhound racing should be abolished. For some people, the entertainment gain cannot justify significant suffering. The largest issue involves eating meat. Again I believe that eating meat would be acceptable if decent treatment is given to animals used as food, killing of animals whether or not troublesome is less troublesome than suffering. As a practical matter, animals which are used for food are inevitably going to endure terrible suffering, and then there is a good debate that people should not eat meat to a range that a refusal to eat meat will lessen that suffering. A legal ban on meat eating would be extremely radical. Like prohibition, it would create black markets and have a set of huge and bad side-effect. Though the principle seems clear, people should be less inclined to eat meat if their refusal to do so would prevent suffering.

There is an objection by the Utilitarian in spirit to the steps of this kind. If people give up on eating meat or take other steps to prevent animals from suffering the unavoidable result will be to ensure that fewer animals exist. It is also objectionable to protect animals through measures that reduce the number of animals. It is even better for animals to have lives, though difficult ones than to have no lives. But in my opinion, this objection is weak. We must

increase the likelihood that animals will have good lives. We must not try to ensure that there are as many animals as possible.

Animal autonomy

People might not only focus on the relief of suffering. In ones view, animals have rights that should not be subjected to human use and control. It is a sort of suggestion that animals deserve to have a kind of autonomy. The suggestion goes well beyond the view which seems correct to me that animals should be seen as ends rather than means. Person who use horses for racing or chimpanzees in zoos or entertainment, do not consider the animals to be mere means to human ends. They accept that animals have instrumental as well as intrinsic value. Those who think that animals should not be subject to human control tend to object all these uses. They just want all animals to be able to make their own choices free from human control.

This raises many questions. In the end it seems to me unconvincing mostly because it neglects the possibility that animals might have bad lives under natural condition and better lives under human control. Those who believe in animal autonomy will accept the idea that people can considerably control animals which have been bred to live with them. Till now, the argument on autonomy would apply only to wild animals, prohibiting human beings from trapping, hunting and confining them.

What if certain practices like confinement in zoos, science laboratories and other facilities be undertaken in a way that ensure good lives for the animals? What if animals like elephants and dolphins do well under human control? Sometimes nature can be very cruel on them. Good zoos have breeding programs that protect the endangered species, provide a good care to animals and also serve an important function in educating people about the worth of animals. We could also imagine that lions, dolphins, elephants and giraffes could have better lives with human assistance even though confined than within their own habitat. Now if this is so, it may be easy to see what kind of response is made by those who believe in animal autonomy. Although autonomy advocates might disagree on the facts and think it highly unlikely that wild animals can have decent lives under the control of human. I personally do not believe them to be correct on the facts. The claim for animal autonomy in the end must in any case depend on an assessment of what will give animals good lives.

ARE ANIMALS A PROPERTY?

I have not explored the continuing debate over the status of animals as property yet. This is the most vigorous debate of all.¹⁹ What highlights the debate?

No single answer to it. People who insist that animals should not be seen as property may be making a modest and a simple claim that human beings should not treat animals however they wish.

¹⁹ Steven Wise, *Rattling the cage* (2000)

A central goal of the Modern Animal Rights Movement which eliminates the idea that animals are property can be taken in a modest way as an attempt to remove legal status that unavoidably promotes sufferings. Again the goal can be taken more ambitiously as an attempt to say that animals must have rights for self-determination and a certain kind of autonomy. Therefore, some people urge that a few animals at least are persons and not property and that they should have legal rights that human beings have. Although this does not mean that those animals can vote or run an office. Its status would be akin to that of children whose status commensurate with their abilities. At a minimum, it would seem to imply protection against battery, torture and even confinement.

However, there is a puzzle here. What does it exactly mean to say that animals are property that can be owned? As stated above, even if owned, animals cannot be treated however the owner wishes. The law already prohibits neglect and cruelty. Ownership is only a label connoting a certain set of rights and duties, and without knowing about them, we cannot recognize those rights and duties. A state can do a great to stop animal suffering without banning ownership of animals. Even animals can be granted a right to bring suit without claiming that animals are in general sense persons and not property. In context of children's rights, the affirmation that children are not property is accepted universally but it appears not to have added anything to debates over how parents may treat their children.

Now when there are real stakes in the argument over whether animals are property, it is thought necessary to demolish the idea of ownership in order to make a statement that the interest of animals count and have weight independent of the interest of animals count and have weight independent of interests of human beings. The idea of property in my view fit very poorly with how people should think on reflection about other living creatures. The debate over whether animals are property is actually a debate over more specific issues as discussed above. Getting rid of the idea that animals are property helps reducing suffering then one must get rid of the idea that animals are property.

DO ALL ANIMALS HAVE RIGHTS?

Every people do not see all animals in the same way. Some may agree that human beings should protect the interests of cats, dogs, dolphins and horses, but they are unlikely to think the same about mosquitoes, cockroaches, ants, mice, squirrels and rats. Usually it is objected to those who believe in animal rights that their stand would lead to ludicrous conclusions.

The claim needs to be taken as extreme or radical. If mosquitoes and ants have no claim to human concern when they can be killed at our whim then it is because they suffer little or not at all. We have some empirical questions here about the capacities of creatures of various sorts. We should certainly be willing to engage a degree of balancing. When human beings are at a risk of disease or illness from rats and mosquitoes, then they have a strong justification or even one self-defense for relocating or eliminating them.

CONCLUSION

Every rational person believes in animal rights. The critics of animal rights also support the anticruelty laws. My suggestion is that the simple moral judgment behind these laws is that sufferings of animals matters. And this judgment supports a significant amount of reforms. Private suits should be permitted to prevent illegal neglect and cruelty. There is no reason to give public officials a monopoly on enforcement which is a recipe for continued illegality. The anticruelty laws should be expanded to those areas that are now exempted from them including farming and scientific experiments. There is also no reason to permit the extent of suffering that is now being experienced by billions of living creatures.

The doubts about the radical idea that animals deserve to have autonomy has been raised by the author. In the view of the author, the actual question involves suffering and animal welfare. And human use and control may be compatible with decent lives for animals. Again the emphasis on suffering and on decent lives itself has a significant implications. Although it is appropriate to consider human interests in the balance and may be sometimes over interests would over weigh those of other animals. The worst part is that most of the time, animal's interests are not counted at all and when they are counted, our practices cannot possibly be justified. The author believes that in the long-run, the willingness to subject animals to unjustified suffering will be seemed a form of unconscionable barbarity which in many ways be morally akin to slavery and mass exemption of human beings.

SHORT NOTES ON JUVENILE RAPE

Animesh Kumar*

RAPE OF MINOR CHILD

It is not only the offence against a particular person but it is offence against the society. A child who has been raped or otherwise sexually assaulted can grow up to feel unsafe in the world, to feel that everyone is going to hurt it, to have little self-confidence, be fearful, isolated and angry. This child can feel powerless, fear losing control, and lack respect for and trust in authority.

The abuse breaks the normal bonds that hold society together, it transgresses boundaries. If there is family breakdown, no home stability and a lack of solid nurturing roots, such children are known to do less well at school because they are either not there or when they are there they can't concentrate.

The greatest jurist Mr. V. R. Krishna Iyer in his judgment rejecting the special leave petition in *Rafiq v. State of U.P.*¹ described rape against women as "...when a woman is ravished what is inflicted is not merely physical injury but '*the deep sense of some deathless shame.*'"

DEFECT IN INVESTIGATION

Negligence of the investigating agency could not affect the credibility of the statements of the prosecutrix and it cannot be ground for discredit the testimony of prosecutrix as because the investigating agency is not under the control of the prosecutrix. [1) *Kasinath Mondal v. State of West Bengal*², 2) *State of Punjab v. Gurmit Singh & Others*³]

CORROBORATION & MINOR DISCREPANCIES

No ostensible reason has been suggested by the defense as to why the prosecutrix would falsely involve the accused for the commission of such a heinous crime. It is almost inconceivable that an unmarried girl and her parents would go to the extent of staking their reputation and future in order to falsely set up a case of rape to settle petty scores if any.

In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should consider. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts

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¹ 1981 AIR 559

² (2012) 7 SCC 699

³ 1996 AIR 1393

should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases it amounts to adding insult to injury. Why should the evidence of a girl, who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. *The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable.* Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.⁴

INJURY IS NOT NECESSARY

It is not expected that every rape victim should have injuries on her body to prove her case as recently observed by Justice Deepak Mishra and N. V. Ramana in a case decided by Supreme Court on 16/305/14 in *Kishan v. State of Haryana*⁵.

MEDICAL EVIDENCE v. OCULAR EVIDENCE

The medical evidence is usually opinion evidence *Duraipandi Thevar v. State of Tamil Nadu*⁶. The medical opinion by itself, however, does not prove or disprove the prosecution case; it is merely of advisory character. In *Mayur v. State of Gujarat*⁷, their Lordships of the Supreme Court observed:

"Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth."

Their Lordships of the Supreme Court in *Solanki Chimanbhai Ukabhai v. State of Gujarat*⁸, observed:-

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use, which the defense can make of the medical evidence, is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however, the

⁴ Ibid

⁵ Available at: <http://indiankanoon.org/doc/126076734/> (Accessed on December 23, 2015 at 12:31)

⁶ AIR 1973 SC 659

⁷ (1982) 2 SCC 396

⁸ 1983 CriLJ 822

medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.”

AN OVERVIEW OF CHILD LABOUR LAWS IN INDIA- A TRENCHANT ASSESSMENT

Utkarsh Tiwari*

Abstract

The objective of this paper is to enlighten the views about the child labour laws in India, besides having various Laws, the rate of child labourer's in India is at hype. Various statutes are established regardless there is a lack of awareness amongst a large number of people. The major reason of being poverty, due to which children are still forced to work as child labours. "*Today's children constitute tomorrow's future. To guarantee a brilliant fate of our children, we need to guarantee that they are taught and not misused. Indeed, children are the most powerless individuals from any general public. They are qualified for uncommon consideration and help due to their physical and mental in capabilities. The issue is more convoluted in creating nations like our own, where child labour exists in association with ignorance and neediness*"¹. Thus the children of our nation deserve better care and guidance in order to obtain a world free from social hurdles, the paper focuses on the underlining principles of laws regarding prevention of child labours with necessary suggestions to help in overcoming the social evil.

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¹ Supreme court on M.C. Mehta v. State of Tamil Nadu reported in AIR 1997 SC 699

INTRODUCTION

Childhood is the period of learning and comprehension. It is the time; one gains new learning furthermore, aptitudes. Instruction to children in this age is crucial to create character and capacities. Right to education is a fundamental right in India. Be that as it may, the later evaluation report of 2011 demonstrates that around 43.5 lakhs children in the age gathering of five to fourteen are child labours². Utilizing children as worker's will deny them access to social open doors like education, disables the identity and innovativeness, the advancement and development of full being, the wellbeing and the mental advancement of the child³.

MEANING OF CHILD LABOUR

The term child labour 'is characterized as a work that denies offspring of their adolescence, their potential and their respect, and that is hurtful to physical and mental improvement. The term child labour is deciphered in two route as a financial practice and as a social underhandedness. As a financial wickedness, it implies work of children in profitable occupation with a perspective to add to the pay of their families. To clarify it as a social malevolence, the nature, the degree, the risks of the occupation to which the children are utilized is to be considered⁴. Child labour implies —any work by children that meddle with their full physical and mental advancement, the open doors for an attractive least of instruction and of their required recreation⁵.

CAUSES AND KINDS OF CHILD LABOUR

The causes of child labour⁶ includes poverty, illiteracy and ignorance of Parents, unemployment, over population, war, low wages of the adult, absence of schemes for family allowances, migration to urban areas, children being cheaply available and non-enforcement of the provisions for compulsory education. Child labour may be two types⁷: Productive and Consumptive child labour.

PRODUCTIVE CHILD LABOUR

In Productive Child labour, the child worker in the family is provided process of learning the skills for a particular trade or craft. This helps the child to be a reasonably proficient craftsman or a skilled worker. Thus the childhood labour, paid or unpaid, might become an investment for at least a modest future. This category of child worker, without interfering with schooling (formal or non-formal), recreation and rest cannot be viewed as exploitative.

² Available at <http://labour.gov.in/upload/uploadfiles/files/Divisions/childlabour/Census-2001%262011.pdf>, Last accessed on 30th October 2015, 11:30 am

³ Bupinder Zutshi, Mondira Dutta & Sudesh Nangia , "In the name of Child Labour, Eradication and Evaluation Programme", Shipra Publications, New Delhi, 2002, Page 24

⁴ V.V.Giri, *Child Labour*, Chapter 21, Page -173 - Usha Sharma, —*Child labour in India*".

⁵ Haks, the chairman of the US National Child Labour Committee

⁶ See Dr.J.C.Kulshreshtha, India Child Labour', chapter III, quoted in M.C.Mehta v State of Tamil Nadu, AIR 1997 SC 699 at 708-709

⁷ Id.

CONSUMPTIVE CHILD LABOUR

In Consumptive child labour, the child is used purely for profit motive, either by the family or by the society. Child labour is used in various kinds of manual work or mental services. Such children are torn off from their family, community life and natural environment. The consumptive child labour could be further classified into categories like domestic work⁸, non-domestic, non-monetary Work⁹, bonded child labour¹⁰, commercial sexual exploitation¹¹ and wage labour (industrial, plantation and street work).¹²

LEGISLATIVE MEASURES TO CURB CHILD LABOUR

The origin of statutory protection of child labour in India can be traced back to the Indian *Factories Act, 1881*. This law is mainly regulated working hours, rest intervals, minimum wages and nature of work of child labour but it does not prevent the employment of children. Later on the *Children Act, 1933* was enacted to prohibit the pledging of labour of children below 14 years by parents. In 1938 the *Employment of Children Act* was enacted to prohibit the employment of children below the age of 14 years in specified hazardous occupations. This Act specifically prohibits the employment of children below 14 years of age in the railway and other means of transport. The Post-Independence Child Labour Laws in India starts with the Factories Act, 1948.¹³ Other laws include the Plantation Labour Act, 1951¹⁴, the Mines Act, 1952¹⁵, the Merchant Shipping Act, 1958¹⁶, the Motor Transport Workers Act, 1961¹⁷, the Apprentices Act, 1961¹⁸, The States Shops and Establishments

⁸ Id. This includes the job undertaken by children, which is unpaid work for the maintenance of the household, thus allowing their parents to go out and work as wage laborers. Caring for younger siblings, cooking, cleaning, washing, fetching water etc.

⁹ Boys, in the rural areas from the age 6 onwards are usually engaged in family tasks like looking after the cattle, grazing goats, collecting fodder and scaring away birds.

¹⁰ The principle factor is the pledging of children against a loan (large or small) or an agreement between the child's parents and the employer, whereby the child would work throughout its life in exchange for money or food.

¹¹ Girls are lured or forced into this form of labour, which can verge on slavery. Agents act as procurers for city brothels.

¹² Children are preferred to adults, because of low wages, docile nature, and pliability and for non-compliance of labour laws. The work nature in industries includes highly hazardous works like carrying molten matter, working in furnaces with temperature of 1500 to 1800 degree Celsius.

¹³ Section 67 of the Factories Act, 1948 reads as —No child who has not completed his fourteenth year shall be required or allowed to work in any factory”

¹⁴ Section 24 of the Plantation Act reads as —No child who has not completed his twelfth year shall be required or allowed to work in any plantation”

¹⁵ Section 45 of the Mines Act, 1952 reads as Prohibits the presence of persons below eighteen years of age in a mine- — (1) No child shall be employed in any mine, nor shall any child be allowed to be present in any part of mine which is below ground or in any open cast working in which any mining operations are carried on—

¹⁶ Section 109 of Merchant Shipping Act, 1958 reads as —No person under fifteen years of age shall be engaged or carried to sea to work in any capacity in any ship, except-(a) In a school ship, or training ship, in accordance with the prescribed conditions; or (b) In a ship in which all persons employed are members of one family; or (c) In a home-trade ship of less than two hundred tons gross; or (d) Where such person is to be employed on nominal wages and will be in charge of his father or other adult near male relative॥

¹⁷ Section 21 of the Motor Transport Workers Act, 1961 reads as —No Child shall be required or allowed to work in any capacity in any motor transport undertaking”.

¹⁸ Section 3 of the Apprentices Act, 1961 provides Qualifications for being engaged as an apprentice- “A person shall not be qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade, unless he- (a) Is not less than fourteen years of age and (b) Satisfies such standards of education and

Act¹⁹ and The Beedi and Cigar Workers(Conditions of Employment) Act, 1966²⁰. Only in 1986 a specific law relating to child labour called the Child Labour (Prohibition and Regulation) Act²¹²² 1986 was passed in the Schedule of the Act²³²⁴²⁵. The Act deals with the creation of a Child Labour Technical Advisory Committee to advise the Central Government

physical fitness as may be prescribed. Provided that different standards may be prescribed in relation to apprenticeship training in different designated trades and for different category of apprentices.

¹⁹ The states shops and establishment Act prohibits the employment of children in shops, commercial establishments, restaurants, hotels, etc. the age of children varies from 12 to 15 years.

²⁰ Section 24 of the Act reads as —No child shall be required or allowed to work in any industrial premises”.

²¹ Section 2 (ii) of the Act

²² Section 3 of the Act

²³ The notification says that the following occupations are to be added to Part A—Occupations:- (14) Employment of children as domestic workers or servants ; (15) Employment of children in the dhabas (road –side eateries) restaurants, hotels, motels, tea-shops, resorts, spas or other recreational centers

²⁴ Occupations such as Transport of passengers, goods or mails by railways; Cinder picking, clearing of an ash pit or building operation in the railway premises; Work in a catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from the one platform to another or in to or out of a moving train; Work relating to the construction of a railway station or with any other work where such work is done in close proximity to or between the railway lines; A port authority within the limits of any port; Work relating to selling of crackers and fireworks in shops with temporary licenses; Abattoirs/Slaughter House; Automobile workshops and garages;Foundries;Handling of toxic or inflammable substances or explosives; Handloom and power loom industry; Mines (underground and under water) and collieries; Plastic units and fiberglass workshops.

²⁵ Processes like Beedi-making. Carpet-weaving, Cement manufacture, including bagging of cement, Cloth printing, dyeing and weaving, Manufacture of matches, explosives and fire-works, Mica-cutting and splitting, Shellac manufacture, Soap manufacture,Tanning,Wool-cleaning, Building and construction industry, Manufacture of slate pencils (including packing), Manufacture of products from agate, Manufacturing processes using toxic metals and substances such as lead, mercury, manganese, chromium, cadmium, benzene, pesticides and asbestos. —Hazardous processes as defined in Sec. 2 (cb) and „dangerous operation“ as notice in rules made under section 87 of the Factories Act, 1948 (63 of 1948),Printing as defined in Section 2(k) (iv) of the Factories Act, 1948 (63 of 1948), Cashew and cashew nut descaling and processing, Soldering processes in electronic industries, Aggarbatti manufacturing, Automobile repairs and maintenance including processes incidental thereto namely, welding, lathe work, dent beating and painting, Brick kilns and Roof tiles units, Cotton ginning and processing and production of hosiery goods, Detergent manufacturing, Fabrication workshops (ferrous and non-ferrous), Gem cutting and polishing, Handling of chromite and manganese ores, Jute textile manufacture and coir making, Lime Kilns and Manufacture of Lime, Lock Making, Manufacturing processes having exposure to lead such as primary and secondary smelting, welding and cutting of lead-painted metal constructions, welding of galvanized or zinc silicate, polyvinyl chloride, mixing (by hand) of crystal glass mass, sanding or scraping of lead paint, burning of lead in enameling workshops, lead mining, plumbing, cable making, wiring patenting, lead casting, type founding in printing shops. Store type setting, assembling of cars, shot making and lead glass blowing, Manufacture of cement pipes, cement products and other related work, Manufacture of glass, glass ware including bangles, fluorescent tubes, bulbs and other similar glass products. Manufacture of dyes and dye stuff. Manufacturing or handling of pesticides and insecticides. Manufacturing or processing and handling of corrosive and toxic substances, metal cleaning and photo engraving and soldering processes in electronic industry. Manufacturing of burning coal and coal briquettes. Manufacturing of sports goods involving exposure to synthetic materials, chemicals and leather.Moulding and processing of fiberglass and plastic. Oil expelling and refinery. Paper making. Potteries and ceramic industry. Polishing, molding, cutting, welding and manufacturing of brass goods in all forms. Processes in agriculture where tractors, threshing and harvesting machines are used and chaff cutting. Saw mill – all processes. Sericulture processing. Skinning, dyeing and processes for manufacturing of leather and leather products. Stone breaking and stone crushing. Tobacco processing including manufacturing of tobacco, tobacco paste and handling of tobacco in any form.Tyre making, repairing, re-treading and graphite benefication.Utensils making, polishing and metal buffing. Zari, making (all processes). Electroplating; Graphite powdering and incidental processing; Grinding or glazing of metals; Diamond cutting and polishing; Extraction of slate from mines; Rag picking and scavenging.

for inclusion of further occupations and processes in the Schedule²⁶. Act also specifies the time limit²⁷ for which a child can be employed. Each child employed in any establishment shall be allowed in each week, a holiday or one whole day which shall not be altered by the occupies more than once in three months²⁸. The Act provides for furnishing of information by the occupier regards employment of a child labour to Inspector²⁹. The act requires the Government to make rules for the health and safety of the child³⁰. The Central Government and the State Government is entrusted with the task to enforce the provisions of the Act.

SHORTCOMINGS IN THE ACT

The major loophole in the Act was that it covers the child in the organized sector and not, the 90 % working in the unorganized urban, rural sector and family units. Many occupations which are hazardous are not included. The act does not determine the minimum age of employment of children in procedures and occupations where the child labour is not prohibited³¹. The Act forgot about domestic labour which forms the largest number of working Children.

CONSTITUTIONAL SAFEGUARDS FOR THE PREVENTION OF CHILD LABOUR

Our Constitutional framers had realized that India of their vision would not be a reality if the offspring of the nation are not sustained and taught. So they incorporated relevant provisions in the Constitution for the welfare of children. Article 21 A provides Right to Education³² of children within the age of 6-14 years, Article 24³³ prohibits Employment of Children in Factories, Article 39(e)³⁴ and 39(f)³⁵ entrust the State with the duty to direct its Policy towards securing the health and strength of the workers and Article 45³⁶ provides for free and compulsory education for children till the age of fourteen. Article 51A (K)³⁷ of the

²⁶ Section-5 of the Act the Committee shall consist of a Chairman and such other members not exceeding ten, as may be appointed by the Central Government. The Committee may, if it deems it necessary so to do, constitute one or more sub-committees.

²⁷ Section 7 of the Act provides Hours of work on each day as three hours and rest for at least one hour.

²⁸ Section 8 of the Act

²⁹ Section 9 of the Act

³⁰ Section 13 of the Act

³¹ Supra note FN 5, page 38

³² Article 21A inserted by the Constitution (Eighty –Sixth Amendment) Act, 2002. Article 21 A reads as “The states shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the state, by law, may determined

³³ Article 24 reads as “No Child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

³⁴ Article 39(e) states that 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;

³⁵ Article 39(f) states that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

³⁶ The State shall endeavor to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education until they complete the age of fourteen.

³⁷ Article 51 K reads as — it shall be the duty of every citizen of India who is parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years

constitution makes it the duty of parents or guardian to provide education to the child who are between 6-14 years.

RIGHT TO FREE AND COMPULSORY EDUCATION ACT, 2009

This Act promises right to free and compulsory education to every child between the ages of 6-14 years of age group³⁸. The central government and the state government are entrusted with the responsibility of funding the provisions of the Act³⁹. The term compulsory education is defined in the Act as the obligation of the appropriate government to provide free and compulsory education to every child of the age of six to fourteen years and to ensure compulsory admission, attendance and completion of elementary education by every child of age of six to fourteen years⁴⁰. The Act also safeguards that children belonging to weaker section and disadvantaged group are not rationalized against and prevented from gaining and completing elementary education on any grounds⁴¹ there shall be no capitation fee or screening procedure for admission to any school⁴². The Act also restricts physical punishment (any injury to body) and mental harassment to child⁴³. The National and the state commissions for assurance of child rights are likewise depended with elements of observing children's entitlement to education⁴⁴. They can also enquire complaints under the Act. A national and a state advisory council can be constituted by the concerned government for the implementation of the Act.

JUDICIARY ON CHILD LABOUR

The issue of child labour has been raised before the Supreme Court on many occasions. In fact, in every case relating to construction workers, migrant labour, bonded labour, child labour is mentioned. Salal Hydro Project v. Jammu and Kashmir. The Court has reiterated the principle that the Construction work is hazardous employment and Children below 14 cannot be employed in this work⁴⁵.

M. C. Mehta v. State of Tamil Naidu and Others

One of the leading cases on child labour is the case of M.C.Mehta v. Union of India, pertaining to children working in the cracker industry in Sivakasi, Tamil Naidu. There are two judgments relating to children working in this industry. One in 1990 and the other in 1996. In the first case, court held that employment of children inside of the match industrial facilities specifically associated with the assembling procedure up to conclusive generation of match sticks or firecrackers ought to not in any way be permitted⁴⁶. Children can be utilized during the time spent pressing however pressing ought to be done in regions far from the spot

³⁸ Section 3(1) of the Act

³⁹ Section 7(1) of the Act

⁴⁰ Section 8 of the Act

⁴¹ Section 8 (c) of the Act

⁴² Section 13(1) of the Act

⁴³ Section 17 (1) of the Act

⁴⁴ Section 31 of the Act

⁴⁵ AIR 1984 SC 177

⁴⁶ 1990 (1) SCC 283

of production to stay away from presentation to mischance. Court likewise guided state to give extraordinary offices ought to be allowed for enhancing the quality of life of children like education, recreation and medical attention, creation of a welfare fund and compulsory insurance schemes for the adult and children employees.

M.C.Mehta v. State of Tamil Nadu and Others

In this judgment, the honorable Supreme Court has given directions, regarding the manner in which the children working in hazardous occupations are to be withdrawn from work and to be simultaneously rehabilitated⁴⁷ like

- 1) Survey for identification of working children should be done.
- 2) Withdrawal of children working in hazardous industry and to impart Free and compulsory education for children below 14 years of age.
- 3) To pay a compensation of Rs. 20000 for every child employed from in contravention to Child Labour (Prohibition and Abolition) Act, 1986 and a matching contributes of Rs.5000/- by the state to compensate the family of the child against loss of income. This fund is called —Child Labour Rehabilitation –cum-Welfare Fund॥
- 4) Employment of one adult member of the families of the children so withdrawn from work and it that is not possible a contribution of Rs.5, 000/- to the welfare fund to be made by the State Government.
- 5) Financial assistance to the families of the children so withdrawn to be paid -out of the interest earnings on the corpus of Rs.20,000/25,000 deposited in the welfare fund as long as the child is actually sent to the schools; (6) Regulating hours of work for children working in non-hazardous occupations so that their working hours do not exceed six hours per day and education for at least two hours is ensured. The entire expenditure on education is to be borne by the concerned employer.

People's Union for Democratic Rights v. Union of India

In this case Public Interest Litigation was filed⁴⁸ to protect children under the age group of 14 years in the construction works for Asian Games. Court directed union of India and every state government to ensure that no child below the age of 14 years is appointed in construction of India.

Banhua Mukhi Morcha v. Union of India

This Writ Petition was filed to take steps to stop employment of children in carpet industry in the State of Uttar Pradesh⁴⁹. Court directed the central and state Governments to take steps to eliminate child labour like,

- 1) Mandatory instruction to all children either by the commercial enterprises itself or in co-appointment with it by the State Government to the children utilized in the

⁴⁷ 1996 (6) SCC 756

⁴⁸ (1982) 3 SCC 235; AIR 1982 SC 1473

⁴⁹ (AIR 1997 SC 228)

processing plants, mine or whatever other industry, sorted out or sloppy work with so much timings as is advantageous to confer necessary trainings, offices for optional, professional calling and advanced education; Apart from education, periodical health checks-up;

- 2) Nutrient food and to;
- 3) Assign the responsibilities for effective ramification of the principles.

Bachpan Bachao Andolan v. Union of India and Others

In this case the petitioners challenged the child trafficking in circuses⁵⁰. The court directed the central government to ban such employments and promoted right to education among them.

CONCLUSIONS AND SUGGESTIONS

Law has done its best for the prevention of child labour and for the protection of children. But still Child Labour is a threat for the country. Even though, the Right of the Children to Free and Compulsory Education Act, 2009 promises free and compulsory education as a right of every child in the age group of 6-14 years of age, it is still in vain. More and more efforts are needed so as to eradicate the evil of child labour and to help all the children to enjoy the fruits of education.

Suggestions:

- 1) First need is for a uniform definition of the term - *Child*. Laws differs each other in defining the term “*child*”.
- 2) Steps are needed to eradicate Poverty and to provide education, adequate living conditions for the people.
- 3) Unemployment is the main reason behind child labour. Better job opportunities shall be created.
- 4) Efficient education shall be provided through various agencies. So that the children who cannot come to school could access it.
- 5) There shall be wide spread propaganda about the right of children to free and compulsory education.
- 6) Speedy disposal of the cases of child labour and severe penalties should be imposed on those who promote child labour.
- 7) Rehabilitation of displaced or rescued children is essential.
- 8) The Child Labour (Prohibition and Regulation) Act should be amended so as to include more industries in Section 3.
- 9) Education should be Job-Oriented.
- 10) The involvement of NGO's, social organizations, local bodies and Media is needed to create awareness about the problem of child labour and about children's rights.
- 11) The Central government of India should help various states of India, providing

⁵⁰ (2011) 5 SCC 1

effective and widespread schemes for the people who are below the poverty line.

More and more awareness should be spread amongst the people by ways of movies, national dramas and posters for eradicating child labour.

INEQUALITY IN MUSLIM LAW

Shubham Bharti* & Shalini Singh**

CASE ANALYSIS ON NAZIR AHMAD v. STATE

INTRODUCTION

Under Mohammedan law it is open to the husband to divorce his wife without intervention of court and without assigning any reason for his action. This is a unique feature of the Mohammedan law. This arbitrary power of the husband is in practice controlled by certain safeguards.

There are three modes in which the husband can exercise his power of divorcing his wife:

- Talak Ahasan
- Talak Hasan
- Talak-ul-biddat

Husband and wife divorcing by mutual consent:

- Khula
- Mubara'at divorce

There are various other types of Talaq's as well.

In the following case of **Nazir Ahmad v. State** which is a very rare case of non-communication of talaq to the wife which later amounted to marital rape charges by the wife on the husband. The author has tried dealing with all the aspects of talaq and even analyzed them.

FACTS OF THE CASE

- The appellant and his wife (Respondent) were married for about 16-17 years back before the registration of the case.
- A daughter was also born out of this wedlock.
- The Respondent and her daughter were turned out by the appellant and they started staying in the house of father of the respondent.
- In January, 1985 the prosecutrix filed a maintenance petition under Section 488, Cr. P. C, before the concerned Court
- To which the appellant appeared in April, 1985 and disclosed that he had already divorced the prosecutrix since 10-2-1978.
- The allegation was that on 30-9-1978 he had also executed a power of attorney in favour of his wife authorizing her to dispose of certain property describing and admitting that she was his legally wedded wife.

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- Consequently, a Criminal case was registered against him on the allegations that in spite of executing and registration of Talaq-Nama against the prosecutrix he had been using her as his wife and cohabitating with her knowingly screening the factum of divorce deed and, as such, he has committed an offence punishable under Section 376, R.P. C. After the completion of the investigation, the challan was filed against him and consequently he was charged under Section 376, R. P. C.

ISSUES

- Whether non-communication of "talaq" to wife forms the basis of divorce?
- Whether having sexual intercourse with wife without informing her about talaq-e-nama amounts to marital rape?

CASE ANALYSIS

1. Whether non-communication of "talaq" to wife forms the basis of divorce?

- Case Perspective:**

In the present case, it was argued that the divorce deed was prepared by the appellant back in 10-02-1978 but this was not communicated to the respondent. Therefore, according to Muslim Law, a talaq cannot be said to be completed without the communication to the wife. To which the respondent argued that Talaq-Nama of February 1978 was used by the petitioners to avoid maintenance.

- Author's Analysis:**

The Supreme Court, in *Mohd. Ahmed Khan v. Shah Bano Begum*¹ has held that although the Muslim Law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation enraged by **Section 125 of the Code of Criminal Procedure, 1973**. The court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to **Section 125 of the CPC, 1973**.

This landmark judgment raised many controversies thus, leading to the formation of **The Muslim (Protection of Rights on Divorce) Act, 1986** which forms the basis of the author's analysis. According to this act- A Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat, and in case she maintains the children this maintenance extends up to 2 years.

The appellant in the present case used this law, in order to get away from maintenance claiming that he has already divorced her in 1978 and also that the iddat period is over and time of two years has also lapsed. Therefore, no

¹ AIR 1985 SC 945

maintenance could be demanded for the same. The Act further says that if the wife is not able to maintain herself the husband has to give her maintenance. But this act doesn't have a direct effect on this case due to the place being **Jammu and Kashmir**. So, the law could only be applied retrospectively. The appellant used the same as a tool. One of the point which stays is that the "talaq" was not communicated.

In **Shamim Ara's** case, which runs on the similar grounds of non-communication of talaq, the Hon'ble Supreme Court held that- "*We are of the opinion that the talaq to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate.*" (**Chambers 20th Century Dictionary, New Edition, p. 1030**) and therefore, did not termed as talaq in **Shamim Ara's** case. This also, made it very clear after this judgment that a plea of previous divorce taken in the written statement cannot at all be treated as talaq by the husband to the wife on the date of filling of the written statement in the court followed by delivery of a copy thereof to the wife.

Similarly, in the present case the respondent (wife) was turned out of her matrimonial home and even the divorce deed (Talaq Nama) was not communicated to her. In fact it is her own case that the Talaq Nama came to her notice only when the appellant took the plea of divorce deed prepared in February 1978 in order to avoid paying maintenance.

Thus, no divorce took place. Therefore, under Muslim Law, a husband is liable to maintain all his wives and children. Therefore, the wife is rightly to get maintenance from her husband because non-communication of talaq does not amount to talaq.

2. Where having sexual intercourse with wife without informing her about talaq-nama amounts to marital rape?

• Case Perspective:

In the case it was argued by the respondent that the applicant had concealed a very material fact of execution of divorce deed (Talaq-Nama) from his own wife and had been cohabiting with her for 7-8 years.

The appellate argued that talaq-nama was prepared way back on 10-2-1978, but this was not communicated to wife (Respondent) and therefore, legally in Muslim Law it cannot be said to be as effectuating Talaq between the parties. Therefore, for all intents and purposes the appellant was cohabiting with the prosecutrix as his legally wedded wife. Thus, no offence under Section 376, RPC is made out against him.

• Own Analysis:

The most material fact for consideration in this case is that the appellant went on cohabiting his own wife for 7-8 years despite the fact that divorce deed got prepared

by him in February 1978. Undisputedly the fact remains that it was not communicated or not pronounced to the wife.

Though the definition of rape also reads that if a woman consents to a sexual intercourse with a man thinking he is her husband and the man knows, he's not the husband this amounts to rape.

In the present case, wife content to sexual intercourse because she was unaware of talaq-nama prepared by her husband but this also stands true that the talaq was not completed as it was not pronounced. Thus, marital rape is not committed because she was still his wife when she was consenting to it.

In case of ***Mansoor Ahmad v State***² which works on similar grounds as this respective case the court held that the husband is not liable because the talaq was not communicated.

CONCLUSION

Following principles laid down in Shamim Ara's case, the appellant was acquitted of Section 376 RPC.

Though in the personal opinions of authors-

Talaq is one of the major factors that results in women's unequal status in marriage. Although Muslim marriage is seen as a contractual relationship that must be entered into by two consenting parties; talaq gives the power to unilaterally terminate this contract to only one of the parties, the husband.

The husbands are given right to pronounce talaq, unilaterally, the power to revoke the talaq is likewise seen as his alone. The wife then has no say in whether or not she wants to remain married to a man who has gone as far as to begin the process of discarding her. When in such a position, a woman's powerlessness and vulnerability are exacerbated by laws that fail to recognise marital rape. Even if the so-called 'right of talaq' is never exercised, a husband can use such a power as a tool of control throughout marriage.

In this case also, if we go by the laws the husband is not liable, which is also proven by analysis done by the authors themselves but the major question remains

'Is the law fair? Is it equal for all?'

² 2006

LABOUR LAWS IN INDIA: CORE ISSUES AND RECOMMENDATIONS

Prabhav Ralli * & Manu Rajvanshi **

Abstract

Various studies indicate that labour laws in India are highly protective of labour, and labour markets are relatively inflexible. Due to the ‘pro-worker’ nature of our labour laws, serious rigidities have cropped up in the market. These rigidities result in high transaction costs and inefficiency in production, thereby making it difficult for the enterprises to compete in international markets. They further discourage investment, expansion in output and increase in employment. In order to undo the aforesaid adversities and prevent them from recurring, it is considered imperative to introduce reforms in the labour market through changes in labour laws. This paper covers various amendments to the two most controversial legislations in this regard, The Industrial Disputes Act, 1947 and The Contract Labour (Regulation and Abolition) Act, 1970 and how the provisions of these legislations have been interpreted by the Hon’ble Supreme Court. It further addresses the difficulties posed by these Acts and a few other labour legislations as well and their impact on the labour market. Thereafter, it enumerates the findings of various authors and economists regarding the issue of inflexibility in labour markets and does a comparative analysis of India’s labour laws and market with labour laws and markets of other countries. Further, the paper enumerates the recommendations of the Government in this regard and in the end, concludes by suggesting various reforms in the legislative framework to ensure flexibility in the Indian labour market.

Keywords: Labour laws, IDA (Industrial Disputes Act 1947), CLA [Contract Labour Act (Regulation and Abolition) Act, 1970], rigid, flexibility.

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INTRODUCTION

Various studies indicate that Indian Labour laws are highly protective of labour, and labour markets are relatively inflexible.¹ For the last so many years, it has been argued that labour laws in India are excessively pro-worker in the organized sector and this has adversely affected the performance of this sector as well as the operation of the labour markets. There have been recommendations by the government and various authors and economists to reform labour laws in India by highlighting the need for flexibility in Indian labour laws.² According to some observers, the current laws are the strongest constraints to income and job growth.³ It has been argued in this context that the rigidities in the labour market result in high transaction costs, reduce efficiency in production and make it difficult for the enterprises to operate successfully in a competitive environment. This further discourages investment, expansion in output and increase in employment. It is therefore considered imperative that reforms be brought about in the labour market through changes in the legislative framework for labour regulation, not only to encourage investment and growth of output, but also for expansion of employment in industry.⁴

This paper covers various amendments to the two most controversial legislations in this regard, The Industrial Disputes Act, 1947 and The Contract Labour (Regulation and Abolition) Act, 1970 and how the provisions of these legislations have been interpreted by the Hon'ble Supreme Court of India. It further addresses the difficulties posed by the provisions of these Acts and a few other labour legislations as well and their impact on the labour market. Thereafter, it enumerates the findings of various authors and economists regarding the issue of inflexibility in labour markets and does a comparative analysis of India's labour laws and market with labour laws and markets of other countries. Further, the paper enumerates the recommendations of the Task Force set up by the Planning Commission in 2002 and the Second National Commission on Labour 2002 and in the end, concludes by suggesting various reforms in the legislative framework to ensure flexibility in the Indian labour market.

RELEVANT LABOUR REGULATIONS

There are a large number of statutes, laws and rules governing the labour market, that make up the regulatory framework both at the central as well as the state level in India. The two main legislations that are the cause of contention here are the Industrial Disputes Act, 1947 and the Contract Labour (Regulation and Abolition) Act, 1970.

Industrial Disputes Act, 1947

¹ Aditya Bhattacharjea, *Labour Market Regulation and Industrial Performance in India: A Critical Review of the Empirical Evidence*, 49 THE INDIAN JOURNAL OF LABOUR ECONOMICS, (2006)

² RC Datta and Milly Sil, *Contemporary Issues on Labour Law Reform in India : An Overview*, ALTMRI DISCUSSION PAPER NO.5, (2007)

³ Ahmad Ahsan and Carmen Pages, *Are all labour Regulations Equal? Assessing the Effects of Job Security, Labor Dispute and Contract Labour Laws in India*, S. P. DISCUSSION PAPER NO. 0713, (2007)

⁴ TS Papola and JesimPais, *Debate on Labour Market Reforms in India : A case of Misplaced Focus*, 50 THE INDIAN JOURNAL OF LABOUR ECONOMICS, (2007)

The Industrial Disputes Act, 1947 (hereinafter referred to as the IDA) was adopted as a comprehensive measure by the Central Government with a view to improve industrial relations. It is the one of the most controversial labour regulations in India that deals with conditions for lay off, retrenchment and closure of an industry. Apart from this, it stipulates an elaborate mechanism for settlement of disputes through conciliation, arbitration and adjudication and also lays down procedures for making changes in conditions of employment.

Important Amendments To The IDA And The Interpretation Of The Provisions Of The Act By The Hon'ble Supreme Court

Various amendments to the Act have been made since the year 1947. The main amendments and their interpretation by the Hon'ble Supreme Court are as follows –

- (i) **Amending Act of 1953** - Chapter VA, consisting of Sections 25A to 25J was inserted. New definitions of 'lay-off' and 'retrenchment' were furnished in the IDA in clauses (kkk) and (oo) of Section 2.
- (ii) **Amending Act of 1957** - Section 25FF was amended to make a provision for payment of compensation to workmen in case of transfer of undertakings and a provision was made in section 25FFF for payment of compensation to workmen in case of closing down an undertaking.
- (iii) **Amending Act of 1972** - Section 25FFA was inserted in Chapter VA of the Act providing for a 60 days' prior notice to be given by the employer to the appropriate government of its intention to close down any undertaking. In case of non-compliance, the person liable was to be punished under Section 30A of the IDA.
- (iv) **Amending Act of 1976** - A new chapter, Chapter V-B was inserted in the IDA. Under Section 25-K, the provisions of this chapter were made applicable to industrial establishments employing 300 or more workmen. Section 25-M dealt with the imposition of restrictions in cases of lay-off. Section 25-N provided for conditions precedent to retrenchment of workmen. And Section 25-O, one of the most controversial provisions of this Act, provided for a 90 days' notice to the appropriate govt. for previous approval of the intended closure.
*In Excel Wear v. Union of India*⁵, it was held by the Hon'ble Supreme Court that section 25-O of the IDA and section 25-R in so far as it relates to the awarding of punishment for violation of the provisions of Section 25-O are constitutionally bad and invalid as they are violative of Article 19(1)(g) of the Constitution.⁶
- (v) **Amending Act of 1982**- Section 25-O was amended and the scope of Chapter VB was extended to cover industrial establishments in which 100 or more persons were employed.

⁵ (1978) 4 SCC 224

⁶ S.N. MISHRA, LABOUR & INDUSTRIAL LAWS, (26th Ed. 2011)

In *Workmen, Meenakshi Mills Ltd. v. Meenakshi Mills Ltd.*⁷, the Hon'ble Supreme Court upheld the validity of Section 25-N of the IDA. The restrictions imposed by the section were held to be reasonable and fair.

In *Papnasam Labour Union v. Madras Courts Ltd.*,⁸ the Apex Court held that Section 25-M of the IDA was not ultra vires of the Constitution or void. The restriction imposed on the employer's right was held to be in greater public interest for maintaining industrial peace and to prevent unemployment.⁹

In *M/S Orissa Textile and Steel Ltd. v. State of Orissa and Ors.*¹⁰, the constitutional validity of Section 25(O) as amended in 1982 was considered, and it was held that the amended provision was not ultra vires of the Constitution as it was saved by Article 19(6) of the Constitution.¹¹

Difficulties Posed By This Legislation and Their Impact on the Labour Market

Despite the fact that the constitutionality of Chapter V-B has been upheld by the Hon'ble Supreme Court, the widespread opinion is that the inclusion of this chapter, incorporated by the Amending Act of 1976, causes rigidity in the market. Under this chapter, no employer employing 100 or more workers is permitted to layoff or retrenches any worker or close down an undertaking without the prior approval of the government. The employer is required to apply to the government for such prior permission, in the prescribed format and serve a copy of the said application to the worker(s) concerned as well. The appropriate government may or may not grant permission after enquiring into the matter. The order of the government in this regard is final and binding.¹²

It has been argued that in such cases, government permission is usually difficult to obtain and therefore, the aforesaid provision has made workforce adjustment practically impossible. As a result, it has a negative effect on the investment, growth and employment in the industry, as the establishments refrain from hiring workers for they know that it would be really difficult to get rid of them when they are no more required. Logically speaking, no establishment should be compelled to carry on the burden of surplus labour and therefore, this provision fails to appeal to the intelligence of a reasonable man.

Section 9-A of the Act has also been a cause of concern when it comes to need for flexibility in the Indian Labour market. According to this provision, a 21 days' prior notice has to be given to the employees before making any change in the conditions of service of any workman in regard to the matters specified in Schedule IV of the IDA. It has been argued that this particular provision acts as a hindrance in the smooth and efficient functioning of the

⁷ AIR 1994 SC 2696

⁸ AIR 1995 SC 2200

⁹ Rupinder Kaur & Sunil Maheshwari, *Labour Reforms: A Delicate Act of Balancing the Interests*, W.P. No. 2005-07-02, INDIAN INSTITUTE OF MANAGEMENT, AHMEDABAD

¹⁰ 1995 1 LLJ 673 (Orissa)

¹¹ S.N. MISHRA, *supra* note 6

¹² TS Papola & Jesim Pais, *supra* note 4

enterprise, where employees have to be quickly redeployed to meet certain time bound targets.¹³

The IDA in an attempt to protect the interests of the workers has obstructed the expansion of the industry which can otherwise benefit the mass of unemployed workers waiting outside for a job. *Besley and Burges (2004)*¹⁴ in their study have found that the amendments to this Act, by taking into consideration the interests of the workers and serving them, have lowered the output and employment levels in the industry.¹⁵ The restriction on lay off, retrenchment and closure has discouraged factories from expanding to economic scales of production, thereby harming productivity. Thus, IDA on the whole hasn't really succeeded in its objective of improving industrial relations, because several provisions of the Act have increased labour's bargaining strength and thereby raised workforce adjustment problems and the costs of labour, which has adversely affected workforce discipline and has resulted in reluctance of the employers to hire further personnel.¹⁶

The Contract Labour (Regulation and Abolition) Act, 1970

The Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as the CLA) was enacted with the prime objective to regulate contract labour in certain economic activities and abolish it in the rest.¹⁷ The Act applies to (a) every establishment in which 20 or more contract workers are employed or were employed on any day of the preceding 12 months as contract labour, and (b) to every contractor who employs or who employed on any day of the preceding 12 months, 20 or more workmen.¹⁸

The constitutional validity of this Act was challenged before the Hon'ble Supreme Court in *Gammon India Ltd. and Ors. v. Union of India and Ors.*¹⁹ Upholding the vires of the Act, the Apex Court held that various powers conferred under the Act were in consonance with the objective of the Act.

Important Amendments

Only twice, the Act has been amended by the Central Government since its enactment in the year 1970. The amendments are as follows:

- (i) ***The Contract Labour (Regulation and Abolition) Amendment Act, 1986***– The definition of 'appropriate government' as laid down in the Act of 1970, was amended.

¹³ RC Datta & Milly Sil ,*supra* note 2

¹⁴ Besley, T & Burgess R, *Can Education Hinder Economic Performance? Evidence from India*, QUARTERLY JOURNAL OF ECONOMICS, 91-134, (2004)

¹⁵ RC Datta & Milly Sil , *supra* note 2

¹⁶ Aditya Bhattacharjea, *Labour Market Regulation and Industrial Performance in India: A Critical Review of the Empirical Evidence*, 49 THE INDIAN JOURNAL OF LABOUR ECONOMICS, (2006)

¹⁷ T.S. Papola & JesimPais, *supra* note 4

¹⁸ The Contract Labour (Regulation and Abolition) Act, 1970, Section 1, (Ind.)

¹⁹ AIR 1974 SC 960

(ii) ***The Delegated Legislation Provisions (Amendment) Act, 2004*** – Subsection (4) was added in Section 35 of the CLA. The sub- section is as follows:

“Every rule made by the State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature.”

The law laid down by the aforementioned amendments has not been subject to much debate or discussion and does not hold much relevance when it comes to the issue of inflexibility in Indian Labour Markets. Therefore, as far as this paper is concerned, the need is not felt to elaborate further on these points.

Difficulties Posed By This Enactment and Their Impact on the Labour Market

Though the constitutionality of the whole Act has been upheld by the Hon'ble Supreme Court, Section 10 of the CLA is still one of the most controversial provisions of the Indian Labour Law and forms the heart of the current dispute on labour market rigidity. The said section gives the authority to the State to prohibit contract labour in any establishment. For example, in 2001, the government prohibited the use of contract labour in handling of food in godowns and depots of the Food Corporation of India.²⁰ The relevant factors considered before passing a prohibition order are whether contract labour is employed in work of perennial nature and if it is done through regular employees in those establishments or establishments of similar nature.²¹

Contracting out work or employing contract employees has the following benefits:

- Provides flexibility
- Leads to efficient idealization of resources
- Boosts exports
- Helps in meeting business contingencies
- Helps in generating employment
- Improves overall competitiveness

Any rigidity in the availability of contract labour prevents the industry from reaping the aforesaid benefits. It further affects the operations of the firm as it is compelled to perform the task with lesser number of employees, for every establishment does not have the financial capacity to hire employees on a permanent basis for each and every task of theirs. Above all, a slight benefit to the workers in terms of the protection of their rights, eventually adversely affects the pace of employment generation in the industry.

It is for the reasons mentioned above, that the industry is of the opinion that Section 10 of the CLA, providing for prohibition of contract labour should be deleted and the Act should be renamed as the Contract Labour Regulation Act.²²

²⁰ T.S. Papola&JesimPais, *supra* note 4

²¹ Ahmad Ahsan & Carmen Pages, *supra* note 3

²² *Industrial Relations and Contract Labour In India*, AIOE, FICCI

<http://www.ficci.com/spdocument/20189/Industrial-Relations-and-Contract-Labour-in-India.pdf>

Absorption of Employees In Case Of Prohibition of Contract Labour

The workers are of the unanimous opinion that where any order, prohibiting contract labour in an establishment, is passed in furtherance of the power conferred under Section 10, the employee so discharged should automatically be absorbed as a permanent employee by the employer and should be entitled to all such benefits that are available to the permanent employees of the employer. The law in this regard, as discussed and laid down by the Hon'ble Supreme Court, is as follows –

- (i) *Air India Statutory Corporation v. United Labour Union & Ors.*²³- It was held by the Hon'ble Supreme Court that on the abolition of contract labour, the employer was under a statutory obligation to absorb discharged labourers.
- (ii) *Steel Authority of India Ltd. & Ors. v. National union of Waterfront Workers & Ors.*²⁴- In this case, the Apex Court overruled the judgment in *Air India Statutory Corporation's case*²⁵ and held that though intendment of CLA was to regulate conditions of service of contract labour and authorize in Section 10(1) prohibition of contract labour system by appropriate Government on consideration of factors enumerated in Section 10(2) of Act, it did not provide for absorption of contract labour on issuance of notification under Section 10(1). The principal employer cannot be forced to order absorption of a discharged employee in case of a prohibition order passed under Section 10.
- (iii) *APSRTC & Ors. v. G Srinivas Reddy &Ors.*²⁶- It was held by the Hon'ble Supreme Court that in view of the principles laid down in the case of *Steel Authority*²⁷, the High Court should not have directed the absorption of the discharged employees, more so, when there was no official notification under Section 10(1), prohibiting contract labour.

It is therefore suggested that Section 10 of the Act if not repealed, should atleast be amended to give effect to the latest ruling of the Hon'ble Supreme Court, by expressly mentioning that there would be no absorption of the employees in case a prohibition order passed under the said section.

Other than the provisions of the IDA and CLA, a few provisions of the following legislations also hamper growth and expansion of the labour market.

The Trade Unions Act, 1926

This Act allows multiple trade unions in one enterprise. Multiplicity of trade unions promote inter and intra union rivalry, adversely affecting production, productivity and industrial

²³ AIR 1997 SC 645

²⁴ AIR 2001 SC 3527

²⁵ *supra* note 22

²⁶ AIR 2006 SC 1465

²⁷ *supra* note 23

relations. To avoid this, in countries like Japan and Australia, ‘one enterprise one union’ is followed.²⁸

The Factories Act, 1948

This Act applies to a manufacturing unit employing 10 or more workers where the manufacturing process is being carried on with the aid of power, or 20 or more workers where the manufacturing process is being carried on without the aid of power. This limit was fixed about 70 years ago and since then many safeguards and hazard free technologies/methods have been introduced. Even then, smaller units employing as low as 10 workers are subject to the same stringent and harsh provisions of the Act. As a result of this, in order to escape compliance with the rigorous provisions of the Act, small manufacturing units employ less than the prescribed limit of workers and employment is directly affected.²⁹

The Shops and Establishments Acts

These state legislations provide for mandatory closing of shops on at least one day of the week.³⁰ Though this provides a day’s relief for the worker, it does not cater to the present day needs of the consumers, which require continuous operations on all days of the year. This again creates a problem for the employers, as they find it difficult to meet the demand of the consumers, which eventually affects the growth of the industry.

Industrial Employment (Standing Orders) Act, 1946

This Act was amended by the NDA Govt. in 2003 to introduce ‘fixed term employment’ as one of the categories of employees in the schedule. It was however repealed in 2007. Fixed term employment is needed to execute time bound projects³¹ where the number of people required are more than the ones already employed. Therefore, the absence of ‘fixed term employment’ again adversely affects the performance of the industry.

FINDINGS OF VARIOUS TABLOIDS, AUTHORS, SCHOLARS AND ECONOMISTS

Various tabloids, authors, scholars and economists have commented upon and discussed the impact of restrictive labour regulations on the Indian Labour Market. A few of the relevant findings and comments are as follows:

Dougherty, Frisancho Robles and Krishna (2014)³²

²⁸ *Suggested Labour Policy Reforms*, AIOE, FICCI, (2014)

<http://www.ficci.com/SEdocument/20301/FICCI-NOTE-ON-LABOUR-POLICY-REFORMS.pdf>

²⁹ *ibid*

³⁰ *Suggested Labour Policy Reforms*, *supra* note 27

³¹ *ibid*

³² Doigherty, S, V C Frisancho Robles and K Krishna ,*Employment Protection Legislation and Plant-Level Productivity in India*, NBER WORKING PAPER NO. 17693, (December 2011)

The total factor productivity in firms in labour intensive industries as well as in industries with highly volatile demand is about 11-14% higher in states with less restrictive labour laws.³³

*HimalSouthasian, November 21st, 2014*³⁴

The Rajasthan Government has sought amendments to the IDA to make retrenchments and closures easier for manufacturers.

*The Hindu Business Line, October 23, 2014*³⁵

The restrictive nature of Indian Labour laws hurts investment in the manufacturing sector.

*The Hindu, New Delhi, November 6, 2012*³⁶

India's labour market is over-regulated and the country's growth is being badly hurt by its rigid labour laws.

*The Hindu Business Line, 2006*³⁷

Planning Commission Deputy Chairman Montek Singh Ahluwalia is of the view that flexibility in labour laws would attract more investment and would be able to create more jobs.³⁸

*Sharma (2006)*³⁹

Regulation of the market by the state leads to deviation from full employment of resources.⁴⁰

Dr.Rangarajan (2006)

In order to achieve faster growth rate, emphasis should be laid on flexibility of labour laws.⁴¹

*GOI, 2006*⁴²

The Government of India appears to have taken the stand that the labour regulations in the country are "highly protective of labour" and therefore cause inflexibility in the labour markets.⁴³

³³ DevashishMitra, *International Trade, Domestic Labour Laws and India's Manufacturing Sector*, IDEAS FOR INDIA,September 22, 2014

³⁴ KinjalSampat, *Global Capital, Local Labour*, HIMALSOUTHASIAN, November 21, 2014

³⁵ PravakarSahoo, *Finally, a push for labour reforms*, THE HINDU BUSINESS LINE, October 23, 2014

³⁶ Kaushik Basu, *Kaushik Basu for flexible labour laws to spur growth*, THE HINDU, New Delhi, November 6, 2012

³⁷ C. Rangarajan, *Improve Employability of Labour Force*, THE HINDU BUSINESS LINE, July 1, 2006

³⁸ RC Datta and Milly Sil, *supra note2*

³⁹ Sharma, A.N., *Flexibility, Employment and Labour Market Reforms in India*, ECONOMIC AND POLITICAL WEEKLY, (2006)

⁴⁰ RC Datta and Milly Sil, *supra note2*

⁴¹ *ibid*

⁴² GOI , Economic Survey 2005-06, Ministry of Finance, (2006)

Sundar (2005)⁴⁴

The Second National Commission on Labour advocates the need for flexibility in the labour markets to promote ‘competitiveness’ and ‘efficiency’ in the current wake of globalization and rapid technological progress.⁴⁵

Besley and Burgess (2004)⁴⁶

Labour regulations adversely affect output and employment, particularly in the registered manufacturing sector.⁴⁷

Hasan, Mitra And Ramaswamy, 2003⁴⁸

Many scholars are of the view that labour market regulations need to be reduced to meet global competition.⁴⁹

Ozaki, 1999⁵⁰

The Trade Unions have come to realize that there is a need for flexibility in the Indian Labour Market and feel that the same could lead to an increase in the pace of employment generation.⁵¹

INDIAN LABOUR LAWS AND LABOUR MARKET VIS-A-VIS LAWS AND MARKETS OF OTHER COUNTRIES

The following comparative analysis will help us understand how our country lags behind many nations of the world, in terms of performance, production and productivity of the labour market and how our restrictive labour laws are responsible for the same.

(1) India and China are similarly placed in many respects including population, very large work force, cheap labour etc.⁵² Still, it is argued that there is much greater flexibility available to employers in China.⁵³ It's been well established that China's flexible and business friendly labour laws have ensured continued investments in Chinese manufacturing industry, unlike in India where restrictive labour laws have been a cause of concern for the investors. Rigid Labour laws have deterred Foreign Direct

⁴³ T.S. Papola and JesimPais , *supra* note 4

⁴⁴ Sundar, K. R. S. , *Labour Flexibility Debate in India*, ECONOMIC AND POLITICAL WEEKLY, (2005)

⁴⁵ RC Datta and Milly Sil, *supra* note 2

⁴⁶ Besley, T and Burgess R, *supra* note 14

⁴⁷ Ahmad Ahsan and Carmen Pages, *supra* note 3

⁴⁸ Hasan, Rana; Mitra, Decashish; and Ramaswamy, *Trade Reforms, Labour Regulations and Labour demand Elasticities, Empirical Evidence from India*, WORKING PAPER NO. 9879, NATIONAL BUREAU OF ECONOMIC RESEARCH, CAMBRIDGE, MA

⁴⁹ T.S. Papola and JesimPais, *supra* note 4

⁵⁰ Ozaki, Muneto, *Negotiating Flexibility: The Role of the Social Partners and the State*, ILO, (1999)

⁵¹ TS Papola&JesimPais, *supra* note4

⁵² Dr. J.P. Sharma, *Labour Law Reforms in China and India: Is the China Model an Answer?*

http://knowledge.icsi.edu/download/aruna_nagendran/200708020901.pdf

⁵³ DevashishMitra, *supra* note 32

investment (FDI) into export-oriented labour-intensive sectors in India. This is in stark contrast to China, where huge amount of FDI has been attracted in export-oriented labour intensive manufacturing, because of flexible labour laws such as the contract labour system implemented in 1995.⁵⁴

- (2) The Trade Unions Act, 1926 allows outsiders to be office bearers and members of Unions. The whole idea of outsiders standing against the employer even when they are not employed directly under him, does not make sense and therefore, does not even exist in other countries. Citing an example of the Trade Union Act in Singapore, Nath (2006)⁵⁵ says that while trade Union policies in Singapore aim at promoting country's productivity and economic growth, India's policies restrict productivity and economic growth.⁵⁶
- (3) When it comes to the issue of prior permission of the government for lay-offs, retrenchment and closure, out of 20 countries analysed in a study on the same: (i) except India, only 2 countries (Pakistan and Sri Lanka) have laws which make prior approval of the public administration mandatory, and (ii) only Vietnam, along with India, requires the consent of workers' representatives prior to collective dismissal. Even countries with restrictive labour regulations, such as Bangladesh, Philippines and Malaysia, do not have requirements of prior consultations and approval by trade unions.⁵⁷

As a result, a Morgan Stanley Report on Labour Market Environment ranks India 99th in Labour Market efficiency among 148 countries, (owing to its rigid labour regulations), in comparison to China's 34th, Japan's 23rd and USA's 4th. Besides, India's share in global manufacturing employment is only 5.8% as compared to China's 34%.⁵⁸ An analysis of the factory employment in a few countries using UNIDO data has revealed that the average number of workers in an Indian firm is as low as 75, as compared to China's 191 and Indonesia's 178. This is despite the fact that India's manufacturing base is largely labour intensive.⁵⁹

RECOMMENDATIONS BY THE GOVERNMENT

In order to counter 'jobless growth' and other challenges faced by the labour market, the government had come up with certain recommendations to reform labour laws, first in 2001 in its Report on Task Force on Employment Opportunities, by the Planning Commission of India and again in 2002 when the Second National Commission came up with certain suggestions.

⁵⁴ Pravakar Sahoo, *supra* note 34

⁵⁵ Nath, S. *Labour Policy and Economic Reforms in India* in, REFORMING THE LABOUR MARKET ACADEMIC FOUNDATION, NEW DELHI, (2006)

⁵⁶ RC Datta and Milly Sil, *supra* note 2

⁵⁷ *Comparison of Labour Laws: Select Countries*, EXIM BANK : RESEARCH BRIEF No. 75, (2013)

⁵⁸ Labour Laws, that's the one killing mfg: Morgan Stanley, (August 19, 2014)

http://www.moneycontrol.com/news/economy/labour-laws-thatsone-killing-mfg-morgan-stanley_1158604.html

⁵⁹ *Comparison of Labour Laws: Select Countries*, *supra* note 56

- (i) The Task Force on Employment Opportunities focussed on Chapter VB and Section 9A of the IDA emphasizing the need to amend them immediately. Referring to Chapter VB of the IDA, it stated that difficulty in getting prior government approval proves to be a serious impediment in case of a firm trying to introduce a new technology where some workers need to be retrenched. Further, Section 9A which concerns the job content and the area and nature of work of an employee and states that a 21 day prior notice has to be given to the employee before changing the content or nature of his work and his consent is also required for the same, was seen by the Task Force as a serious hindrance in redeploying workers to meet time bound targets, as it becomes virtually impossible to do so if the employees do not give their consent for the same. Had the process of retrenchment been easier to be implemented, the workers would have been willing to accept redeployment in order to avoid retrenchment. The Task Force further stated that this inflexibility is too harsh for smaller establishments that are labour intensive and other establishments with large number of workers because the transaction costs involved in such cases are too high.⁶⁰
- (ii) The Second National Commission on Labour recommended the use of contract-labour in non-core activities and to some extent in core activities as well. Though the employers were satisfied with this and wanted it to be implemented, they were dissatisfied with the fact that the commission had not raised the cut off limit for closure permission to establishments with 1000 or more workers which was earlier indicated to them.⁶¹

CONCLUSION AND SUGGESTIONS

To say that Indian labour laws are archaic is an understatement.⁶² Restrictive and pro-labour regulations have adversely affected the performance of India's manufacturing sector, especially in labour-intensive industries, constraining India's industrialization and economic development.⁶³ It is therefore considered imperative that reforms be brought about in the labour market through changes in the legislative framework for labour regulation, not only to encourage investment and growth of output, but also for expansion of employment in industry.⁶⁴

Based on the observations made by the Hon'ble Supreme Court, the recommendations of the government and various authors and economists, it is suggested that the certain reforms need be carried out by amending the following laws to make the Indian Labour Market more flexible and less regulated:

Industrial Disputes Act, 1947

⁶⁰ RC Datta and Milly Sil, *supra* note 2

⁶¹ *ibid*

⁶² N Madhvan , Narendra Modi Govt. is right to back Labour Reform measures, BUSINESS TODAY, August 1, 2014

⁶³ DevashishMitra, *supra* note 32

⁶⁴ TS Papola and JesimPais, *supra* note 4

- (a) Chapter VB of this Act which provides for prior government approval before ordering lay-off, retrenchment or closure in an industrial establishment where the workers are 100 or more in number hampers the industry's endeavour to expand, be competitive and face global challenges. It is therefore recommended to delete this chapter, or at least increase the threshold limit for this provision to apply from 100 employees to 500 employees.
- (b) Section 9A of the Act requires an employer to give 21 days' notice to the employee before altering the content or nature of his work. This operates as a serious bottleneck, in industries, to address exigencies, such as power shortage or rescheduling work to meet emergency demands.⁶⁵

The Contract Labour (Regulation and Abolition) Act, 1970

Contracting out job work not only helps the organization to achieve efficiency, cost effectiveness and optimization of profits, but promotes employment as well. Prohibition of contract labour would definitely strike out the aforementioned benefits and it is therefore, recommended to delete Section 10 of this Act, to provide flexibility to engage contract workers.⁶⁶

Without prejudice to the above, it is further suggested to at least amend Section 10 if not repeal it, to give effect to the latest ruling of the Hon'ble Supreme Court on the subject of 'Absorption of Contract Labour in case of Prohibition' by expressly stating that the employees would not be absorbed in case of a prohibition order under the said section. This would help in preventing further litigation or disputes regarding the same.

The Trade Unions Act, 1926

To reduce multiplicity of Trade Unions, only Trade Unions having membership of at least 25% of the total workforce in an enterprise should be registered. Section 4 of the Trade Unions Act, 1926 should therefore be amended accordingly as the threshold limit currently laid down in the section is 10%.⁶⁷

The Factories Act, 1948

In order to escape compliance with the rigorous provisions of this Act, manufacturing units employee less than the threshold limit prescribed under the Act and employment is directly affected. It is therefore recommended that Section 2(m) of this Act be amended to cover a manufacturing unit employing 20 workers or more (*instead of 10*) if the process is being carried on with the aid of power and 40 workers or more (*instead of 20*) if working without power.⁶⁸

The Shops and Establishment Acts

⁶⁵ *Suggested Labour Policy Reforms*, *supra* note 27

⁶⁶ *ibid*

⁶⁷ *Suggested Labour Policy Reforms*, *supra* note 27

⁶⁸ *ibid*

To cognize for today's consumer dynamics, the requirement under these Acts of mandatory closing of shops on at least one day of the week should be done away with and the employer should be given the option to run the establishment on all days of the week, as long as the provisions of working hours applicable for employees are complied with.⁶⁹

The Industrial Employment (Standing Orders) Act, 1946

To help the employers execute time bound targets and meet any exigencies, the category of 'fixed term employment' introduced in the Schedule of this Act in 2003, but later repealed in 2007, should be reintroduced.⁷⁰

The aforesaid suggested measures if implemented would go a long way in ensuring flexibility in the labour market and consequently not only encouraging investment and growth of output, but expansion of employment as well.

⁶⁹ *Suggested Labour Policy Reforms*, *supra* note27

⁷⁰ *ibid*

NJAC AND COLLEGIUM SYSTEM: RETROSPECT AND PROSPECT

Ekta Rathore *

Abstract

The debate regarding the appointment of judges has been going on for a long time and has had a long and controversial history of deliberation and judgments. The collegium system that has been going on for a while was sought to be replaced by the National Judicial Appointment Commission Act of 2014, which was declared unconstitutional by the apex court in October, 2015.

But the debate regarding the appointing body continues. This paper seeks to highlight the divisive background of the debate and delve into the matter of competence and legitimacy of the Collegium System and also, suggest reforms in the same.

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THE RECENT LANDMARK DECISION

The Supreme Court of India, on October 16, 2015, in the case *Supreme Court Advocates-on-Record-Association and Anr. v. Union of India*, passed a historic judgment that clearly laid down that National Judicial Appointments Bill, passed in November, is unconstitutional and that the ongoing ‘Collegium System’ was to continue.

NJAC, originated by the NDA government, had sought to replace the more than two decades old Collegium system, a system followed by the Indian Judiciary to appoint CJI and other judges of the Supreme Court and High Courts. Apart from this, the apex Court declared unconstitutional the 99th Constitutional Amendment that was to bring this Act and replace the Collegium System. Central government’s plea for a review by a larger bench was also rejected.

This landmark judgment was passed by a five judge bench of Justice J. S. Kheher, J. Chelameswar M B Lokur, Kurian Joseph and A K Goel.

This case, which is now being called the second landmark case after the *Keshawananda Bharati Case*, had a 31 days marathon hearing and constitutes an interestingly controversial history, and at the same time, an significant background. This will go deep into the historical background and also the prospective effects of his judgment, and would suggest alternatives to the ongoing dispute regarding appointment of judges.

THE DEBATE

The judiciary is one of the vital pillars for the country’s social and political development. Not only does it upholds the rights of the citizens and administers justice to them, but also keeps a check on the law making body and the implementers. In such circumstances, of course, appointment of judges in the judiciary, who are the upholders and protectors of its principles, is a crucial matter. It acts as the interpreter and the guardian of the Constitution.

According to the Centre, there are discrepancies and opaqueness in the Collegium system. This appointment body only consists of existing members of judiciary- CJI and two senior judges of the Supreme Court- and has fallen deep into corruption, bias and favouritism. Hence, it needs revision and improvement. Centre got the support of the Supreme Court Bar Association and twenty state governments that ratified the Act, in this matter.

The judiciary, on the other hand contends that the results of handing over the appointment of judges to non-judicial authorities will be disastrous and the appointment process should remain within the domain of the judiciary.

THE CONTROVERSY

The hullabaloo regarding appointments of judges started in 1982, from the case *S.P. Gupta v. Union of India*. The major issue in this case was whether the opinion of the Chief Justice of India had predominance over other authorities and if CJI’s advice was binding on the

President of the country while he made appointments. The decision did not favour the judiciary.

Justice P.N. Bhagwati clearly stated that the judges are merely constitutional functionaries and appointment of judges was a matter purely in the domain of the central government.¹ Like him, according to many in the legislature and executive, it was merely ‘consultation with the Chief Justice’ that was provided in clause (1) of Article 217 of the Indian Constitution. Ironically, when he became the President of India, his own recommendations were not accepted by the centre, relying on his own judgment.²

Also, in this decision, it was laid down that the President’s decision regarding judicial appointments could not be questioned, not even on the questions of mala fide intentions or abuse of constitutional powers. This legislation was, hence, called the ‘New Year gift of the Executive.’

Noted jurist, H.M. Seervai, has criticized this judgment for not following the provisions of Article 145(4) and (5).³

This decision proved problematic for the judiciary. Issues of bias and interference soon began to surface in the political tissue of the country. Judicial independence started to be hindered. One such instance could be seen during the time of emergency in 1970s, when Justice A.N. Ray ordered transfer of certain judges from one court to another, on the sole ground that they had decided some cases that were politically against the central government of the time.

It was due to this unwarranted interference and nepotism that another case regarding the appointment of judges came up before the judiciary- *S.C.Advocates on Record Association v. Union of India*⁴, popularly known as the *Second Judge Case*, when a writ petition was filed in the Supreme Court by Lawyers Association that put forward some grave issues regarding the appointments of judges.

The two important issues were- whether the Chief Justice had a binding opinion over judicial appointments and whether these matters were justifiable.⁵

The majority in this case decided that Chief Justice was in a better position to know which judges should be appointed and he, along with the senior most judges of the Supreme Court, should decide the appointments of the judges and the deciding collegiums need not give regard to the government’s view.

However, the constitution nowhere provides for the collegiums system.

¹ Abhishek Sudhir, Restoring the judiciary’s credibility, The Hindu, (Nov. 15, 2014), <http://www.thehindu.com/opinion/lead/restoring-the-judiciarys-credibility/article6242504.ece>

² Extracted from the autobiography of F S Nariman ‘Before Memory Fades An Autobiography’ Chapter 16, Hay House, 2010.

³ H.M.Seervai, Constitutional Law of India (Silver Jubilee Edition 4th ed. Vol 1, 1991).

⁴ S.C.Advocates on Record Association v. Union of India , A.I.R.1994 S.C. 268.

⁵ Abhinav Chandrachud, The Informal Constitution-Unwritten criteria in selecting judges for the supreme court of India 121-122 (Oxford University Press 1st ed. 2014).

This collegium system has been criticized for its nepotism, impracticality and lack of transparency.⁶ The discussions and deliberations of the collegiums are secret. The quality of the appointed judges was deteriorating and their characters were repeatedly coming into question. As a result, favouritism, casteism, sexism, corruption, medeocrity and nepotism ruined the selection process of the judges.

Fali S Nariman also stated that “If there is one important case decided by the supreme court of India in which I appeared and won, and which I have lived to regret, it is the decision that goes by the title – Supreme Court Advocates on Record Association v. Union of India.”⁷

Again the issue came before the court in 1998, during the Vajpayee government, when a presidential reference was made to the Supreme Court due to the issues that had arisen after, and because of, the Second Judge Case judgment. This came to be known as the *Third Judge Case*. The judgment of this case was not as the government wished it had been. It was not only in judiciary’s favour, but also enlarged the scope of its powers.

There has been a lot of criticism of the Third Judge case, which can in no way be discredited or disregarded. The collegium works without any kind of transparency. The criteria on which it selects and appoints judges is not concretely decided. It favours superiority in age over that of wisdom and knowledge. It has led to an inherent corruption, bias and preferential treatment in the selection process.

OBJECTIONS AND ISSUES TO BE ADDRESSED

Now that the collegium system has been upheld, there are several objections against NJAC that need to be relooked upon and several issues regarding the collegium system that need to be addressed.

The *judiciary was never consulted* while framing the NJAC bill. *Opinions and advice of the judiciary was not sought* and considered. Although the Indian Constitution has no mention of collegium, the Constitution, without any doubt, upholds the principle of ‘*independence of judiciary*’, which, as the political history dating back to the period of emergency proves, is necessary and indispensable. The provision of *veto power* limits the power of the judges in deciding appointments, which leaves a high probability that the vote of the two members of legislature and the eminent person can override the wishes and opinions of the members of the judiciary.

But, the collegium system is by no means free of defects. The apex court, while deciding the recent decisive case, has agreed to the fact that it needs reconsideration and amendment. The fact that the deciding bench of the case met again on November 3, 2015, to discuss and suggest reforms in the collegium system, proves that it is in grave need of reformation.

REFORMS IN THE COLLEGIUM SYSTEM

⁶ N H Hingorani, Collegium System of Judicial Appointments: Constitutionally Invalid, (Oct. 28, 2014), <http://www.lawyersupdate.co.in/LU/1/1591.asp>.

⁷ Supra note 2.

After the recent judgment declaring NJAC null and void was passed, the same bench that decided this case called a meeting on 3rd November, 2015, to suggest reforms and improvements in the collegiums system. Even in the landmark judgment in question, the constitutional bench has admitted that the ongoing system needs reform. This proves that the collegiums system is not free from evils and desperately needs restructuring and alteration.

As the legislative and executive history of India proves, we cannot do away with the Principle of Suppression of Powers and cannot afford interference in the judicial appointments.

Following are some *suggestions* for the reformation of the collegium system:

1. The criteria for the selection of judges should be pre decided and the collegiums of judges should be obligated to respect and follow the criteria that are laid down.
2. The discussions, deliberation and reason of appointments of the collegiums should not be secret, but should be made public.
3. Seniority of the judges who appoint other judges should not be based on age, but on knowledge, wisdom and their previously decided cases.
4. More participation of women in the collegiums, as there is a shocking difference between the number of male and female judges in the judiciary.
5. The President should have the power to ask the collegiums to reconsider a particular appointment, though, this advice should not be made binding on the collegium.

CONCLUSION

As legislative and executive history of India proves, NJAC is not an acceptable reform in the appointment process, but the shortcomings of the collegiums system cannot be overlooked. The system has become biased, opaque and secretive, and needs immediate reforms, like- a pre decided criteria for selection and more transparency in the decision process. If not done so, and the current system is allowed to continue, the future result can be an opaque, discriminatory and whimsical selection system that has the ability to infringe on the basic rights of the citizens and hamper legislative operation and competence.

CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES: A DISCUSSION

Nikhil B. Gangai

Abstract

‘Equality’ is a prospect no country can survive without. It’s also something that can never be achieved completely. In a developing country like India, which is a mixed bag of cultures, the rights of the minority groups matter a lot. Since around 19% of India’s population belongs to the minority group¹, their development and progress is vital for the overall development of the nation.

It is estimated that around 142 million children are denied education in India. This is more than the total population of Japan.

The educational rights and the cultural rights of the minorities are also to be dealt with. Are the legislations currently trying to do justice to the minorities efficient enough? What did the framers of the constitution have in mind when they framed the constitution? The laws that currently legislate the welfare of minorities are prospective in nature. But how far prospective are they? The legislations have been interpreted amicably by the ‘temples of justice’² in India to increase or widen their³ scope and to ensure that justice is done in all aspects.

¹ According to the census conducted by the Government of India in 2011, Available at https://web.archive.org/web/20150825155850/http://www.censusindia.gov.in/2011census/C-01/DDW00C_01%20MDDS.XLS

² Term denoting Courts of Law.

³ Here ‘their’ refers to the legislations governing the welfare of minorities in India.

INTRODUCTION

The Indian Constitution ensures '*justice; social, economic and political*' to all its citizens. It has established a judiciary that functions on the basis of equity and good conscience. The intelligent Indians who drafted the constitution created various provisions in it to ensure the protection of the backward classes. They made sure that the religious and ethnic minorities were safeguarded and also made sure that the economically backward people would be protected.

India, in the preamble of the constitution, declares herself to be a secular state meaning the state has no official religion that is imposed on its citizens no matter how overwhelming their majority is.

Article 29 of the Constitution of India is,

"Protection of interests of minorities:

- (1) *Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.*
- (2) *No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."*

This article expressly forbids discrimination on the grounds of race, religion, caste, language, in admission to educational institutions of their own. India is a country of diverse cultural and ethnic societies. Under this Article, the minorities have been given the unrestricted rights to promote and preserve their own culture. Article 29 also provides the linguistic and religious minorities the right to establish and manage educational institutions of their own. But, discrimination is prohibited, and hence, the doors of all such educational institutions that are run by the government or receive funds from the government are open to all groups of Indians.

Article 30 of the Constitution of India is,

Right of minorities to establish and administer educational institutions

- (1) *All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.*
- (1A) *In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.*

(2) *The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language*

Article 30 is vital to the protection of the minorities. Under this Article, the minorities have been given the right to establish and administer educational institutions of their choice. In matters of granting aids, the state cannot discriminate against educational institutions established and managed by the minorities. Such educational institutions are however, under the guidance of the state educational authorities since they have been given the right to manage the institutions, not mismanage them.⁴

Article 16 guarantees that in matters of public employment, no discrimination shall be made on grounds of race, religion, caste or language etc. This means that in matters of public employment, all Indians will receive the same treatment and there shan't be any kind of discrimination. Every citizen of India will get equal employment opportunities in the government offices.

Article 25 of the Constitution of India guarantees freedom of religion to every citizen of India. This article of the constitution ensures that the members of the religious minority community are allowed to follow their respective religion without any hindrance.

It is now clear that a minority group can maintain an educational institution and reserve a certain number of seats in that institution only for students belonging to its group.⁵

The minority rights in India are comparatively very secure. They protect the rights of the institutions in the most precise way possible without harming the interest of the rest of the citizens of India.

DISCUSSION

"It may be asked how a man can be at once free and forced to conform to wills which are not his own. How can the opposing minority be both free and subject to laws to which they have not consented?"

- Jean Jacques Rousseau

Any version of democracy that neglects the existence of minorities is not only inadequate but also ineffective.

These cultural and educational rights that are granted to the minorities are a vital necessity for the upliftment of the minority communities in India. Culture defines us; it defines the way we live and behave; and that is why, the preservation of minority culture, language and religion

⁴ As given in the *obiter dictum* of J. S. N. Variava in the case of TMA PAI Foundation & Ors vs. State of Karnataka & Ors.

AIR (2003) SC 355

⁵ This contention was cleared in the case of TMA Pai Foundation & Ors vs. State of Karnataka & Ors.
AIR (2003) SC 355

is so un-ignorable. A community changes only when its mindset changes and its mindset changes only when it's educated. Therefore, to ensure the development and transformation of the minority communities, we must ensure their education. The idea of giving the backward classes some special privilege is not meant to hurt the sentiments of the other classes or to treat them unequally but, instead to foster to the minorities' sense of security.

MINORITY

Before we reflect upon the rights of the minorities, let us reflect on what is minority?

The term 'minority' has not been defined in the constitution. The honourable Supreme Court of India in *Kerala Education Bill*⁶ which was referred to it by the then President of India under Article 143(1), held that, 'minority' means,

"Community, which is numerically less than 50 percent of the total population"

In another case, *A. M. Patroniv v. Kesavan*⁷, a divisional bench of the Kerala High Court held that

"Since the word 'minority' has not been defined in the constitution, and in the absence of any special definition, any community, religious or linguistic, which is numerically less than 50% of the population of the state concerned, is entitled to fundamental right guaranteed under Article 30 of the Indian Constitution."

In the case of *D. A. V College, Bhatinda v. State of Punjab and Others*⁸ the honourable Supreme Court of India held that,

"What constitute a linguistic or religious minority must be judged in relation to the State inasmuch as the impugned Act was a State Act and not in relation to the whole of India."

In the case of *T. M. A. Pai Foundation v. State of Karnataka*⁹, CJ Kirpal said that,

"A linguistic and religious minority are covered by the expression 'minority' under Article 30 of the constitution. Linguistic lines, therefore for the purpose of determining minority, the unit will be the state and not the whole of India. Thus religious and linguistic minorities, who have been put at per Article 30 have to be considered State wise."

In *St. Stephen's College v. University of Delhi*¹⁰, the apex court of India held that,

"The minority under Article 30 must necessarily mean those who form a distinct or identifiable group of citizens of India."

⁶ AIR 1958 SC 956

⁷ AIR 1965 Ker. 75 at p. 76

⁸ 1971 (Supp) SCR 677

⁹ AIR 2003 SC 355 at p. 418

¹⁰ AIR 1992 SC 1630

One of the most important cases was *Bal Patil v. Union of India*¹¹, where the court held that,

"The central government had to exercise its power for identification of minority group not merely on the recommendation of the commission but on consideration of the social, cultural and religious conditions of the community in such state. Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen or professionals and propertied class, it may not be necessary to notify them as minority under the Act and extend any special treatment or protection to them as minority under the Act."

These minority rights are not just recognised under the Indian Constitution but also under various international treaties, declarations and conventions.

CULTURAL RIGHTS

The Right to Culture is given even under the Universal Declaration of Human Rights.¹² Article 27 of the Universal Declaration of Human Rights says:

1. *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
2. *Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is author.*

The expression “everyone has the right freely to participate in the cultural life of the community” implies that it is duty of governments not merely to respect the right of everyone to participate in the cultural life of the community but also to provide everyone with the effective means of participating in the cultural life.¹³

Even under the *International Covenant on Economic, Social and Cultural Rights*, the cultural rights of a person are recognised. Article 15 of the Covenant¹⁴ says,

1. *The State parties to the present covenant recognize the right of everyone.*
 - (a) *To take part in cultural life.*
 - (b) *To enjoy the benefits of scientific progress and its applications.*
 - (c) *To benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production, of which he is the author.*

¹¹ AIR 2005 SC 3172

¹² Article 27 of the Universal Declaration of Human Rights.

¹³ Dr. U Chandra, Human Rights, 7th Ed. 2007, p-228.

¹⁴ International Covenant on Economic, Social and Cultural Rights

The Right to Culture, mentioned under the Universal Declaration of Human Rights¹⁵ and the International Covenant on Economic, Social and Cultural Rights events are granted and respected irrespective of caste, creed, race, religion or sex.

Though none of these conventions stress particularly on the rights of the minorities, article 27 of the International Covenant of Civil and Political Right states that,

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minority shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

EDUCATIONAL RIGHTS

Article 26(1) of the UDHR emphasizes that everyone has the right to education. It also says that education should be free, at least in the fundamental stages. It emphasizes that elementary education is compulsory. Also, sub clause 2 of Article 26 says that,

"Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for maintenance of peace."

Clause 3 of the same article of the same convention¹⁶ says that parents have a prior right to choose the kind of education that shall be given to their children.

Under the International Covenant on Economic, Social and Cultural Rights also, education has been immensely emphasized upon. Article 13(1) of this convention says,

*"They further agree that education shall enable all person to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial ethnic or religious groups and further the activities of the United Nations for the maintenance of peace."*¹⁷

Sub clause 2 of Article 13¹⁸ says that,

- (a) *Primary education shall be compulsory and available free to all.*
- (b) *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.*

¹⁵ Hereinafter referred to as "UDHR"

¹⁶ Article 26 of the Universal Declaration of Human Rights.

¹⁷ Here 'They' refers to the states party to the treaty.

¹⁸ Of the International Covenant on Economic, Social and Cultural Rights.

- (c) *Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.*
- (d) *The development of a system of school at all level shall be actively pursued, an adequate fellowship system shall be established and the material conditions of teaching staff shall be continuously improved.*

Article 5 of the International Covenant on the Elimination of all form of Racial Discrimination stresses on the right of education to everyone without distinction as to the race, colour and national or ethnic origin.

RIGHTS OF MINORITIES ACCORDING TO INDIAN CONSTITUTIONAL PERSPECTIVE

'India is a melting pot of cultures'

- Jawaharlal Nehru

Our First prime minister, ‘Chacha’ Jawarhalal Nehru said that India was a melting pot of cultures. He took pride in telling that because even though Indians comprised of so many different cultures, we all existed together in a symbiotic environment. We first belonged to our country and then our ethnic groups. But, after independence, these ethnic groups shed the essence of togetherness and started vying for cultural dominance. Some cultures who were very few in number or who were ostracised traditionally were never given an opportunity to grow. The framers of our constitution, who foresaw this made sure to safeguard the interests of these minority groups. At the Fifth Session of the Constituent Assembly, the Chairman, the first President of Independent India, Dr. Rajendra Prasad assured the minorities that,

“To all the minorities in India we give the assurance that they will receive fair and just treatment and there will be no discrimination in any form against them. The religion, their culture and their language are safe and they will enjoy all the right and privileges of citizenship, and will be expected in their turn to render loyalty to the country in which they live and its constitution. To all we give the assurance that it will be our endeavour to end poverty and squalor and its companions, hunger and disease, to abolish distinction and exploitation and to ensure decent condition of living.”

Dr. B R Ambedkar, the Chairman of the Drafting Committee stated in the Constituent Assembly that,

“It is wrong for the majority to deny the existence of the minorities to perpetuate. A solution must be found which will serve the double purpose. It must recognize the existence of the minorities to start with. It will also be such that it will enable majorities to merge some day into one”.

Along with article 29 and 30 of the Indian Constitution, Article 350A and 350B also help in empowering the minorities in the country.

Article 350A states that,

It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such direction to any state as he considers necessary or proper for securing the provision of such facilities.

This article enables the minority groups to preserve their language; indirectly enabling them to preserve their culture and tradition thereby fostering their growth and security.

And Article 350B states that,

- (1) *There shall be a special officer for linguistic minorities to be appointed by the President.*
- (2) *It shall be the duty of the special officer to investigate all matters relating to the safeguards provided for linguistic minorities under this constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of President, and sent to the governments of States concerned.*

This Article ensures that the maxim of '*parens patriae*' is upheld. The officer thus appointed for the minority group will ensure that the government fulfils its promises and also ensures that the government hears about the problems faced by the respective community.

CONCLUSION

Our constitution and its framers believed that our diversity was our strength.

Even though there are International treaties and conventions upholding the notion of 'Human Rights' all around the world; and despite many countries participating and signing such memorandums, it has been still observed that these have not been completely effective. In developing countries like India, where the enforcement of law is not very easy due to ethnic diversity, there still prevails many kinds of inequality; economic, cultural and ethnic.

Elementary education in India, is not just imparted by government schools, but is also imparted by private ones. It is generally observed that the education provided by the private entities is much better and effective than the education provided by the government schools. Also, the private schools are English Medium based whereas the government ones are usually the respective state-mother tongue based.

Reservation also hasn't been much helpful in uplifting the minorities. Many of them have lost the urge to strive. They are content just after they cut the minimum criteria for acquiring merit from reservation. Very few strive to acquire the maximum merit without reservation. Reservations have sculpted their minds to depend on reservations for everything; be it education, jobs or food for living. This isn't helping them progress in any way.

It is estimated that 142 million children in India are denied access to primary and secondary education due to inadequate schools or social and family conditions. That number is bigger than the entire population of Japan.¹⁹

There is a need for the development of clear guidelines for the exercise of regulatory powers by the states. The government should strive to strike a balance between the legislation in the country and the norms set by the international community.

¹⁹ Ashok Malik, “Set Priorities”, The Times of India, Kolkata, Sep 17, 2010, p. 18

SOCIAL GUARANTEE AND LABOUR WELL-BEING AND UNORGANISED SECTORS IN INDIA: AN ANALYSIS

Satendra Pratap Singh* & Neha Arora**

INTRODUCTION

The term ‘labour welfare’ means where it occupies an important place in the industrial development as well as in the economy. It is always an important aspect of industrial relations. It stated that it plays an important role in giving satisfactions to the worker in a way who cannot get a good wage, in the views, with the growth of industrialization and mechanization where it has already acquired added importance.

Labour welfare means nothing but the maintenance function of personnel in the sense that it always deals with a particular to the preservation of employee health and attitude. In other views, it contributes to the maintenance of employee morale. The welfare service in an industry has to improve the living and working conditions of workers and their families because the worker well-being cannot be achieved in isolation of his family.¹

Labour welfare activities in an industrialized society are far reaching impact not only on the work but also on all the aspect of human resources. Labour welfare which includes all such activities, and not only secures basic necessities but also ensures improvement in spiritual and emotional quotient. It always comprises of short term and long term goal toward building a human society.

If we want to keep the employee motivated and committed various welfare facilities are provided by the organization and we have to provide facilities to their family members also.

Though such benevolent fringe benefits the employer make life worth living for employees. The welfare amenities are extended in additional to normal wages and other economic rewards available to employees as per the legal provisions. I think that welfare may also be provided by the government, trade unions and non-government agencies in additional to the employer.

The term of labour welfare activities is flexible, differs from time to time, industry to industry, district to district and country to country, depending upon the value system, social custom, degree of industrialization and the general standard of the social economic development of a people.

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¹ The Committee on Labour Welfare (1969) Constituted by the Government of India vide their resolution No. Lwl (1) 30 (3) 165 of August 5, 1966 issued by the Ministry of Labour, Employment and Rehabilitation (Department of Labour and Employment).

It is also related to the political situation in a country. It always depends upon the kinds of problems with which society is confronted and it always deals with the structure of the industry. Sometimes, it is formed according to the age group, sex, social cultural background, marital status, economic status and educational level of the employees in various industries.

The welfare measures have more relevance in the context of the poor standard of living persons who live in Indian working class. In the views, one major aspect of national programmes towards the promotion of the welfare of the people and designed to create a life and work environment of descent comfort for working class. The Indian Constitution also wants to secure the conditions of work for this vital segment of the community and it has mention in the directive principal of state policy also.

Welfare has been accepted by employers because the welfare measures influence the sentiment of the workers and their contribution to the maintenance of industrial peace.² Apart from improved morale and loyalty welfare measures are of significance to reduce absenteeism and labour turnover in industries. Welfare measures also serve to enhance an organizations image as a caring employer.³

In a resolution in 1947, the ILO defined labour welfare as “such service, facilities and amenities like adequate canteens, rest room and recreation facilities, arrangement for travel to and from work and for the accommodation of workers employed at a distance from their houses and such other service, amenities and facilities as contribute to improve the conditions under which workers are employed.”⁴ The Encyclopedia of Social Science⁵ defines it as “the voluntary efforts of the employers to establish, within the exiting industrial system, working and sometimes living and cultural conditions of employees beyond what is required by law, the customs of the industry and the condition of market.

In the Report II of the ILO Asian Regional Conference⁶, it is stated that worker’s welfare may be understand to mean “such service, facilities and amenities, which may be established outside or in the backyard of undertaking, to enable the persons employed therein to perform their work in healthy and congenial surrounding and to provide them with the amenities conducive to good health and high morale.”

SCOPE OF WELFARE ACTIVITIES

Labour welfare activities are combinations of various steps, the cumulative effect of which is to grease the wheels of industry and society. If a sound industrial relation can based on human relations and good human relations dictate that labour being, human being should be treated humanely which includes respect that labour dignity, fair dealing and concern for the

² C.B.Mamoria, Mamona Satish, Labour Welfare Social Security and Industrial Peace in India, New Delhi, 1980,p

³ Stone H Thomas, Understanding Personnel Management, New York, 1990, p.397.

⁴ Quoted from the ILO Resolution of 1947, as in the Report of the Committee on Labour Welfare.

⁵ Encyclopedia of Social Science, Vol. XV 1935, p 395

⁶ Government of India, Ministry of Labour & Employment, amin Report of the Labour Investigation Committees, Delhi, 1946, p-336.

human being physical and social needs. In the views, many industry good relations between the management and workers depend upon the degree of mutual confidence, which can be established. The basic needs of a labour are freedom from fear, security of employment and freedom from want. They always want adequate food, better health; clothing and housing are human requirement. They just want an environment where he is contended with his job, assured of a bright future and provided with his basic needs in life. They want an atmosphere of good condition and satisfaction to labour.

Labour welfare activities are based on the plea that higher productively requires more than modern machinery and hard work. The worker has a fund of knowledge and experience at his job. If rightly directed and fully used, it makes a contribution to the prosperity of the organization. They feel proud on this and he does at most for increasing the production and its productivity.

Approaches to Labour Welfare

The welfare is a dynamic concept and it is continually changing circumstances and adapted it also. For example, the first approach was the paternalistic approach where it deals with the approach to labour welfare can be traced back to the beginning of the modern industrial system. When there was any difference between management and ownership. The owners got first-hand information of the living and working conditions of workers where they live. If we motivated by humanitarian and religious considerations then they improved the lot of the working classes. Though considerable amount of the welfare work was done during the post first world war, It was insufficient to result in promoting welfare as is clear from the following observation of the British Trade Union Congress Delegation (1927-28). “We became convinced that obtained and that was not really much, if anything, to be said in favour of employees parsing welfare work as against others who do not. Our general conclusion on welfare work as at present carried on is that is a delusion and a snare.”

Paternalistic approach followed by the industrial efficiency approach. Industrial efficiency approach was an outcome of the growth of big companies which brought about a separation of functions of management and ownership and increased the distance between the owners and the workers.

Theories of Labour Welfare

The form of labour welfare activities is flexible, elastic and differs from time to The term of labour welfare activities is flexible , differs from time to time , industry to industry, district to district and country to country, depending upon the value system, social custom, degree of industrialization and the general standard of the social economic development of the nation. We have seven theories constituting the conceptual frame work of labour welfare activities are the following:

- 1. The Police Theory:** This is based on the contention that a minimum standard of welfare is necessary for labourers. The assumption is that without policing, without compulsion, employers do not provide the minimum facilities for workers. This

theory assumes that man is selfish and always tries to achieve his own ends, even at the cost of welfare of others. In the views according to this theory owner and managers of industrial undertaking get many opportunities for exploitation of labours.

2. **The Religious Theory:** This is based on the concept that man is essentially a religious animal. Even today when we look then it is wide crystal clear that many acts of man are related to religious sentiment and beliefs.
3. **The Philanthropic Theory:** This theory is based on man's love for mankind. Man always believes to have an instinctive urge by which he strives to remove the suffering of others and promote their well-being.
4. **The Trusteeship Theory:** This theory is also called the Paternalistic Theory of Labour Welfare. According to this theory the industrialist holds the total industrial estate, properties, and profits accruing from them in trust.
5. **The Placing Theory:** This theory is based on the fact that the labour groups are becoming demanding and militant and are more conscious of their rights than ever before. Their demand for higher wages and better standards of living cannot be ignored.
6. **The Public Relation Theory:** This theory is based on the provide the basis for an atmosphere of goodwill between labour and management and also with public, labour welfare programmes under this theory and help an organization to project its good image and build up and promote good and healthy public relation with them also.
7. **The Functional Theory:** This theory is also called the Efficiency Theory. Where the welfare work is used as a means to secure, preserve and develop the efficiency and productivity of labours. An employer's takes good care of his workers, if they will tend to become more efficient and will step up production.

PRINCIPAL FOR SUCCESSFUL IMPLEMENTATION OF WELFARE ACTIVITIES

The welfare policy should be guided by idealistic morale and human value because labour welfare is not a substitute for low wages and other allowances. The principle of labour welfare programmes is to ensure that it serves the real needs of workers concerned. Special classes of workers require special types of welfare services.

Social Security Measures

Social security always forms an important part of labour welfare providing the security which is a great importance to the worker's and their families. The whole concept of social security measures also is reflected in the ILO definition. When it can be taken to mean the protection which society provides for its members and it is against the economic and social distress that would be caused by the stoppage reduction of earnings resulting from sickness, maternity, employment injury, unemployment, old age and death, the provision of medical care and the provision of subsidies for families with children.⁷ The concept of social security varies from the country to country with different political ideologies. The Social Security (Minimum Standards) Convention (No. 102) adopted by the ILO in 1952 defines the nine branches of

⁷ International Labour Office "Introduction to Social Security", Geneva 1984, p.3.

social security benefits; They are medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, maternity benefit and invalidity benefit.

International Labour Organization and Social Security

The International Labour Organization was formed in 1919 for promoting social justice and improving the living and working conditions of workers throughout the world. In its preamble to its constitution which promised protection of the worker against sickness, disease and injury arising out of his employment, the protection of children of children , young persons and women, provision for old age and injury.⁸In the views if we want to implement these orders and measures the International Labour Organization took certain steps:

- (1) It tried to create international standards by way of recommendations regarding the definition of social security.
- (2) It always collected and spread the information about social security schemes in the country.

Social Security in India

The following legislative measures have been adopted by the Government of India by a way of social security schemes for industrial workers.

Worker's Compensation Act, 1923

The compensation is payable by the employer to workman for all the personal injured caused to him/ her by an accident arising out of and in the course of his employment which disable him for more than three days. And if the workman dies, the compensation is to be paid to his legal representatives.

Employee State Insurance Act, 1948

If an injured person is entitled to receive benefit such as medical benefit, sickness benefits, maternity benefit etc.

The Payment of Gratuity Act, 1962

The Gratuity is payable to an employee on the termination of his employment after when he has rendered continuous service for not less than five years. The completion of continuous service of five years is not necessary where the termination of the employment is due to death or disablement.

The Industrial Dispute Act, 1947

The worker is entitled to compensation at the rate of 15 days average earning for every completed years of service. Where the closure of the undertaking is due to circumstances beyond the control of the employer, compensation is limited to the maximum of three months average earnings.

⁸ Constitution of ILO and Standing Orders of the International Labour Conference (Geneva ILO 1955), p.3.

Maternity Benefit Acts, 1961

The act applies to women in factories, mines and other establishments. This act replaced the mines act and it adopted by the most of the State.

(1) Employees Family Pension Schemes, 1971

The family pension search to provide some monetary relief to the family members of employees die in service. In the event of an employee's death his family gets pension on a graded scale depending on the employee's last salary grade.

TRENDS

The most employees benefit are selected for employees by management. One study found that union representative did not have a good idea of the benefits desired by their constituents.⁹ Another study conducted where it founded that when given the opportunity, 80 percent of the respondents were in favour of changes in their benefits packages.¹⁰ If we look in the light of the above finding the recent "cafeteria style" approach to benefit represents a major step in the evolution of employee benefits based on age, sex, number of child, family status, life style and preference. In this system, we get each employee is allowed to select on individual combination of benefits within some over all limits. There are two important advantages to a cafeteria style approach:

First, it allows employees to have the benefits : they need and desire most, second, by their active involvement in benefits selection, employees become more aware of the benefits they have and of their cost¹¹but at time an in appropriate benefit package may be chosen by employees.¹²

I think that labour welfare service is an important personnel function in a business. The effective utilization of other factors of production depends on the efficiency of human factor. The worker who spends more than a quarter of his life in his working place, I think that the worker has every right to demand that condition under which he works should be reasonable and provides safeguarded for life and health.

CONCLUSION

I think that in India introduced actual industrial policy which is aimed and tries to growth promoting modernization and technological up gradation to make industrial competitive in both domestic and global market also. I think that even today's scientific development of modern techno production methods higher productively depends on worker.

⁹ Lawter E.E. and Levin E., "Union Officers perceptions of members' pay preference", Industrial and Labour Relations Review, 1968,21 p. 509-517.

¹⁰ Fragner N. Benwyn," Employees Cafeteria offers insurance options". Harvand Business Reviews, November – December 1975,p.7-10.

¹¹ Stone H. Thomas, op.p.421.

¹² Mathis L. Robert and Jackson H. John, Personnel, Human Resource Management. Tata MC Graw Hill Publishing Company Ltd., New Delhi, 1990, p 210.

In Indian industries is indicative of the lack of commitment on the part of the workers. This can be reduced to a great extent by provision of good housing, health and family car, canteens, educational and training facilities, provision of welfare activities

SUPREME COURT'S NAZ JUDGMENT: AN UNEQUAL INTERPRETATION OF DOCTRINE OF EQUALITY

Anurag Pandey*

Abstract

The Supreme Court's judgment on the Naz Foundation case showed us a very weak form of judicial review opted by our apex court. We also witnessed how a group of our nationals and citizens constituted were denied the equal protection of law which by the way is the fundamental right and part of the '*Golden Triangle*' mentioned in Article 14 of the Indian Constitution. On the reasoning of very less number of people constituting the community of homosexuals. In this work the author will be engaging in the comparison of both Delhi High Court and Supreme Court's Judgment of the same case and will be critiquing the apex courts judgment on the touchstone of '*Doctrine of Equality*'.

Keywords: Doctrine of Equality, Weak Form of Judicial Review, Strong Form of Judicial Review, Equality, Liberty, Constitutional Legitimacy, Moral Legitimacy.

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INTRODUCTION

"There is a higher court than court of justice and that is the court of conscience. It supersedes all other courts"

- M.K. Gandhi¹

In authors view this court of Gandhi fits aptly after the Hon'ble Indian Supreme Court's judgment in the case of *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*, better known as the Naz foundation case; the judgment which raged the spark of doubt on the conscience and rationality of the apex court which reversed the judgment given by the Delhi high court in the same case. But why did this judgment of the court attracted so much of attention of many; that when given by High Court people cried in joy and later in sorrow when delivered by the apex court.

If seen from a leman perspective it was a judgment over the legalization of homosexuality, but there is a reason that Delhi High Court judgment was acclaimed in the legal sphere and the same case judgment given by the S.C. was equally criticized; the reason being the acknowledgement of the equality rights to the group of people who have to live hiding their sexuality or in some peoples view their identity. The discourse of Justice A.P. Shah was acclaimed because of his understanding and acknowledging the need of change of social mindset of India which shall be starting from court to provide legal reinforcement but the apex court flipped the coin using the morality aspect to keep on the age old social thinking of considering the homosexuals as a plague.

In this work, the author will be attempting to create a discussion on the subject of the doctrine of equality in context of homosexuality in India. Which at present we can see is almost nonexistence, hence questioning the conscience of the apex court in delivering the judgment which has not only be deemed shameful but also has shown that there is lot to be done to call us a nation of developed mind.

THE OBNOXIOUS STAND

On July 02, 2009, the Indian as well as international news channel exploded with the scene outside the Delhi High court where hordes of people were bursting into tears of joy and the whole of the nation has been wrapped into the debate of judging the judgment of the court . The judgment, which announced Sec. 377 of I.P.C. to be in violation of the equality doctrine, which is a fundamental right of the citizen of India under Art. 14 of, the Constitution of India.

In the legal sphere, especially the academicians applauded A.P. Shah for the judgment he delivered rendering Sec. 377 void in and around Delhi, as of finding Sec. 377 I.P.C. being in violation of Art. 14, 16, and 21; all right is being in chapter: III of the Constitution of India, meaning hereby that these were the fundamental rights.

¹ Available at: http://thinkexist.com/quotation/there_is_a_higher_court_than_courts_of_justice/216419.html

Coming back to the topic of concern; this judgment was applauded for its interpretation of the doctrine of equality. The interpretation which helped to prove that the canonical and stereotyped view of a particular view shall not receive any backing up from the law in this modern world and that these public moralities is not in itself is not a valid justification for restriction of any above mentioned fundamental rights. Quoting the paragraph of the judgment will help one better to understand what the judge and the author here want to explain:

*"88. The scope, content and meaning of Article 14 of the Constitution have been the subject matter of intensive examination by the Supreme Court in a catena of decisions. The decisions lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that the differentia must have a rational relation to the objective sought to be achieved by the statute in question. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e., causal connection between the basis of classification and object of the statute under consideration...In considering reasonableness from the point of view of Article 14, the Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable."*²

Here one can observe the broad and constitutional spectrum that the court of law has taken to resolve this issue. The spectrum of constitutional morality over public morality to grant the protection of law to the minority people rather than using a law to coerce them. The court here can be seen calling the cause of action from the side of respondent illogical, unfair and unjust; because of not being able to clear the needed conditions for calling the cause of action of the respondent a restriction over the fundamental right of equality.

Justice A.P. Shah here took the interpretation which in the view of most was the best; interpreting the word 'Sex' as not only in its literal meaning of sexual intercourse but rather deemed it as a different group of people based on their sexuality. This interpretation of the justice has rather been very helpful in justifying the courts stand on the issue. In various part of the judgment, the court can be seen making the same argument and specially in paragraph 93 of the judgment used the '*Declaration of Principle of Equality*' to state that Sec. 377 IPC does indeed is against the doctrine of equality and amount to the harassment. The court defined equal treatment as follows:

"EQUAL TREATMENT Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality, it is necessary to treat people

² Naz Foundation v. Govt. of NCT of Delhi; 160 DLT 277 (2009); Paragraph: 88.

differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals. ... ”³

Quoting various judgments both foreign and domestic cases the High Court of Delhi passed the judgment of scraping down the part of sec. 377 IPC till the extent of it affecting the private life of consenting adult.

But this broad view judgment of the court was not long lived as on December 11, 2013; the High Court's judgment was reversed by the Supreme Court. But not to be mentioned in a rather escapist manner where in the conclusion of the judgment all the burden of change in law was transferred to the legislature of the nation. Hence, calling the judgment only a verdict over the correctness over the judgment delivered by the high court.

The apex court in its judgment has mentioned numerous times about the law being against the act in itself and that the mere probability of it getting abused shall not be making it objectionable. In authors view, the popular morality influenced mind of the apex court failed to see several of the flaws in the judgment delivered by them which will be dealt in the succeeding section of the paper.

Therefore coming back to the subject of the work; the author would like to bring in the limelight the narrow use of one's consciousness in matter of law relating equality; where the court have denied a particular group of people the protection under Article 14, a fundamental right and in effect of it we have seen how various other fundamental rights of these people of sexual minorities have been violated. The court in its judgment said that:

“43. While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a minuscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.”⁴

The apex court here can be seen denying the homosexual people the fundamental rights they are deemed to be given being the citizen of the state. But just because the reported orders of the court shows a very small portion of the population constituting the group of homosexuals; the apex court came to a conclusion that it will not be a sound basis for them to call an archaic rule backed by religious values and morals unconstitutional. In spite of paying the cost of denying these sexual minorities the rights they should be getting being a citizen of the Union of India.

It seems that in the mind the court have decided what judgment they have to give rather than what they should be giving, the stand of the apex court in this judgment has shown an immaturity by calling Sec. 377 I.P.C. constitutional in a democratic state. Completely

³ Ibid.

⁴ Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors; (2014) 1 SCC 1; Paragraph: 43.

denying the fact that there are misuse of this law to harass and coerce the people of these sexual minority communities and also who are not belonging from this community at all. It's shameful to witness that the court has denied all the contention raised by the respondent in the case even on the ground of the safety of the homosexuals from not only societal harassment they have to face but also from the plight of the disease they can communicate and spread because of maintain their secrecy.

THE CRITIQUE

Just as the judgment was delivered, the news sources got flooded with the critique of the judgment. The critique which was not limited to a national level, but even attracted several scholars and other people's attention at the international level. In the following section the author would be attempting to critique the judgment delivered by the Apex Court on various constitutional doctrine and comparing the judgment of the Supreme Court with that of the one which the very same judgment over ruled; the Delhi High Court's.

WEAK FORM OF JUDICIAL REVIEW

Some called it politically influenced, some a religious judgment, but one thing which we found in common too many was; calling the judgment of discussion '*Naz Judgment or Naz Case*' an example of '*Weak Form of Judicial Review*'. Hence, the first contention we will be dealing with.

Mark V. Tushnet defines weak form of judicial review as:

*"...a form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the short run."*⁵

As we can infer from the judgment, the Indian Supreme Court did opted for a legislative revision of Sec.: 377 I.P.C. rather than scrapping it our or some of its part using the constitutionally granted power of judicial review. This decision of court; opting for a legislative change to be bought in the law rather than practicing their own granted powers is the example for the weak judicial review.

Whereas; we have also observed that the Delhi High Court took a *Strong Form of Judicial Review* approach. Mark Tushnet said that it is the approach where the court of law has the final and unrevivable interpretation and meaning of the constitution, where the executive and legislature don't have substantial role in forming of the court's opinion.⁶ The reason of saying that the Delhi high court opted for the stronger form of review is the core aspect of it ready to use doctrine of severability on Sec. 377 I.P.C. to give the homosexuals the right and equal treatment and protection of law which the constitutions grants to its citizen but the law in question was depriving as well as abusing these minority people in this so called modern world with modern thinking.

⁵ Weak Form Judicial Review and "Core" Civil Liberties, By: Mark V. Tushnet; 41 Harv. C.R. C.L. L. Rev. 1-22 (2006).

⁶ *Ibid.*

But here the main question is; except to the word ‘weak’ being used here is there any more consequential result of it? Mark Tushnet answers it in yes. He in his work has clearly stated that this form of review by any judiciary is inappropriate for core constitutional rights, especially the right against discrimination. Tushnet has compared the weak review with strong review and has come to conclusion that how this gave the legislature an in proportionate power where they can come up with their own constitutional power and stick with it. This interpretation might not be the same as the recent judicial interpretation and may even be completely opposite of what interpretation judiciary has come up with.

We can see this happening (legislative interpretation not synchronizing with popular thinking) in the present situation post Naz judgment and not only in the context of homosexuality but various other subjects too. Taking the recent instance of Beef Ban Laws; here we have seen how a legislative intent of the Maharashtra Animal Preservation (Amendment) Act, 2015 has raised a tussle between different groups in the nation. How one particular intent has shown a potential of sidelining and depriving numerous people of different groups from their various fundamental rights. Here we can clearly witness the gap of thinking both legislature and judiciary have and why we need this power tussle of interpretation of law to be balanced among all (legislature, Judiciary and Executive).

EQUALITY OR LIBERTY?

Now after dealing with the form of review our apex court has taken, lets come to the core topic of our paper; doctrine of equality and homosexuality. In the context of a constitutional law; two topics have always been seen running side by side and there has been seen a tussle between the government and civilians for the same; Equality and liberty. Where liberty has been seen as safeguarding the unfettered expression of individuality in all its form, equality on the other hand has been understood as: A set of limitations on human actions.⁷ A proper definition of the same could be taken from the one propounded by R.H. Tawney, who said that:

“Equality implies the deliberate acceptance of social restraints on individual expansion. If liberty means, therefore, that every individual shall be free to indulge without limit his appetite (for wealth and power), it is clearly incompatible not only with economic and social, but with civil and political, equality”⁸

Here, one can observe that both these terms; Equality and Liberty are being used as a counter balance to each other. Where liberty is acting as the individual freedom of doing as an individual wills to do; Equality, on the other side has to be taken as the limitation or social restraint over individual expansion, i.e.: Liberty.

But what is the need of mentioning there here, in the context of Naz Judgment?

⁷ The Merging Concept of Liberty and Equality, By: Richard B. Wilson; Washington and Lee Review; Volume: 12, Issue: 2.

⁸ Tawney, Equality, (1931) Page: 238.

In author's point of view, the importance is to differentiate as well as see the scope of individual expression and social restraint over each other and the symbiotic existence of the same. When one goes through chapter: III of the constitution of India; Fundamental Rights, one could see that each and every rights carry their own limitations. Some common to others, other distinctive. The need for these limitations is to control the individual expansion of rights and self-expression in a social stage. These limitations were primarily said to be set to maintain a social decorum and peace and tranquility over the society.

But the question arises here is what if the situation became vice versa; meaning: what if these limitations started to overpower the individual liberty guaranteed as a right by the constitution?

This is generally seen in the constitution with less of constitutionalism. But what is constitutionalism? In the simplest it has been defined as an idea that the government should be legally limited in its power, and that the government's authority and legitimacy depends on them observing these limitations.⁹ The recent example for this can be seen in the Jasmine Revolution 2011; where the pre revolution Tunisian Government was overthrown by the revolutionaries and one reason for the revolt was the excessive interfere and control of the government on the constitutional guaranteed rights of its citizens by enforcing the limitations over the same rights.¹⁰

Hence, now we know that there is always a need to limit any rights guaranteed but even those limits shall be subject to certain restriction with the main aim of social welfare, including the maintenance of its peace and decorum. So what stand should one take after Naz Judgment? Should one go through the Delhi High Courts broad interpretation or should one follow the morally backed interpretation of the apex court?

CHECKING THE LEGITIMACY OF THE LEGITIMIZING AUTHORITY

In authors point of view; one should answer this question with a legal and constitutional view point, rather than taking a moral one. Why? Because we are talking about a secular constitution, which shall be free from any religious connotation or any particular groups morality. In the case of Naz judgment one point which was constantly raised was the questioned law being having canonical connotation in it; which was condemning and non-natural sexual intercourse among the consenting humans. This non-natural sexual intercourse includes any sexual act among consenting human beings which are not resulting in the procurement of a child in normal course of nature.

R. Fallon talked about three kinds of constitutional legitimacy¹¹, which were:

- 1) Legal Legitimacy,
- 2) Social Legitimacy &

⁹ <http://plato.stanford.edu/entries/constitutionalism/>

¹⁰ http://www.orsam.org.tr/en/enUploads/Article/Files/20141016_maria.syed.pdf

¹¹ <http://www.righttononviolence.org/mecf/wp-content/uploads/2012/03/Legitimacy-and-the-Constitution.pdf>

3) Moral Legitimacy.

In the Naz case, the apex court invoked the most disputed and controversial; Moral Legitimacy whereas the High court opted for the Legal/ Social Legitimacy. But then what is the problem with a court opting for a different perspective than the one opted before?

The problem doesn't lie in what perspective one is opting, but the problem lies in when and where they are using it. In the present instance, The Delhi High Court bought legal and social legitimacy in use by attempting to scrape down part of Sec. 377 of I.P.C. and hence, getting it a social legitimacy where consenting adults can indulge in the non natural sex in their privacy without the fear of any sanction by law.

But the apex court opted to use moral legitimacy for delivering the verdict of the case. One should know that moral legitimacy generally overlaps to the religious and traditional authority of the society. Generally the practitioners of legal field tend to cease themselves from using this course of legitimacy but this was not the situation in the Naz case.

Therefore now we can see that; because of analyzing a sensitive situation on the moral ground of a non-minor group to judge the morality of a minority group can end up in a drastic consequence of the latter being denied their fundamental rights and not being treated equally in the same society as them.

CONCLUSION

In the conclusion, the author would say that with the changing era and time, we are changing, but some aspect of our life has remained constant and primitive especially our mindset over minority groups is it race, caste, sex, or sexuality. The same drawback was witnessed by us when the apex court declared Sec. 377 I.P.C. constitutional and even expressly denied the homosexual citizen of our nation their fundamental right to equality; on the mere ground of very less number of cases being known to be filed concerning them.

By this work, the author has attempted to compare and critique the judgment delivered by Delhi High Court and the Supreme Court of India and critiqued the latter on the ground of the form of judicial review and their approach of dealing with the present matter.

It is not just us who have faced a legal situation regarding homosexuality in the recent times. Various other jurisdiction including U.S.A. have faced similar situations, and upholding the legal principle over the moral one various jurisdiction including U.S.A. have legalized and recognized the homosexuals as part of their constituent population, and have not only given them legal recognition and protection, but has also attempted to change the social mindset of the people. The best example for the same would be the recent case of *Obergefell v. Hodges*¹² in the American Supreme Court; here the apex court of America in a 5:4 decision held that the fundamental right to marry does not exclude same sex marriage, and it is guaranteed to

¹² 135 S. Ct. 2584

the same sex couples (Homosexuals) by both *Due Process of Law* and *Equal Protection Clause or Doctrine of Equality*.

Last but not the least, the author would stress on the point that in his view which is following the view of Mark Tushnet; the courts shall refrain themselves from using the weak form of judicial review when they are facing the issue of core and contemporary rights which are guaranteed by the constitution because there was a reason the judiciary has been given the power to question the step of both Executive and Legislature for the Societal welfare, and they shall attempt to go for a societal and legal legitimacy rather than that of a moral one cause morality being a very subjective word will differ from one person to another depending on what group they are affiliated from, and in a secular state like India where the constitution expressly mention the legal distinction for minorities to be legally binding; a minority group based on their sexual preferences shall also be recognized without getting any religious or societal thought getting in the way of justice.

As was mentioned in the very beginning of this work; consciousness supersedes all the court. Hence, for the delivery of justice and for bringing a positive societal change one need to use their consciousness and choose the sides they want to take. In the present context of discussion; the fake morality which denies a particular group of people the right they deserve or the side where we upheld the rule of law and give them the equal protection of law and equal value in comparison to all the other citizen of the state.

SURROGACY AS A MEANS OF VIOLATION OF HUMAN RIGHTS - A NEW FORM OF HUMAN TRAFFICKING

Sitikantha Mitra* & Piyali Pan **

Abstract

The commodification of the human body has been drawn into sharp focus over the last several years as issues such as human trafficking for organs and sexual servitude have gained international attention. Unfortunately, another form of trafficking has evaded the same level of attention and outrage of the international community: surrogacy motherhood. Surrogacy motherhood is a violation of the rights of the mother as well as the child. Surrogacy, which helps a childless woman to get a child through someone else. In traditional surrogacy, the surrogate contributes her own egg, which is artificially inseminated with the donor's sperm", but "In gestational surrogacy, a fertilized egg is implanted in the surrogate as because the majority of surrogates no longer use their own eggs, in this Article. Surrogacy may be altruistic, in which the surrogate is not paid for her labor, or commercial, in which she is." Today Surrogacy is widely practiced in India. Even though there have been no legal provisions to guide this surrogacy or to take care of the rights of a surrogate mother but then also this practice is widely prevalent in India specifically. Surrogacy has emerged as a business and might be a good option for any childless couple and people who are ready for bring a surrogate mother is also doing a great job but then where is the security of these surrogate mothers. What are the rights of this surrogate mother and the child born out of this surrogacy? To stop the exploitation India should come forward with strict laws governing surrogacy such that women of our country are not exploited.

Keywords: Human trafficking, human rights, new form of labor, human exploitation, women as a commodity.

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INTRODUCTION

“Surrogacy refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep. Rather, she is carrying the baby for its intended parent or parents, usually because the parent is unable to do so without her. Surrogacy, which helps a childless woman to get a child through someone else. In traditional surrogacy, the surrogate contributes her own egg, which is artificially inseminated with the donor’s sperm.”¹, but “ In gestational surrogacy, a fertilized egg is implanted in the surrogate as because the majority of surrogates no longer use their own eggs, in this Article. Surrogacy may be altruistic, in which the surrogate is not paid for her labor, or commercial, in which she is.”² Today Surrogacy is widely practiced in India. Even though there have been no legal provisions to guide this surrogacy or to take care of the rights of a surrogate mother but then also this practice is widely prevalent in India specifically. People from foreign also come here for surrogacy. India has become the growing hub to the practice or rather the business of surrogacy which is being widely practiced in India.

In the past surrogacy would limit to only between the family members and the relatives, ‘confined to kith and kin of close relatives’³ which would be basically an altruistic deed, but then with the improvement of the society and the financial arrangements, this practice of surrogacy actually extended to outside the families and friends but rather today it has been extended to strangers also within the country as well as beyond the country as well.⁴ This if we see is also a good way to give child to a childless woman but then even this leads to much exploitation and other things⁵ “the commercialization of surrogacy has raised fears of a black market and of baby selling and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product.”⁶ “Slowly but steadily India is emerging as a popular destination for surrogacy arrangements for many rich foreigners’. Cheap medical facilities, advanced reproductive technological know-how, coupled with poor socio-economic conditions, and a lack of regulatory laws in India, in this regard combined to make India an attractive option.”⁷ This is the situation in India today as because India is a country where we can see that the large number of people lives below the poverty line and hence they are being in need of the money where they get exploited as such they never know how much the actual cost of being a surrogate mother, but then these poor people actually become ready to become a surrogate mother at a very low cost and hence they are being exploited here and hence can lead to human trafficking.

SURROGACY AS EXPLOITATION

¹ Barbara Stark , TRANSNATIONAL SURROGACY AND INTERNATIONAL HUMAN RIGHTS LAW, available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118077, last seen 7/9/2015.

² Ibid.

³ Centre for social research, Surrogate motherhood- ethical or commercial, available at, <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>, last seen 8/9/2015.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

Surrogacy is a new form exploitation which is emerging in this era of globalization. It compromises the dignity of the child by making it a commodity for a contract and also it compromises the dignity of the surrogate mother also even though her participation is voluntary but then treating her as a gestational oven.⁸ “Religious fundamentalists, the Roman Catholic Church, and feminists alike have condemned the practice of contractual surrogacy as ‘baby selling’ - one that demeans and threatens women.”⁹ The emerging business of surrogacy has opened new ways as to how women are exploited. They are not only exploited physically but also mentally.¹⁰ Today this surrogacy though has become very popular in our country but then today this the major ground for exploitation today. Today we do not have any legislation for surrogacy and hence there are no rights which are determined for the women as well as the surrogate child. Where there are chances of exploitation. The surrogate mother can be exploited in many ways. There are many instances where they are not paid the exact amount what they should be paid and hence they get ready for this for any amount and hence they are exploited health wise where may be perfect care cannot be taken and hence may be sometimes their womb bleed also and hence the surrogate mother is affected highly and may also can lead to death of the surrogate mother. In India we are very much concern about this surrogacy as because this process helps a childless couple to get a child but did we notice that why this surrogate mother are only the people from the weaker sections of the society as because they are much more in need of money and hence they are not at all concerned with the health conditions of their own but what they want is only money to raise their family and hence they become ready at whatever amount they get without knowing about their rights.

COMMERCIAL SURROGACY IN INDIA

“In 1978, October 3, India became the world 2nd nation to use IVF(in vitro fertilization) procedure to give birth to a baby girl named Kanupriya alias Durga at Calcutta, that also after the birth of the first baby boy through IVF named Louise Joy Brown born in Great Britain in the year 1978, July 25.”¹¹. Commercial surrogacy, where a women is paid for renting the womb of her for another person, It came to India where after the use of the technology of IVF procedure by the fertility centre, Associated Reproductive Technologies become popular among couples who are medically unfit for giving birth to child.¹² “In India the first child born through gestation was at Dr. Nayna Patel’s Akansha Fertility Clinic in Anand, Gujarat in 2004, where Rhadha Patel aged 47 years, became surrogates mother for her UK based daughter. After that case, the Dr. Nayna Patel’s Akansha Fertility Clinic was highlight in media there by attracting numbers of foreign Couples.”¹³ Previously surrogacy was not legal

⁸ European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, last seen 7/9/2015.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015.

¹² Ibid.

¹³ Ibid.

in India but it was after the case of baby manji¹⁴ where the Supreme court of India held that commercial surrogacy is legal in India and even asked the legislature to make laws regarding surrogacy and the surrogacy should be governed by the laws and hence According to that, Legislature has prepared a bill called Assisted Reproductive Technologies (*Art*) *Regulation Draft Bill 2010*, which is still pending for its approval.¹⁵ But then why India has become the emerging hub of surrogacy, where in other advanced cases we cannot find surrogacy this much prevalent as in India where even people from the foreign actually come to India for having a surrogate child. This is because in India Surrogacy can be done in such a low cost with all the modern facilities available and with no such strict laws available to guide the surrogacy and hence people can easily practice surrogacy and can earn much and hence since in India still we do not have any such strict laws to guide this hence the surrogate mothers are exploited in every other way and hence India has become the surrogacy hub and people from foreign also come for the surrogacy. Surrogacy has emerged as a business and might be a good option for any childless couple and people who are ready for bring a surrogate mother is also doing a great job but then where is the security of these surrogate mothers. What are the rights of this surrogate mother and the child born out of this surrogacy? To stop the exploitation India should come forward with strict laws governing surrogacy such that women of our country are not exploited.¹⁶

COMMERCIAL SURROGACY AND HUMAN TRAFFICKING

“In a recent study done by the National Rapporteur on Trafficking In Human Beings of Dutch¹⁷, and also the report submitted by the same, raised a question about the Commercial Surrogacy, that whether the women for commercial surrogacy were coming voluntarily or forcefully to become a Surrogate mother?”¹⁸ In India exploitation is at a different level than other countries as because in India we don’t have any codified strict laws to regulate the surrogacy and due to this we see that both the women and children are exploited.¹⁹ “Unfortunately, given the ethical dilemmas and newness of surrogacy issues, many human rights groups are either ignorant or remain neutral to the dangers of surrogacy.”²⁰ Human trafficking which is an emerging issue in this globalization and there are many forms of globalization and this surrogacy somewhat is emerging as a type of surrogacy. With

¹⁴ Baby Manji Yamada versus Union of India & Anr. [2008] INSC 1656

¹⁵ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at,

http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

¹⁶ Ibid.

¹⁷ National Rapporteur on Trafficking in Human Beings, *Human trafficking for the purpose of the removal of organs and forced commercial surrogacy*, THE HAGUE: BNRM,2012,at.18

<http://www.dutchrapporteur.nl/reports/organ-removal-forced-commercial-surrogacy/>

¹⁸ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at,

http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015.

¹⁹ European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, last seen 7/9/2015

²⁰ Ibid.

surrogacy comes this concept of baby selling conspiracy. In Asia, it is the trick of the rich people to use women from poor families to use as surrogate mothers. "Another incident of human trafficking in 2011 was report, where 14-15 Vietnamese women were rescue from Thailand and they were trafficked and forced to become Surrogate mother for Commercial Surrogacy by a company named BABY 101."²¹ There have been several rings which operated in various countries such as Vietnam, Thailand, Cambodia and other countries where illegal surrogacy business was going on. "Thai police broke up the illegal surrogacy service rescuing fourteen Vietnamese women. The victims, aged nineteen to twenty-six, were transported to the outskirts of Bangkok and confined to two houses after first being promised . . . a job 'suitable for their health' and only figured out the real situation after several months being kept in the houses without a job."²² Hence even in these illegal situations women are transferred from one country to another for this business of surrogacy where these women are exploited in the name of surrogacy. There has been cases where once the women is transferred from one country to another then their passport are taken and they are not allowed to come back to their own places.²³ All these happen due to no laws in this country. "In absence of surrogacy law, women in India are subject to many sufferings both mentally and physically. And there was a case in India, where a girl from the orphanage of Haryana, sold out for two times within 3 yrs."²⁴

The second issue which arises is that Forced surrogacy which is also the result of commercial surrogacy. This type of surrogacy has actually raise concerns on forced surrogacy and also on the manipulation on how the women are manipulated to enter into this business of surrogacy and this has drawn a thin line between the human trafficking and this which is probably being overlooked. In India this is very common and here we can find that the surrogate mothers who mostly come from villages, which are illiterate and are very poor.²⁵

Some human rights activists have researched upon how the recruiting process is notably similar to the recruitment process used by human traffickers to 'coerce rural women into sex work in cities.'²⁶ Then there could have been seen other similar situations where women are made to sign documents as it is done in the situations of human trafficking where they do not even read the documents and these are performed until the obligations are fulfilled and then again it is found in the reports that after this there has been reports where it could be seen that there are large number of women who are dying due to this but then the hospitals or the agencies does not take any liability on the death of the surrogate mother. such as "renting' of Indian women's bodies by westerners, the lack of counseling services available to surrogates

²¹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

²² European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, last seen 7/9/2015

²³ Ibid.

²⁴ Supra at 21

²⁵ Supra at 22

²⁶ Ibid.

after the relinquishment of their gestational babies”²⁷ women who become the surrogate mothers are exploited in various ways.

So, if a woman is forced to become Surrogates mother or forced to donate her eggs in that case it will be a crime and will fall under human trafficking as per the definitions of United Nations. The report which was submitted by National reporter said that, which says that the instances where if a woman is forced to become a Surrogates mother then in that case it will comes under trafficking and it will be a crime.²⁸

In this Indian scenario it complicates the scenario of Surrogacy world -wide. Surrogacy has changed the situation of many families in India, but then the question comes whether they are doing this voluntary or not, even though they might say that they are doing this voluntarily but then these Indian women are forced into this by their husbands and in-laws and even they have said that they do not want to do these works, for them these works are not ethical but they do it because this is a majboori for them to work.

Even though surrogacy is voluntary but then also this surrogacy has pictured “Women’s bodies as commodities through which others can purchase what they wish to have, and most or all care, concern, and medical attention is directed at the child while the surrogate mother is left to fend for herself.”²⁹

Then the question which arises is that what the situations of the woman are after surrogacy. “What about the possible long-term, harmful effects fertility drugs, obstetric complications, or surgical procedures might have on surrogacy workers? Are these risks less morally acceptable in developing-world contexts? Are clinics or contracting parties responsible for surrogacy workers’ medical care if the gestational labor they did under contract causes cancer, sterility, or long-term pregnancy-related disabilities? Can these harms be written off as occupational job hazards?”³⁰

“Because of nonattendance of law identifying with Commercial Surrogacy in India, if there should arise an occurrence of death of surrogate mother or premature delivery because of any complexity, the healing facility power and the hereditary guardian are not at risk. In India, nobody is obligated for the Surrogate's hopelessness Mother.

The UNODC Model Law against Trafficking in Persons is create by the United Nations Office on Drugs and Crime (UNODC) to help States in executing the procurements contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing that Convention. Furthermore, here they had proposed to incorporate "the utilization of ladies as surrogate mother " under abuse. In addition, we realize that abuse of people go under infringement of Human Rights. Indeed, even it was

²⁷ Ibid.

²⁸ Supra at 21

²⁹ European centre for law and justice, SURROGATE MOTHERHOOD: A VIOLATION OF HUMAN RIGHTS, available at, <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf>, Last seen 7/9/2015

³⁰ Supra at 21

found that, if there should arise an occurrence of any inconveniences amid conveyance, the Doctors attempted to spare the life of the unborn infant first and after that the mother's life. Since, the altered cash was for the unborn infant and not for the mother. Simply because of this reasons the life of the unborn tyke have first need over mother's life."³¹

There has been so many cases of surrogacy and human trafficking such as in a case In India, a 26 years woman named Yuma Sherpa from Delhi, died during the egg removal procedures and a 17 years Girl named Sushma Pandey from Mumbai, died after two days of egg removal procedures. Because of the absence of law and guidelines regarding how many eggs can be removed from the body at a time and the dosage of injection Gonadotropin that is used for producing multiple of eggs has increased a great concern for the doctors, lawyers and Human rights activist in respect of the health and life of the women. Recently, the Thailand Military Government, after the case of BABY GAMMY, has given approval for a drafted bill by which Commercial Surrogacy in Thailand will amount to be a criminal offence and thereby making it banned.³² Women in surrogacy are exploited physically, emotionally and as well as economically. After the baby is born the contractual parents they take away the baby and then after that no one thinks about the surrogate mother. They become emotionally connected to the baby but then they have to give up the baby and then may be as entered into contract they cannot even contact the baby. As we do not have any codified laws in India, hence the surrogate mothers face this problem. Here there should be law to determine the rights of a surrogate mother. That they should at least could meet the child. They should have been given the rights. Even this surrogacy does not only lead to the human trafficking of the surrogate mothers but also of the child who are born out of surrogate mothers. There are situations where the child born out of this are not accepted by the contractual parents then the legal status of the child become questionable which was decided in the famous case of baby Manji where both the parents from Japan refused to take the custody of the child and hence the status of children was questionable as because the government of that country refused to give the citizenship status to the child and even he could not be given the citizenship of India and hence then supreme court gave the custody of the child to his grandmother. But then there are many instances where the status of the child remains undecided and then they become the victims of child trafficking.³³

VIOLETION OF ARTICLE 19, 21 AND 23 OF INDIAN COSTITUTON

In India the basic right of reproduction is also given under article 21 of the constitution of India. "The Andhra Pradesh High Court in *B. K. Parthasarthy v. Government of Andhra Pradesh*³⁴, ruled that reproductive right is a human right and its comes under right to privacy and also they agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of*

³¹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, Available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

³² Ibid.

³³ The kenan institute for ethics, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA, available at <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf>, last seen 10/9/2015.

³⁴ AIR 2000 A.P. 156

*Oklahoma*³⁵, which characterized the right to reproduce as one of the basic civil rights of man.”³⁶ Now the question arises that does these rights violates the basic human rights of other people. Though, we know that surrogacy through modern medical technology which gives an infertile couple the happiness of getting a child. But then in this only the poor women are exploited and how the surrogate mother are treated in the society and it still has a very negative impact on the society. There is a great violation of women rights under Article 21, which grants No person shall be deprived of his life or personal liberty except according to procedure established by law.³⁷ Then again under article 23 of the constitution “Prohibition of traffic in human beings and forced labour”³⁸. In addition, they are not getting the proper money for their work also and hence they are exploited in a very bad manner. Then in this male dominating society the women are exploited very badly as because they are forced into this business of surrogacy for money and paying off debts and hence their rights are violated under article 21 of the constitution and then under article 19 (1) of the constitution as because they are not allowed to stay with their families when they become pregnant and hence they could not even express their feelings and they even cannot meet their own children.

CONCLUSION

From the above discussion, we have found that Commercial Surrogacy is a gift of Medical Science and Technology to the infertile or medically unfit couples to have their own baby. But then still it has a very bad impact on the society as well on the health of the woman and also she is being exploited physically, emotionally, economically, various rights of the woman are violated as well as of the child. In the absence of Uniform International Law to regulate the Reproductive Industries, “the Industries are flourishing day by day with the increase of trafficking of women and minor girl in Indian market as well as in the International market. To deal with the present scenario, uniform International Law is to be passed to control the trafficking in the places like India.”³⁹

³⁵ 316 US 535

³⁶ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

³⁷ Ibid.

³⁸ Ibid , Rita Biswas, HUMAN TRAFFICKING - A BURNING PROBLEM IN INDIA,2 BCC-ISSN-2278-8794,(March,2014)

³⁹ Piyali chatterjee, HUMAN TRAFFICKING AND COMMERCIALIZATION OF SURROGACY IN INDIA, available at, http://www.researchgate.net/publication/268518044_Human_Trafficking_and_Commercialization_of_Surrogacy_in_India, Last seen 8/9/2015

SURROGACY IN INDIA

Milind Gaur* & Kriti Gangwar**

Abstract

Nature has given the beautiful capacity to procreate a life within women and every woman cherishes the experience of being a mother. Unfortunately, some women due to certain medical, genetic conditions are not able to give birth to children. The desire for motherhood leads them to search for alternatives, and surrogacy procedure is seen as the most viable alternative in this regard.

With the availability of cheap medical facilities, advanced reproductive technological know-how, India is emerging as a popular destination for surrogacy arrangements. Also poor socio-economic conditions and a lack of regulatory laws governing surrogacy procedures in India, contribute to this cause

This paper talks about types of surrogacy and surrogacy arrangements. This paper also discusses rights of surrogate mothers and children and the legislation regarding surrogacy in India. A number of cases have also been analysed in this paper including Baby Manji and Balaz case. The Assisted Reproductive Technology Bill, 2010 has also laid down various guidelines regarding the surrogacy procedure. The bill also empowers a National Advisory Board to act as the regulatory and has been bestowed with the power of laying down policies and regulations. It seeks to set up State Advisory Boards in various states that in addition to providing assistance to state governments, are charged with the duty of monitoring the implementation of the provisions covered under the ambit of the Act, especially with respect to the working of the semen banks, artificial fertilization clinics etc.

Key Words: surrogacy, surrogate mothers, ART Bill, Baby Manji

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INTRODUCTION

Surrogacy term is derived from the Latin word ‘*subrogare*’, which means ‘to substitute’.¹ In the past two decades, there has been enormous advancement in reproductive techniques. Although the newer technologies, i.e. donor insemination, in vitro fertilization (IVF) and embryo transfers have given hopes to childless couples, but the emergence of surrogacy procedures have changed the concept of parenthood and brought in various controversial social, medico-legal, legal and ethical issues. Surrogacy is a method of assisted reproduction wherein a woman carries a pregnancy and gives birth to a child, acting as a substitute for another woman.

Surrogacy is a complex and challenging topic that is plagued with controversies for the past several decades. There are many legal, social and ethical aspects of a pregnancy involving a surrogate mother. Some infamous cases have been there, which have garnered public attention and have given rise to endless debates in favour of as well as against the procedure. History was created by India when it became the first country to legalize commercial surrogacy in 2002. Internationally, India has become the preferred destination for couples desiring pregnancy through surrogacy although it is difficult to estimate the prevalence of surrogacy in India. Today surrogacy is a business which leaves behind the traditional values and ethics. In this article we have tried to discuss the problems faced and issues with the rules and regulation under the Indian context.

EARLIER CONCEPT OF CHILD

In the early societies also the desire for a male child was very natural and this was very boldly declared in some of the holy books like the VEDAS, and also by our ancient writers like YAJNAVALKYA and MANU, and to beget a son various methods were popular and practiced which our ancient laws permit.

AURASA was said to be a legitimate child begotten by man with his own lawfully wedded wife. Other sons were, **KSHETRAJA** (Son by another man appointed by husband), **GUDHAJA** (Son by another unknown man, brought forth by wife secretly i.e. unknown adultery), **KANINA** (Son secretly born by unmarried damsel in her father's house), **PUTRIKA PUTRA** (Son of an appointed daughter who was given in the marriage to bridegroom), **SAHODHAJA** (Son begotten when a man marries, either knowingly or unknowingly with a pregnant maiden), **POUNARBHAVA** (Son begotten by a man on a twice married woman).

SONS BY ADOPTION were **DATTAK** (Son of same caste given as a gift to a man), **KRITA** (Son sold by its parent to a man), **KRTRIMA** (Orphan son being adopted), **SVAYAMDATTA** (Abandoned son being adopted) and **APDVIDDHA** (Deserted son being adopted).

¹ Gibbs R. Surrogacy: Medical, ethical and legal issues to be considered. Jan 2008 http://www.northeastsexpct.nhs.uk/public_29_01_2008/surrogacy-policy.pdf

Today this classification has become a history and rather in our modern society the law has made three distinctions viz - *legitimate son or daughter, illegitimate son or daughter, adopted son or daughter*. As under section 112 of Indian Evidence Act 1872, legally legitimate means child born during continuance of valid marriage between the parents or within 280 days of its dissolution, the mother remaining unmarried. Under Section 11, 12 of Hindu Marriage Act offspring of a void or voidable marriage shall be deemed to be legitimate of their parents notwithstanding the decree of nullity. *First therapeutic insemination* was performed by Dr. John hunter in London in 1770 in the patient, whose husband was suffering from the disease of *hypospadias*.²

Today surrogacy is one of the most debated topics of discussion globally. Although generally believed to have been in vogue for at least hundred years, the first formal arrangement of surrogate mother was recognized in 1976 in USA. However, it was in 1980, with the first surrogate mother case of Baby M coming up for trial that stirred up a debate on the controversial issues associated with surrogacy. To understand the controversies of surrogacy it is necessary to understand the indications and various types of surrogacy.

TYPES OF SURROGACY³

- **Natural/Traditional/Partial Surrogacy:** In this form of surrogacy, the embryo is genetically related to the surrogate, being conceived with her own ovum. Sperm can be obtained from commissioning father, wherein he also becomes the biological father of the child. Alternatively, the sperm may be obtained from an anonymous donor, i.e. where the two females are 'commissioning couple,' or the child is commissioned by a single woman. The pregnancy may be conceived by sexual intercourse or intrauterine insemination (IUI) or IVF.
- **Gestational/Full Surrogacy:** In this form of surrogacy the surrogate acts only as a 'carrier' of the embryo; it is not related to her genetically. The pregnancy is conceived by IVF and the fertilized embryo is implanted in the uterus of the surrogate. The embryo can be the result of fertilization of gametes of the commissioning couple, or may be as a result of anonymous donor insemination.
- **Commercial Surrogacy:** The process wherein an individual or couple pays a fee to a woman (*subrogare*) in exchange for her carrying and delivering a baby. After birth, the child is given over to the individual/couple, either privately or through a legal adoption process. Couples facing fertility problems, same-sex couples, and single people who desire to be parents are the ones who seek surrogate mothers. In the present days surrogacy contracts usually involve insemination which is artificial in form (*Invitro fertilization*), which is much medically advanced and safer form of insemination.

² a congenital condition in males in which the opening of the urethra is on the underside of the penis

³ Saxena P, Mishra A, Malik S. Surrogacy: ethical and legal issues. Indian J Community Med. 2012;37:211-13

- **Altruistic Surrogacy:** Under this type of surrogacy arrangement a surrogate does not stand to achieve any financial benefit for carrying a pregnancy. The pregnancy-related expenditure is borne by the intended parents such as medical expenses, maternity expenses, etc.

SURROGACY ARRANGEMENTS

A surrogate mother is a woman who is or will try to become pregnant with a child, with the intention that she surrenders the child to another person or persons after the birth. The commissioning couple or individual assume the parenting rights to the child, in accordance with an agreement.

There are several options for impregnation of the surrogate mother including impregnation with the commissioning couple's sperm and ova, the commissioning couple's sperm or ova fertilized with donor ova or sperm, the surrogate mothers ova and commissioning parents sperm, and the surrogate mothers ova fertilized with donor sperm. Partial surrogacy is where the child is the genetic child of the surrogate mother and full surrogacy is where there is no genetic connection between the child and the surrogate mother.⁴

There are two types of surrogacy arrangements. *Altruistic or non-commercial surrogacy* is where the surrogate mother is paid only for the medical expenses associated with the pregnancy and may receive no reimbursement at all. Such agreements tend to be between parties who are known to one another, often family members, without the intervention of an intermediary. *Commercial surrogacy* is the other type of arrangement. This involves payment to the surrogate mother over and above necessary medical expenses in return for her making her body available to host a baby.

All forms of surrogacy are prohibited in some American States where surrogacy became the subject of fierce debate in the mid-1980s when a surrogate mother refused to hand over the child created as the result of a surrogacy arrangement to her genetic father.⁵ The American approach to surrogacy is not uniform. Certain states permit commercial surrogacy, some permit only altruistic surrogacy some will not enforce commercial or altruistic surrogacy contracts, and in some the act of entering into a surrogacy contract is deemed to be criminal.

Whilst commercial surrogacy is uniformly against the law, non-commercial surrogacy arrangements are legal in some states of Australia⁶. Non-commercial surrogacy is available to married couples in the United Kingdom where reasonable expenses can be paid to the

⁴ The New Zealand Law Commission, *New Issues in Legal Parenthood, A Discussion Paper; Preliminary Paper* 54, March 2004, published by the New Zealand Law Commission, Wellington New Zealand p.36

⁵ *Re Baby M* (1987) 525 A 2d 1128

⁶ In Australia surrogacy arrangements are regulated on a state by state basis with a resultant capacity for forum shopping. In the Northern Territory there is no regulation of surrogacy, although altruistic surrogacy is available Victoria, ACT, Tasmania and South Australia and there is no prohibition on the child of a transnational commercial surrogacy arrangement being brought to these states. New South Wales, Queensland and Tasmania do not permit transnational commercial surrogacy.

surrogate mother, though it is illegal to advertise for a surrogate mother.⁷ India encourages commercial surrogacy, which it legalised in 2001.⁸

CHILD OF A SURROGACY ARRANGEMENT

There have been years of discourse on adoption, the human rights involved and an acceptance of what is and is not appropriate and reasonable. Adoption from a human rights perspective invests the responsibility in States, and subsequently in foster and adoptive parents and other guardians deemed suitable, to protect and provide for children whose parents are dead, or unable or unwilling to look after them.

CARA

Foreign prospective adoptive parents considering adoption of a child from India are required by law to use an adoption agency. The adoption agency must be recognised by the Indian Central Adoption Resource Agency (CARA) and is subject to both the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption 1993 and the UN Convention on the Rights of the Child 1989. A child is only legally free for inter-country adoption where the child is either an orphan or the child's parents have given consent to the child being adopted, and an agency has first attempted to place the child with a family in India.⁹

By contrast our understanding of surrogacy and human rights is less certain. One fundamental reason for this may be that adoption prioritises the welfare of the child and recognises the right of a child to a family. The rights of the child are not prioritised in surrogacy as a child only comes into existence as a result of surrogacy arrangements. Instead the rights of the commissioning parents are prioritised and the interests of the child in prospect are unrepresented. The legal analogy selected is natural birth, not adoption irrespective of the genetic relationship between the child and the commissioning party/ies.

RIGHTS OF SURROGATE MOTHERS AND CHILDREN BORN VIA SURROGACY

The moral issues surrounding surrogacy have implications for human rights law. With the lack of regulation currently found in states such as India, surrogate mothers risk being exploited. Their lack of legal or medical knowledge and the fact they are being offered sums of money that to them seem huge, make it difficult for surrogates to have equal bargaining power against the comparatively wealthy and powerful clinics and commissioning parents they contract with. While those parties have an incentive towards ensuring that the surrogate conceives and bears a healthy pregnancy for nine months, they do not necessarily have any need to protect the longer-term physical and mental health of the surrogate mother.

Pregnancy and childbirth can be risky and can result in serious medical consequences or even

⁷ Surrogacy Arrangements Act 1985 ss 2 & 3 as at
http://www.England-legislation.hmso.gov.uk/RevisedStatutes/Acts/ukpga/1985/cukpga_19850049_en_1

⁸ Australian Embassy, India. http://www.India.Embassy.gov.au/ndli/vm_surrogacy.html

⁹ Central Adoption Resource Agency <http://www.adoptionindia.nic.in/carahome.html>

death. Furthermore, the mental elements of bearing a child for someone else cannot be taken lightly. In the documentary *Google Baby*,¹⁰ a surrogate is filmed crying after giving birth to the baby and other surrogates mention that giving up a baby was the hardest thing they have had to do. While some surrogates may not experience intense emotional attachment to the baby they are giving up, some have argued that informed consent for surrogacy is difficult to attain when a woman does not know how she will feel upon the end of her pregnancy and that women are not fully counselled through this process.

Other surrogates have reported feeling as though their body belongs to someone else. Before and during the surrogacy process a woman may have little medical and reproductive autonomy. For these reasons, both courts involved in the *Balaz* case,¹¹ expressed concern about the possible exploitation of Indian women through surrogacy. Some commentators have gone as far as to call international commercial surrogacy “reproductive trafficking” because “it creates a national and international traffic in women in which women become moveable property, objects of the reproductive exchange and brokered by go-betweens mainly serving the buyer.”

For children born through surrogacy, it is often assumed that so long as their commissioning parents can gain custody of the child and provide the child with citizenship, there are no issues in relation to the child’s welfare. However, even when not genetically related to a surrogate mother, a biological (although not genetic) relationship exists between a foetus and its gestating mother. The nine months spent in the womb may create the beginnings of an attachment bond and be a factor in a child’s identity. As has been recognized by the United Nations Convention on the Rights of the Child, a child has a right to know and understand its history and identity. This is particularly relevant to children born of surrogacy given many of these children have anonymous donors as one or both genetic parents. This lack of medical and personal history will represent a loss to most children, which may be heightened in cases where the genetic donor shares a different ethnic background to the family in which the child is raised.

Children born via surrogacy may feel commodified by the way in which they were brought in to the world. One nearly eighteen year old boy born via surrogacy wrote “How do you think we feel about being created specifically to be given away? ... I don’t care why my parents or my mother did this. It looks to me like I was bought and sold.”

Given the commercial nature of international surrogacy and the high value society places on bearing children and motherhood, the ethical implications of surrogacy arrangements remain highly controversial. Analysing these ethical considerations through a feminist paradigm is a useful method for examining many of these moral dilemmas, particularly as many of the issues raised relate to the harms to and freedom of the surrogate mothers.

Two contrasting positions on the subject can be delineated from feminist theory, which reflect the divides within feminism itself. The first approach derives from the gender-

¹⁰ Zippi Brand Frank *Google Baby* (HBO Documentary Films, Israel, 2009).

¹¹ *Jan Balaz v. Anand Municipality*

neutral/anti-differentiation school of feminism and rejects the notion that woman should receive different treatment to men. This can be aligned to the pro-surrogacy feminist argument that reproductive autonomy and the right to enter into contracts are paternalistically curtailed by anti-surrogacy laws, and female freedom is thereby restricted. The opposing view, based on the anti-subordination approach that accepts power differentials within society and the redistribution of power to promote gender equality, supports anti-surrogacy laws in order to prevent the harms it sees commercial surrogacy as causing to the women involved.¹²

LEGISLATION REGARDING SURROGACY IN INDIA

In India efforts have been made to regulate reproductive technology, with the booming international surrogacy market in mind. The Indian Council of Medical Research has issued guidelines to regulate clinics providing assisted reproductive technology services.¹³ However, these guidelines are not legally binding, do not include clarification on many major issues, and are often violated.¹⁴

In 2010 more concerted efforts were made to regulate surrogacy in India. A 12-member committee, consisting of experts from the Ministry of Health and Family Welfare, the Indian Council of Medical Research, as well as other medical specialists, drafted the Assisted Reproductive Technology (Regulation) Rules 2010. These Rules, which are yet to be passed into law, are extremely comprehensive. They would allow foreigners to commission a surrogacy only when they have provided proof of registration of the intended surrogacy arrangement with their embassy. The Rules also stipulate that a child born of surrogacy will have the commissioning parents named on his or her birth certificate, and sets out a number of rules designed to protect the appropriate selection, medical welfare and fair payment of surrogate mothers.

Key features of the Rules are:¹⁵

- The commissioning parents and surrogate mother must enter into a surrogacy agreement, which will be legally enforceable;
- The surrogate must relinquish parental rights over the child;
- A surrogate must be between 21 and 45 and may not be a surrogate for more than three live births;
- The birth certificate will bear the commissioning parents' names as the legal parents;
- The commissioning parents are legally bound to accept the child;

¹² Catherine London, above n **Error! Bookmark not defined.**, at 403-404.

¹³ National Guidelines for Accreditation, Supervision, Regulation of ART Clinics in India, 2005.

¹⁴ Anil Malhotra and Ranjit Malhotra

¹⁵ As discussed in Usha Rengachary Smerdon

- Foreign commissioning couples must be able to provide documentation that they will be able to take the child to another country.

CONFLICT OF LAWS: NATIONALITY, PARENTAGE AND THE ILLEGALITY OF SURROGACY

Children created via surrogacy are often born with an uncertain status as to their parentage and nationality. Conflicting laws between jurisdictions on parentage, citizenship and surrogacy mean that a child can end up with no legal parents or nationality.

Parenthood usually has three components – an intention or willingness to have a child, genetic consanguinity and, in the case of motherhood, gestating and giving birth to a child. Surrogacy can divide these components between two to three different ‘mothers’ and one or two different ‘fathers’. Determining who the legal mother and father are in such situations is frequently a difficult task and different jurisdictions have taken different approaches to this task. Because a child’s citizenship is usually based on parentage and place of birth, this can be equally complicated and a jurisdiction’s interpretation of parenthood will usually have implications for a child’s nationality.

Matters are made worse by the fact that commissioning parents usually come from countries that ban either surrogacy or commercial surrogacy. Consequently, the laws relating to parentage and citizenship are often interpreted in such a way as to exclude commissioning parents from becoming legal parents of a child born overseas via surrogacy. Adoption would seem an obvious solution to this problem, but adoption laws often stipulate many stringent requirements that exclude commissioning parents from adopting their child (for example, payment or knowledge of the birth mother is often prohibited in international adoption).

Commissioning parents are frequently unaware of these legal problems. This may be due to the intending parents’ desire for a child overwhelming their better judgment. This is often fuelled by the practice of agencies facilitating international surrogacy to encourage couples to ignore laws implemented in their own countries and downplay the risk of this to their parental rights to the child that results.¹⁶ For example, one United States based surrogacy website completely minimises the legal and immigration issues associated with international surrogacy. The website states:¹⁷

“Since surrogacy became legal in the United States, more than 30,000 births have resulted from surrogate mothers. The United States is the preferred country for intended parents from all over the world who are looking for international surrogates. Conceive Abilities is conveniently located in Illinois, one of the most surrogacy-friendly states in America. The Illinois Gestational Surrogacy Act provides additional flexibility, stating that intended parents do not need to be Illinois residents and that a birth certificate will be issued with the names of

¹⁶ Usha Rengachary Smerdon “Crossing Bodies, Crossing Borders: International Surrogacy Agreements between the United States and India” 39 Cumberland Law Review 15 at 30.

¹⁷ Conceive Abilities “International Surrogacy” (26 February 2013) <www.conceiveabilities.com/>.

the intended parents - avoiding the need for complicated court proceedings. Laws in other American states do not provide the same protection for surrogacy.”

The situation has reached the point that in 2010 a letter was sent to a number of Mumbai IVF clinics from the consul generals of Belgium, France, Italy, the Netherlands, Poland, Spain and the Czech Republic.¹⁸ This directive stressed that clinics needed to direct potential parents seeking surrogacy towards their embassies for approval before initiating the surrogacy process.

A number of cases have arisen as a result of commissioning parents being unable to establish their legal parenthood and their child’s national identity. Few of the cases are described below.

CASE LAWS

The Baby Manji Case¹⁹

In 2008 a baby was born to an Indian surrogate mother and commissioning parents from Japan. The Japanese couple had used the husband’s (Mr Yamada’s) sperm and an Indian donated egg to create the embryo. Shortly before Manji’s birth, Mr and Mrs Yamada divorced and Mrs Yamada made no claim to the baby.

Following the directions of the chief registrar of the Anand Municipal Office, a birth certificate was applied for and issued with only Mr Yamada’s name on it. Japanese authorities told Mr Yamada that he would only be able to bring Manji to Japan by adopting Manji pursuant to both Japanese and Indian laws and obtain an Indian passport.

While Mr Yamada attempted to obtain the relevant documents to adopt Manji, an NGO called Satya filed a petition in the Rajasthan High Court seeking to prevent Manji from being taken out of India. Satya challenged the legality of commercial surrogacy and accused the clinic where Manji was born of illegal trade in infants. It alleged that the absence of surrogacy law in India meant that no one could claim to be the parent of Manji, including Mr Yamada.

The Rajasthan High Court required Manji to be brought to them within four weeks. In response Mr Yamada’s mother filed a writ of petition on Manji’s behalf with the Supreme Court of India. The Supreme Court granted her temporary custody of Manji and disposed of the proceedings involving Satya by ruling that the Commission organised under the Protection of Children Act 2005 and not the Rajasthan High Court was the appropriate forum for Satya’s complaints. The Supreme Court then said that commercial surrogacy was legal in India.

¹⁸ “Bar Our Nationals, European Countries Tell Surrogacy Clinics” *The Times of India* (online ed, India, 14 July 2010).

¹⁹ *Baby Manji Yamada v. Union of India and Anr*, (2008) 13 SCC 518.

After this judgment was issued, the Jaipur passport office gave special dispensation and issued Manji with a ‘certificate of identity’. The Japanese Embassy in New Delhi granted Manji a one-year Japanese visa on humanitarian grounds and Manji’s grandmother was able to take her to Japan.

The Balaz Case²⁰

A German couple, Mr and Mrs Balaz, commissioned a surrogate pregnancy in India using Mr Balaz’s sperm and a donated egg. As a result, Nikolas and Leonard were born in India in 2008 but had to remain there for two years due to their statelessness.

The twins were originally registered and issued with Indian birth certificates naming the Balaz’s as their parents. A legal battle ensued when the German authorities refused to recognize the birth certifications as establishing the parentage or German nationality of the twins due to surrogacy being illegal in Germany.

The Balaz’s turned to judicial procedures to seek Indian passports for the twins. A lower court refused to recognize the children as Indian because they lacked an Indian ‘parent’. The authority that had issued the birth certificates then recalled them and replaced Mrs Balaz with the Indian gestational surrogate as the children’s ‘mother’, while Mr Balaz remained identified as the ‘father’. Passport authorities then allowed the application for two Indian passports.

However, the Indian Ministry of External Affairs ordered the Balaz’s to surrender the passports while the matter went before the High Court of Gujarat. The Court recognized the nationality of the children as Indian because they were born on Indian soil to an ‘Indian mother’, meaning gestational mothers were now recognised as legal mothers, despite birth certification practices undertaken in most surrogacy clinics to the contrary. Nevertheless, the Indian passport authority refused to reissue the twins’ passports.

India’s Highest Court, the Apex Court, finally considered the matter in December 2009. It urged Indian authorities to consider non-judicial avenues and suggested adoption as a possible solution. Adoption was not possible because of certain requirements in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and in Indian law that had not been met, such as the children needing to have been orphaned or abandoned and no contact being allowed between the birth mother and intended adoptive parents. The Apex Court asked the Central Adoption Agency to reconsider its jurisdiction. Before this took place, Germany issued the children with visas and the Balaz twins were able to leave India with the agreement that the Balazs would formally adopt the twins in Germany under German law.

The Goldberg Twins Case²¹

²⁰ *Jan Balaz v. Anand Municipality* LPA 2151/2009, 17 November 2009 (High Court of Gujarat, India). See also Yasmine Ergas “The Trans-Nationalization of Everyday Life: Cross-border Reproductive Surrogacy, Human Rights and the Re-visioning of International Law” (12 March 2012) Institute for the Study of Human Right: Columbia College <<http://hrcolumbia.org/>>.

Mr Goldberg and Mr Angel, a gay couple from Israel, arranged a surrogacy in India using a donated egg and Mr Goldberg's sperm. Israel allows surrogacy but does not allow gay couples to be parents under surrogacy arrangements.

When Goldberg and Angel's surrogacy resulted in the birth of twin boys, they found themselves stranded in India after the Jerusalem Family Court refused to allow a paternity test to initiate the process for gaining Israeli citizenship for the twins.

The issue was debated in the Israeli Parliament and, with the support of Prime Minister Benjamin Netanyahu, the case was appealed to the Jerusalem District Court where it was accepted that it would be in the best interests of the children to allow the paternity test to go ahead. The DNA test confirmed that Mr Goldberg was the boys' biological father and so they were able to gain Israeli passports and travel to Israel after spending the first three months of their lives in India.

The Canadian Twins Case²²

In 2005, a Canadian couple commissioned a surrogate pregnancy in India using the husband's sperm and a donated egg. Twins, a boy and a girl, were born in 2006 and the couple applied for proof of Canadian citizenship at the Canadian High Commission in New Delhi. Surrogate children are usually granted Canadian citizenship so long as the child has a genetic link to one Canadian parent.

DNA tests confirmed the couple's baby girl was the genetic daughter of the commissioning father; however the baby boy was not, suggesting a mix up at the clinic. There were no policies in place for the Canadian authorities to deal with such a situation so the family had to stay in India until 2011, when a citizen card was issued to the female twin and travel papers to the male. From Canada, the couple was able to file an application on humanitarian and compassionate grounds for their non-biological son to gain Canadian citizenship.

CONCLUSION

Surrogacy is a complex and challenging subject that has been plagued with controversies for the past several decades. At one end of the spectrum we have the pain of infertility and craving for parenthood, at the other end we have commoditization of the reproductive capacity and exploitation of women and children. However, it needs to be reiterated that, viewed in a correct perspective, surrogacy is a reproductive treatment which can provide many an instance of happiness, fulfilment and satisfaction to an infertile couple.

Commercial surrogacy may seem to many Indian women, and their families, their best option for alleviating poverty. This is not a compelling argument for regulating commercial surrogacy but rather for addressing the poverty, limited opportunities and education of women in India that create the environment that renders surrogacy an attractive option.

²¹ Anil Malhotra and Ranjit Malhotra, above n **Error! Bookmark not defined.**, at 33.

²² Raveena Aulakh "After Six Years and Fertility Mix-up, Surrogate Twin Can Come Home" *The Star* (online ed, Canada, 5 May 2011).

Most human rights dilemmas involve an intersection of competing rights and needs: the right of a child to know his or her parents and other members of his or her family, the right of the surrogate mother to be able to feed, clothe and house her own family, the need of infertile people to found a family. Whilst there are competing rights to be considered in regulating surrogacy arrangements including the child's right to be protected and to know about the circumstances of his or her birth, the arranged parents interest in being able to have a child and to be recognized by law as parents of that child, and the birth mothers right to be protected from exploitation, the welfare of the child should be paramount in any balancing of these competing rights.

RIGHT TO FREE AND COMPULSORY EDUCATION: A PREVIEW ON REALITY

Prof. G. K. Chandani* & Dr. Ritu Agrawal**

PROLOGUE

Every 5th child in the world is an Indian as nineteen (19) per cent of the world's children reside in India. Unlike China, where there is pretty high percentage of older generations, India is home to world's largest number of younger generation. This fact has its own implication as on one side it is beneficial as this is potential workforce and productive generation, but on the other side there are concerns about the adequacy of their education and literary factor. China was able to control its population but currently faces the problem of an ageing population. India, on the other hand is a host to 1/3rd of the world's illiterate population. Although literacy rates have increased with time, but this increase has been offset by the growing rate of population. So the net percentage has shown only slight improvements. In the previous decade, there was even deterioration and an indication of this is the statistics showing 12.6% literacy rate in 1991 which declined to 9.21% in 2001.

This was a concerning trend, so the government of India took steps to improve the situation and reverse this trend. The Government introduced the Right to Free and Compulsory Education (RTE) Act, thereby making education a fundamental right for each and every child from the age of 6 to 14 years. However, there are some harsh facts associated with it. RTE provides for ensuring free and compulsory education in India to every child between the age of 6 to 14 years. Considering the population of India, especially the growth in the population of younger generations, this is a daunting task. A continuous effort is required to make it a reality. A sheer accomplishment would require Himalayan efforts, not to talk about providing a quantitative and qualitative education in this context. Accomplishing this task means not only increasing availability and accessibility to schools, classrooms, teachers and infrastructure facilities across the country but also there is a need to improve the quality of education. Unfortunately, this could not happen, so most children have remained out of the scope of the Right to Education (RTE), as these children continue to stay within below poverty line families. Tenth Annual Status of Education Report published by Pratham, has reviewed elementary education within rural areas. They found that although enrolment levels have been on the rise but the learning level remains very weak. Moreover, many of the children continue to be out of the scope of RTE as for them breaking the shackles and barriers as posed by poverty to arrive at avenues provided by RTE continues to be a big challenge. This is so because the country is yet to connect the RTE with greater socio-economic reality of rural denizens in the neo-liberal cross-country regime.

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Commercializing education has also posed a major issue. Education, especially the premium quality of it, comes with a special price. It has been commercialised and the more one can pay, the access and affordability to a good educational institution becomes a possibility. This has its own impact on the educational institutes as envisaged under RTE. A minimum standard of acceptable quality has to be maintained. Thus, RTE has to be seen in this perspective and a comprehensive view has to be taken while considering not only availability of infrastructure, teachers or Faculties but also in terms of the quality of education and its meaningfulness in neo-liberal cross country regime.

A REVIEW

In this section the actual scenarios are presented which exist at various locations in India. These scenario help u to assess the current status of affairs in the context of RTE. Lata is fifteen years old shy teenage girl who comes from a village at border of West Bengal. She came to Gurgaon with her mother just around a month before. Previously she received education upto class Five but the further education could not be continued following the demise of her father who worked as a potter. They had a very meagre financial means as lata had 3 more siblings, who are now staying with her grandmother in the village. One of her 12 year old sister is rolling beedis in village and earning Rs 300/ per week. Her uncle offered to marry her mother after she became widow, but she refused, because he is a drunkard. Lata realised that her family needs resources and therefore she persuaded her mother to bring her to city so that she can contribute to family income. For Lata, her goal is to ensure that her sibling should study. Her mother is working as a maid in four different houses in Gurgaon and earns Rs 4500/- . Lata now will be taking care of an infant at a posh residency in the city. She will be paid 3000/- for 10 hours of work. But, lata still has hopes. Her dream is to continue her studies and work in an office.

SCENARIO OF SURYA OUTSIDE A METRO STATION IN DELHI: A SOURCE OF ENLIGHTENMENT

I met Surya outside the Metro Station at Mandi House, New Delhi. With a lot of big dreams in his eye, Surya a thin lean 14 year old boy was selling Chana (roasted gram). He hails from Gopalpur near Patna and has studied upto fourth grade. His father used to own a small piece of land but it was sold for the treatment of cancer of his grandfather. Surya has three younger sister and two brothers. The elder brother died in an accident and the younger one is residing in the village. His father expired after he consumed poison. With no other source of income, the family was at the verge of destitution. Therefore, Surya went to Lucknow with one of his relative in search of a job eight month back. He worked at a small dhaba for three months but left it because the owner refused to pay him any money after making him toil for 11 hours day. Beside he was given enough food or a holiday and the owner used to beat him violently. He ran away from Lucknow and came to Delhi to look for better opportunities. Since then he has been searching for work but faced disappointments. However, he considered himself to be fortunate enough to meet a man who taught him to be self-reliant and now he is happy to find a new opportunity to be an entrepreneur and to 'live a life on his own'. Every day he is selling different items and on certain days manages to earn Rs 100/ a day. He could send a

1200 to his family in village last month and feels that he is now the ‘man in the house’ and therefore is responsible to earn a living. He wanted to go to school but now according to him ‘life is a great teacher and streets are like a school’- his wisely words are indeed a source of enlightenment.

Both these children from the lower socio-economic strata have entered into vocation because of their economic compulsion and constitute invisible work force. For them education entails learning while earning. Their stories are reflective of dreams, aspirations, longings and hopes of children from marginalised communities within the marginalised globalised India and the manner in which these are crushed by changing socio-economic environment. Attending school is not a choice as they are excluded from the mainstream education because of pressing circumstances. The Child Labour Prohibition Act or the Right to Education Act or any such legal provisions become meaningless in such a situation as these overlook the realities of life of millions of children like these two. These situations also indicate toward fragmentation of family, weakening of community bonds and increasing vulnerabilities specifically for children from poor communities. It also reflects on the impact of macrostructures and processes of globalised and capitalized world on children. In order to address such situation it is essential to look and to address the structural roots of poverty which lie in crisis created by introduction of neoliberal regime.

One of the arguments raised is that the benefit of development will trickle down and the demand for child labour will be replaced by the demand for skilled labour. However, this argument proves to be wrong in Indian situation. It is not on the basis of demand created by the market that children are compelled to work; rather it is their circumstances relating to abject poverty and dire need to work those children to work. It is therefore essential to link up microcosmic realities of life with macrocosm policie to realise rights in a meaningful way. Rights, political or civil, in themselves are futile unless they are linked up with the socio-economic rights.¹ The rhetoric of right to education is therefore ineffective unless the basic needs are met; education has to be link up with the food security, right to health, right to livelihood and employment and other social security measures.

Many children like these two are navigating through the maze of poverty and scarcity, helping their families to survive through the tough times. Reaching to the corridors of education is a challenge for children from marginal families because the state failed to link up the Right to Education with larger socio-economic realities of the majority of population. For millions of children, survival becomes a major preoccupation at the young age and therefore becomes the priority. Though much of debate² has been held on the issue of working children in an informal economy, however, the need is to re-examine thee deliberation in the context of RTE in the globalised framework when the state is rolling back from its obligation to provide education and instead privatizing and commercializing the same.

¹ Nigam Shalu(2014) Asserting Rights, Claiming Entitlements: Revolution by Masses, Countercurrents dated December 10th <http://www.countercurrents.org/nigam101214.htm>.

² Bura Neera(2005)Crusading for Children in India’s Informal Economy, Economic and Political weekly December 3.

Further, though the RTE Act has been into operation since 2010 however, the quality of education remains as a major concern. The Annual Status of Education 2014³ (ASER) released by Pratham, based on the audit of education in rural areas, reported that though enrolment is high, however learning remains poor in most of the states. School facilities in some state have improved nevertheless reading and math remained as a major source of distress. The report shows that the enrolment level has increased to 96% nonetheless it is observed that only a quarter of children in grade 3 can read the text of grade 2 fluently. In a few states like Bihar, Assam, Jharkhand, Chattisgarh, Madhya Pradesh and Maharashtra the reading status has declined over previous years. Only 25.3% children in grade 3 could do two digit subtractions. A serious issue that emerged is that around 20% children in grade 2 cannot recognise numbers upto 9.

The National Achievement Survey⁴ conducted by MHRD also reported that low score were obtained by children in mathematical questions in the states of Madhya Pradesh, Chattisgarh, Jammu and Kashmir, Bihar, Rajasthan, Haryana and Odisha. Children from these states also performed low in reading. Thus, the available data clearly indicates that focus has been laid on quantitative aspects like enrolment or attendance, what is neglected in the process is the quality of education. The 4E's strategic priorities⁵ which define approach on education in India that is Expansion (establishing educational institutions in undeserved and unserved areas), Equity and Inclusion (bridging gender and social gaps), Excellence (improving quality and relevance of education) and Employability (focus on vocational skills) therefore failed to meet the objectives.

EDUCATION: A PREVIEW

Education is considered as an essential pre-requisite for development – economic as well as social. It is necessary not only to create an agile workforce but also to develop a band of an active citizenship to realise the democratic ideals. MK Gandhi proposed the concept of 'Nai Talim' based on holistic education process. According to him the purpose of education is to attain 'swaraj' or self-rule. Paulo Freire warned against the banking system of education and advocated for the critical pedagogy which is transformative, empowering and political and aim for conscientization. Antonio Gramsci gave the concept of 'organic intellectuals' that promotes the interest of common people rather than perpetuating the hegemony of dominating class. For Rabindra Nath Tagore, education is a process of self realisation and freedom rather than colonization of mind.

A focus on quality of education, therefore, requires more than enhancing test scores or even preparing for vocations; it entails that a learner should develop life skills as well as experiences that promote critical consciousness, further citizenship and deepen democracy.

³ ASER(2015) The Tenth Annual Status of Education Report ASER 2014 <http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER%202014/pressreleaseeng.pdf>

⁴ National Achievement survey Cycle 3 http://mhrd.gov.in/sites/upload_files/mhrd/files/document-reports/summary%20NAS%20Class-3%20%28Cycle-3%29-final.pdf.

⁵ NUEPA (2014) Education For All, Towards Quality with Equity Minister of Human Resource and Development, GOI http://mhrd.gov.in/site/upload_files/mhrd/files/upload_document/EFA%20Review%20Report%20final.pdf.

The basic purpose of education is to develop a creative and an enlightened mind that has the capacity and self-confidence to question, imagine, innovate, challenge the status quo and is accountable to strengthen the process of governance. Education enables individual to act as a responsible and independent critic of government's policies, programmes and actions, to act fearlessly to expose the harsh realities thus push for democratic reforms. To create such a system there must be an educator who thinks and act liberally and therefore may guide the students towards the path of liberation. Also, the institutions which provide the education, therefore, are bound to provide a democratic environment, based on the principle of shared governance that promotes academic freedom. However, this system remains merely a wishful thinking in the globalised capitalised world which prefers to commercialise and privatise education.

Moreover, recently, much emphasis is being laid on the employability aspect of education in India rather than its democratic aspect which aims to develop proactive citizenship qualities. The real purpose of education is clearly not meant to serve business or profits. Schools cannot act as an appendage to serve the interest of state or corporation. Also, citizens are not mere human resource or consumers; rather they are the part of a vibrant democracy and a changing world. The need is therefore to develop active citizenry for strengthening a vibrant, grass root, plural democracy by preparing young mind to engage in critical thinking, engaging in real world issues through active and meaningful participation in civil and political processes.

FREE AND COMPULSORY EDUCATION UNDER ARTICLE 21A OF INDIAN CONSTITUTION

The Supreme Court in Unnikrishnan's matter in 1993 pronounced that all children up to fourteen years of age shall be granted a Fundamental Right to Education. The Court contended that the Fundamental right to Life (Article 21) in Part III of the Constitution should be read in harmonious construction with the Directive in Article 45 (Part IV) to provide free and compulsory Education to the 0-14 year age group children. Hence, by implication, free education of equitable quality became a Fundamental right. The Court through this decision clearly upheld the rights of masses to quality education thus enabling to join the mainstream and compete with the privileged sections of the society. Indeed, it holds state responsible to provide education that is non-discriminatory, inclusive, universal and equitable. However, the state in the guise of RTE continued with its agenda of privatisation thus creating a contradiction in terms of what it intends to do or what it actually does.

The Constitution 93rd Amendment Bill (amended to 86th in process) was passed in Loksabha on November 28, 2001 to envisage education as a fundamental right of citizen rather than as a state's obligation as was provided under Article 45 of the constitution , a non justifiable provision previously. On the same historic day, it was reported that a shiksha Satyagrah was launched by the National Alliance for Fundamental Right to Education (NAFRE) where 40,000 to 50,000 people gathered to demand the right to education. "These peasants, landless labourers and slum-dwellers, both men and women , demolished the myth promoted by the state and the educated civil society that the poor people are interested only in roti, kapda and

makaan (food, clothing and shelter) and not in educating their children”⁶. The demand was to make the right to education a reality for all children up to class 12, equitable education irrespective of child’s background and for building a common school system. However, this rally was abruptly ended under the pressure from the government because globalisation was seen as an alternative agenda which pushes to reduce the role of state and promote the design of the Structural Adjustment programme while enhancing the involvement of private and market sector, leading to commercialisation of education.

The 93rd Constitutional Amendment Bill was so designed to fulfil the agenda of globalisation rather than fulfilling its commitment to the constitutional obligation. The state diluted and distorted the meaning of the RTE and deprived millions of children their basic entitlement by legitimising unequal, hierarchical, multilayered system of schooling. The Right to Education Act 2009 which was notified on 1st April, 2010 clearly violated the principle of equitable education. The Act in actual promoted the neo-liberal agenda and prescribed inferior discriminatory infrastructure for government schools. It provides for hiring teachers on contract denying them social security and dignified remuneration. The act was criticised for its welfarists approach rather than working on the right based model.

Through marketisation of education and paving the way to sell it like a commodity, the state denied many children the opportunity to get educated. In a country where many people are being deprived of their basic necessities like food, water or shelter because of their inability to pay, privatisation of education only act as a hindrance to access and avail opportunities to education. Yet, the state continues to commercialise the education by opening space for market to profit, shift funds from public corpus to private, unaided, commercial schools and denying unprivileged children to quality education.⁷

Article 21-A of the Constitution states, “the state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.” The conditionality introduced by adding the phrase “in such a manner as the state may by law determine” is detrimental to the interest of millions of children. It was not the paucity of fund rather it is the matter of socio-political priority for the state when it declares its intent while enacting this provisions of the constitution.

The phrase ‘free and compulsory education’ is ambiguously interpreted as education provided in the private institution is never ‘free’ and ‘compulsory’ in the state run schools is absent because there is no proper infrastructure, inadequate number of teachers and more focus on numbers rather than the value which severely impact the quality of education⁸. Also the word compulsory does not fit into the framework of right based perspective of education.

⁶ Sadgopal Anil(2002) A Convenient Consensus: The Political Economy of Constitutional 93rd Amendment Bill, The Front Line, Vol 18, (26) December 22, 2001 to January 4,2002 <http://www.frontline.in/html/f11826/18261070.htm>

⁷ Sadgopal Anil (2008) Misconceiving Fundamentals, Dismantling Rights, Tehelka June 14th Original version available at <http://www.educationforallindia.com/CSS2.pdf>

⁸ Bhuyan Avantika (2013) Right to Education has failed the no-fail policy, The Business Standard dated May 4 http://www.business-standard.com/article/economy-policy/right-to-education-act-has FAILED THE NO FAIL POLICY-anil-sadgopla-113050400584_1.htm

Compulsory attendance in school necessarily does not ensure quality learning especially when the teacher is absent or overburdened or the school lacks other facilities or classrooms are cramped.

The phrase ‘free and compulsory education’ implies that it is mandatory for the state to provide for facilities and means to educate children. However, sufficient funds are never allocated to meet such provision in spite of the fact that government created a fund through education as compared to recommended GDP of 6%.⁹

RTE provides for free and compulsory education for children between the age group 6 to 14 years of age. The children in the age group of 0 to 6 years are left to be covered under the purview of ICDS programme. Further, none of the states have fulfilled the basic norms emphasized under the RTE act in terms of requirements of teachers, infrastructure requirement or pupil teacher ratio¹⁰. Also, education still remains an elusive goal for millions of children from tribal and minority communities and those hailing from conflict zone.

A sub clause (K) was added to 51A which states that, who is a parent or guardian to provide for opportunities to education to his child or as the case may be ward between the ages of six to fourteen years. It therefore compels parent to provide education to children shifting responsibility from state to the parents. Again, parent’s ability to pay determines the opportunities he/she can provide to educate the child because the state promotes private education indirectly by not improving the quality of education in the government schools. Further, it fails to provide quality education to children who are orphan or to the children whose parents are sick, ailing or poor and therefore are not in a position to fulfil their constitutional obligations.

Why after so many years of independence, India failed to create a system that could educate all of its citizens? Lack of political clout of the illiterate masses is a major factor because of which state i neglecting education opined Dreze and Sen¹¹. Weiner¹² in his famous book argued “Educator and officials do not regard education as an equalizer, as an instrument for developing shared attitude and social characteristics, but rather as a way of differentiating one class from another....Those who are educated have power over those who are not”.

Also too much focus on numbers-enrolment, attendance etc is diverting the attention from the real meaning of education. Beside 3 R’s- Reading, Learning and arithmetic, emphasis must be laid on nurturing creativity, imagination honing skill like art, music, handicraft, textiles, pottery, farming and similar other skills including the life skills, which are different from the

⁹ Rukmini S. (2014) The Price of Learning, The Hindu September 14 <http://www.thehindu.com/sunday-anchor/the-price-of-learning/article6408317.ece>

¹⁰ Howdhary Kavita (2014) Right to Education: More Needs To Be Done, The Business Standard, dated April 5 http://www.business-standard.com/article/economy-policy/right-to-education-more-needs-to-be-done-114040500105_1.htm

¹¹ Dreze J and Sen A (1995) Basic Education as a Political Isue, Journal of Education Planning and Administration Vol. XI (1)

¹² Weiner Myron (1991) The child and The State in India: Child Labour and Education Policy in Comparative Perspectives, Princeton: Princeton University Press.

market or business requirement . However, this issue of linking education with life skills and democratic goals to make it more meaningful has been neglected for years.

STRIVING TOWARDS MEANINGFUL RIGHT TO EDUCATION

In short, it may be said that the RTE remains rhetoric for majority of the people who exist on the margins. For children like Lata and Surya who entered the work force and an informal economy because of economic compulsions, education remains a distant dream. They remain behind because of reasons relating to food security, vulnerability, growing up in situation where resources are not available and face the stress of being poor. Poverty contains life leading to stress, adversity, fewer opportunities and availability of meagre resources among other problems. Acting as a breadwinner in childhood push them farther as works becomes the priority. Therefore for children from poor families, it is crucial to address a range of possible situations through innovative ways including focusing on the issue of family poverty. Supporting families economically and providing intervention directed to the children themselves may facilitate the goal of education to all. The 4 A's framework that is availability (universal availability), accessibility (free of fees and without any barrier created by cost, geography or other discrimination), acceptability (quality education) and adaptability (responsive to learner's need) has to be understood and implemented broadly to include the context of children from the marginalised sections and must be inclusive of their specific needs.

Public education is a means whereby the state fulfils its responsibility to make education available for all the citizens. However, by withdrawing its commitment to education and by promoting privatisation the state is denying right to individual as well as acting to diminish societal inspiration. The discourse on child right has to be seen in the context of globalisation and its impact in accentuating inequality in third world countries including India. While pushing for Structural Adjustment Programmes in the countries like India, factors specific to Indian situation like lack of social security policies or social welfare measures clubbed with inequalities that exist due to distribution pattern relating to land, tenancy, income, corruption, caste and class based hierarchies, marginalisation and impact of all such issues on standard of living of needs to be taken into account.

The RTE is crucial for creation of equitable society and ensuring democratic governance. Implemented properly, the RTE may help individual to respond to life challenges and take advantages of opportunities while simultaneously promoting educational and civic resources essential for democratic governance. Education is a tool to generate a sense of solidarity in a diverse society by addressing concerns relating to inequality, exclusion and segregation. It is essential to take realities of the lives of poor children and therefore the need is to think beyond the provisions of making schools available, enrolment or attendance related data.

THE INTERNATIONAL STATUS OF TAIWAN IN THE EMERGING NEW LEGAL ORDER: LEGAL AND POLITICAL CONTEMPLATION

Kratika Singhal*

Abstract

While gendering at the world map it appears as if the entire world is immaculately cleft into separate boundary, with each boundary representing a defined territorial entity, called State. But under this tidy partite surface, the concept of statehood is veiled in many ambiguities. One such state is Taiwan. It is accorded the status of a de facto state inspite of having met almost all the pre-requisites required under the international law to be called as an independent state, that is, inspite of having a defined territory; a permanent population and a government, it is still not considered as a separate recognized independent state. The researcher in this paper will attempt to bring out the evolution of Taiwan's statehood; how declaratory or constitutive theories of international law have affected the legal status of the Taiwan and how these theories negatively affects *de jure* recognition of the Taiwan. In order to do so, researcher will be looking into *Treaty of Shimonoseki*, *Instrument of Surrender of Japan*, *Cairo Declaration*, *Potsdam Declaration*, *Treaty of Taipei*, *San Francisco Peace Treaty*, *United Nations Charter* etc. This paper will be based on doctrinal research method, whereby the researcher will analyse, extrapolate, reconstruct and compare the information gathered from the various literatures revolving around this area and will attempt to clarify the factual circumstances surrounding Taiwan.

Keywords: *Statehood, de facto and de jure recognition, treaties and declarations.*

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INTRODUCTION

The biggest problem in international law and politics in the western Pacific is the anomalous status of Taiwan and thus its future, has been very much in the debate. There are a wide diversity of views revolving around it, some more realistic and lucid than others. The issue today is not which government that is whether Republic of China (ROC) or People's Republic of China (PRC) governs and represents China but how Taiwan can participate in the international community alongside the PRC. For some authors this is a matter of recognising a separate Statehood that already exists by virtue of the de facto exercise of sovereignty in Taiwan. By some others authors view it as a goal of Taiwan to get independence from China because of its own public position and the lack of any explicit claim to Statehood¹.

EVOLUTION OF CHINA

Early Taiwan in 1623 was colonised by the Dutch and its population consisted of Austronesian people. From 1661-1683 the Kingdom of Tungning which was the first Han Chinese government ruled Taiwan. Taiwan was ruled by the Qing Dynasty as a prefecture from 1683-1875. In 1875, Qing Dynasty divided the island into two prefectures and subsequently after 10 years that is in 1885 the island was made into a separate Chinese province to speed up development in the region².

From 1894-1895 the First Sino-Japanese War was fought between the Qing Empire of China and the Empire of Japan. The war ended with the success of Japan and failure of Qing Empire. Thus, subsequently in 1895 Taiwan was ceded by the Qing Dynasty to Japan in perpetuity by signing the *Treaty of Shimonoseki*. By the terms of the treaty, China was obliged to recognize the independence of Korea, over which it had traditionally held suzerainty; to cede Taiwan, the Pescadores Islands, and the Liaodong (south Manchurian) Peninsula to Japan; to pay an indemnity to Japan; and to open the ports of Shashi, Chongqing, Suzhou, and Hangzhou to Japanese trade³. This was the first time that the regional dominance in East Asia shifted from China to Japan⁴. However Japanese rule over Taiwan lasted for around 50 years that is from 1895 to the conclusion of World War II in 1945 which lead to the miserable defeat of Japan and Nazi Germany. Thus with the conclusion of world war II, Japanese troops in Taiwan surrendered to the Republic of China, putting Taiwan back to, under the control of Chinese government by signing Japanese Instrument of Surrender.⁵

In freeing Taiwan from the control of Japan the Cairo Declaration of 1943 and Potsdam Declaration played an indispensable role. Cairo Declaration was the result of Cairo Conference held from November 22–26, 1943, in Cairo, Egypt, that outlined

¹ A. E. Boyle, The International and Comparative Law Quarterly, Vol. 47, No. 4 (Oct, 1998), p. 965.

² Republic of China, Government Information Office, A Brief Introduction to Taiwan: The Economy, http://www.gio.gov.tw/taiwan-website/5-gp/brief/info04_8.html, as seen on 5th October, 2015.

³ <http://www.britannica.com/event/Treaty-of-Shimonoseki>, as seen on 31st October, 2015.

⁴ Taiwan Yearbook 2007, History (2007), <http://www.gio.gov.tw/taiwanwebsite/5-gp/yearbook/03history.htm>, as seen on 10th October, 2015.

⁵ http://Www.Archives.Gov/Exhibits/Featured_Documents/Japanese_Surrender_Document/, as seen on 15th October, 2015.

the Allied position against Japan during World War-II and made decisions about post war Asia⁶. In the conference Allies' decided to continue deploying military force in Japan until Japan unconditionally surrenders. The main clauses of the Cairo Declaration was that the three great allies, i.e. United States of America(USA), United Kingdom (UK) and Republic of China (ROC) will fight the ongoing world war-II to restrain and punish the aggression of Japan. Also to strip off Japan from all the islands in the Pacific which it had seized and occupied since the beginning of the First World War in 1914. It also aimed to make provisions for ROC to restore all the territories Japan has stolen from the Chinese.⁷

Potsdam Declaration⁸ was a proclamation defining terms for Japanese Surrender during World War-II. It was in the form of an issued the document, which outlined the terms of surrender for the Empire of Japan as agreed upon at the Potsdam Conference. This ultimatum stated that, if Japan did not surrender, it would face prompt and utter destruction.

According to the Cairo Declaration, Potsdam Proclamation, and Japanese Instrument of Surrender, the United States of America and the United Kingdom pledged along with Japan that Taiwan would be restored to the ROC. Therefore, following the victory of the Allies in World War II, from October 25, 1945 the ROC government began exercising its sovereignty over Taiwan, declaring the restoration of Taiwan as an integral part of the ROC's territory, and restoring ROC citizenship to the people of Taiwan. Thereby ROC conducted elections and an effective provincial government was established.

All these three documents above mentioned documents are embodied in the third volume of *Treaties and Other International Agreements of the United States of America 1776–1949* published in 1969 by the U.S. Department of State. United States of America considers these three documents as operative, legally binding treaties and valid even today.

STATEHOOD THEORY: CONSTITUTIVE V. DECLARATORY

The question- whether a state comes into being by fact or by recognition from other established states, leads to emergence of two theories⁹.

Constitutive theory holds that an entity has to be legitimised as such by other states in order to be a state while declaratory theory considers the existence of a state as a question of fact and not of law. It is believed that before twentieth century, the constitutive theory of statehood prevailed over declaratory theory of statehood, however during twentieth century, declaratory theory over powered it. The classical application of the declaratory theory was demonstrated in the Montevideo Convention on Rights & Duty of States.¹⁰ Although it is regional treaty the Montevideo Convention is regarded as a reinstatement of Customary

⁶ Life: Noel F. Busch, "Alexander Kirk," August 13, 1945, as seen on 25th October, 2015.

⁷ Churchill, Winston Spencer (1951). *The Second World War: Closing The Ring*. Houghton Mifflin Company, Boston, p. 642.

⁸ <http://www.ndl.go.jp/constitution/e/etc/c06.html>, as seen on 30th October, 2015.

⁹ P.K. Menon, The Law Of Recognition In International Law: Basic Principles 23 (1994).

¹⁰ Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097.

International Law as it codified existing legal norms on Statehood. Article 1 of the Convention sets out Four criteria for statehood: The states as a person of International law should possess the following qualification¹¹:-

- (a) Permanent population
- (b) Defined Territory
- (c) Government
- (d) Capacity to enter into relation with other states.

According to declarative theory of statehood if an entity satisfies the above four criteria, it becomes state, and the political existence of such a state is independent of recognition by the other states.

It is wrangled by number of Taiwan politicians that Taiwan is an independent state as it satisfies all the above mentioned four criteria¹².

Permanent Population

The existence of a permanent population is conspicuous and there is no specification of a minimum number of inhabitants. Taiwan has a population of nearly 23 million since 1949 when more than 1 million mainlanders arrived in Taiwan; the Taiwanese population has been stable overtime. Thus it is generally contested that Taiwan satisfies the first criteria.

Defined Territory

A defined territory desideratum as a particular territorial base upon which to operate. However, there is no indispensability in international law for defined and settled boundaries. A state may be recognised as a legal person even though part of its territory is in dispute as to the precise demarcation of its frontiers, so long as there is a consistent band of territory which is incontrovertible and is controlled by the government of the alleged state¹³.

Taiwan encompasses a well defined territory consisting of the island of Taiwan itself and dozens of smaller islands in the Taiwan ‘s straits. There are few better geographical arrangements than a good-sized island. Taiwan’s boundaries has been clear over the centuries. Although Taiwan sovereignty over this territory has been challenged by the PRC which maintains that China’s entire territory encompasses both Mainland China and Taiwan, as explained above this challenge does not necessarily indicate that Taiwan fails in the requirement that it maintains a stable territory.

A Government

¹¹ D.J. Harris, Cases and Materials on International Law, 7th Revised Ed. (25 June 2010), Sweet & Maxwell.

¹² Victor Hao Li, The Status Of Taiwan, Asian Affairs, Vol. 16, No. 3, Symposium: Relations Between the Chinese Mainland and Taiwan: Problems and Prospects for Reunification (Fall, 1989), pp. 167-171

¹³ Malcom M. Shaw, 6th Ed., p. 199, Cambridge Publishers.

For a political society to function reasonably effectively it needs some form of government or central control? The government of the entity must exercise effective power over its territory and citizens, the government must actually be independent of any other state. However, this is not a precondition for recognition as an independent country. It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs¹⁴.

Taiwan satisfies the criteria because for more than half a century, Taiwan has been under the governance of ROC. The PRC has never ruled over Taiwan. Since 1991, the ROC has undergone a series of constitutional reforms, although the territory of ROC has been untouched, these reforms effectively withdraw its claim over mainland China. According to these reforms, Taiwan governmental body would represent Taiwan people only.¹⁵

The Capacity to Enter Into Relations with Other States

Although this criteria is clearly controversial, from pure declaratory vie, its implication is clear. Taking into consideration, Article 3 and Article 6 of the Montevideo Convention, which clearly state the existence of state is independent of recognition by the other states, these criteria shall not be interpreted as to require states to be recognised by other states in order to engage in diplomatic relations.

In this sense, these criteria constitute no obstacle for Taiwan to claim its statehood; Taiwan need not seek permission from other governments in dealing with the world. If not for the political obstruction posed by the PRC government, Taiwan could well enter into relations with any states as it wishes. The diplomatic relations over 20 countries are evidence that Taiwan has independent diplomatic capacity among nations.

The key point affecting status of Taiwan has been that both the governments that is ROC and PRC claims to represent the whole of China. Till today no claim as such is made claiming separate statehood for Taiwan and this is also one of the reasons that Taiwan never made a declaration for its independence. Total lack of recognition of Taiwan as a separate independent state merely reinforces this point¹⁶. However, even if Taiwan would have declared its independence, whether as the ROC or as PRC, it would still not have iron out the issue of Taiwan's international status. A state becomes a full player in the international system only when it gets recognition from other states. A declaration of independence by Taiwan would not substantially increase the number of countries that recognized the government but it might actually harm relationships with a number of friendly states that now entertain informal but close relations with it.

This clearly points out that states base their decisions primarily on policy considerations rather than legal principles. In this regard, it is crystal clear that the law of recognition is a

¹⁴ Malcom M. Shaw, 6th Ed., p. 200, Cambridge Publishers.

¹⁵ The significance of Taiwan's Constitutional reforms, <http://www.gio.gov.tw/>, as seen on 2nd November, 2015.

¹⁶ Malcom M. Shaw, 6th Ed., p. 234, Cambridge Publishers.

highly politicized part of international law. This may partially explain why the question of recognition of states and the governments has neither in theory nor in practise been solved satisfactorily. In practice, because of the discretionary nature of recognition, a state acts legally in not granting recognition to an entity which in fact possesses all the necessary qualifications of statehood or to a government which in fact have effective control over the alleged states population and territory.

UN AND STATEHOOD THEORY

The UN's influence on International Law can be seen in almost every aspect of relations amongst states. Example Vienna Convention on Diplomatic relations (1961) and Vienna Convention on Consular relations (1963) constitute the cornerstone of rules guiding day to day inter-state relations.

In terms of Human Rights protection, Charter of United Nations, UDHR, ICCPR, and Convention against Genocide etc. would now have an impressive array of conventions protecting the rights of all people, children, women and minorities. The recognition and protection of human rights fundamentally changes the traditional notion of state and sovereignty.

The Montevideo Convention on the Rights and Duties of State was signed in 1933. Since then international relations and state practices have undergone changes. Among them the creation of UN and the emergence of a large number of new states after the Second World War have significantly reshaped contemporary international law.

UN redefined Statehood

Statehood must be understood in the context of international laws which provide for rights and obligations a state enjoys and bears. As an international organisation which is designed to facilitate international security, economic development and human rights issues, UN has vastly expanded the existing body of international law. It is estimated that UN has helped to conclude more than 500 unilateral treaties and agreements. These treaties have formed the basis of primary laws governing relations¹⁷.

In the area of international trade, the UN Commission on International Trade Law has developed a number of Conventions, model laws, rules and legal guidelines to harmonise international trade. Example UNCITRAL Model Law on International Commercial Arbitration (1985).

In sum, the influence of the UN on each state has been sweeping and profound. The UN has fundamentally changed people's understanding of states and their rights and duties. A state which has all the rights and privileges and obligations as a member of UN is called a state. It means it has admitted to UN. In this sense, statehood begins only after admittance to the UN.

¹⁷ Ralph N. Clough, The Emerging New International Legal Order In The Western Pacific: The Status Of Taiwan, The Journal of East Asian Affairs, Vol. 8, No. 1 (Winter/Spring 1994), pp. 225-237.

The practice of admission to the UN virtually discards the declaratory theory of statehood.

Article 4 of UN Charter deals with membership to UN. Applying the declaratory theory of statehood, to be admitted as a UN member, an entity has to satisfy the criteria mentioned in Montevideo Convention.

They should also accept the obligations of Charter as a member of UN. But, neither of the above conclusions is true. This can be easily proved using Rhodesia situation where it had experienced great difficulty in getting a membership to UN

The case of Southern Rhodesia's¹⁸ unilateral independence from the British Empire indicates that even if an entity satisfies all the requirements of effectiveness, it could be rejected UN admission.

South Rhodesia and Northern Rhodesia were both British Colonies before independence. In 1964, Northern Rhodesia remained a British Colony governed under the white dominated Smith administration. On 11th November 1965, the Smith Administration unilaterally announced the independence of Southern Rhodesia from Britain. The Britain government this an act of rebellion. At that time, Smith Administration was an effective government. But UN Security Council rejected Southern Rhodesia recognition and refrained from rendering any assistance to it.

It was not until 1980 when the British government granted its independence that Southern Rhodesia became a member of the UN under the name of Zimbabwe.

The UN has always been unwilling to accept unilateral independence¹⁹.

New Constitutive Theory of statehood based on the UN's collective recognition mechanism

According to James Crawford²⁰, of states in existence in 1945, only Switzerland and the Vatican city are not UN members. Of more than 140 states which have come into existence since 1945, only Kiribati, Nauru, Touga and Tuvalu all joined the UN and in 2002 Switzerland also became a full member. Today, it is fair to say an entity can claim to be a state only after it has become a member of UN.

When a state applies to join UN, accordingly to the UN Charter, the UN should decide whether the applicant is able and willing to carry out the obligations stated in the charter. Such decision is made by General Assembly upon the recommendation of Security Council. Once an entity has been admitted as a member of the UN, it conclusively becomes a state.

¹⁸ <http://speeches.empireclub.org/61140/data>, as seen on 29th October, 2015.

¹⁹ McWilliam, Michael (January 2003), Zimbabwe and the Commonwealth, *The Round Table: The Commonwealth Journal of International Affairs* (Newtonabbey, Northern Ireland: The Round Table) 92 (368): 89–98.

²⁰ James Crawford, *The Creation Of States In International Law*, Oxford University Press 2005.

Therefore, UN in effect has undertaken the effect suggested by Lauterpact²¹. UN provides a collective recognition mechanism for new state²².

Jurisdiction- the ICJ's jurisdiction is based on the consent of parties. A state is able to consent to the ICJ jurisdiction by special agreement, by treaties and conventions or by recognition of the courts compulsory jurisdiction. According to Article 36(1) of ICJ statute, the Court's jurisdiction includes all cases referred by state parties, usually in the form of special agreement for the specific purpose of submitting the dispute and indicating the subject of the dispute as well as the parties involved.

In authors view despite the fact that country is not a party to the ICJ statute, based on Article 36(1) of the ICJ Statute, Taiwan may accept the ICJ's jurisdiction by concluding treaties or conventions that require that disputes that arises from the agreements to be subject to the ICJ's jurisdiction.

The FCN (Friendship Commerce and Navigation) treaty, meets the requirement of 'treaties and conventions in force' under article 36(1) of the ICJ Statute, may enable Taiwan to resort to the ICJ. The other way of conferring jurisdiction on the ICJ is based on Article 36(2) of the ICJ Statute under which a state may accept the courts compulsory jurisdiction. However, it is unlikely that Taiwan would become a party to the ICJ Statute because of Chinese pressure.

CONCLUSION

As one of the greatest human achievements in the 20th century, the UN has fundamentally reshaped the structure of international relations. It is fair to say that UN membership has become the synonym of statehood. The only way to become a state is to follow the collective recognition procedure and to be admitted to the UN.

To be admitted to the UN, Taiwan first has to get the recommendation of the UN Security Council of which China is a permanent member. According to section 27 of the UN Charter, the Security Council's decision on all substantive matters require the affirmative votes of 9 members. A veto by permanent member would prevent the adoption of a proposal, even if it has received the required number of affirmative votes. Therefore, without the consent of the Chinese government, it is impossible for Taiwan to be admitted to the UN. Further Article 1 of Montevideo Convention is no more enough to grant the status of state though it forms the prime base for essentials of statehood. This is the reason that till today the status of Taiwan has been considered as unsettled.

Even if Taiwan declares its independence, it cannot act as an independent entity until other state recognises it as a separate state and enters into contact with it. No other state would be freely willing to openly recognise Taiwan as an independent state as that would mean that recognising state going against China which is an emerging superpower.

²¹ H. Lauterpacht, *Recognition in International Law*, Cambridge University Press 1947.

²² Ti-Chiang Chen, *the International Law of Recognition*, L.C. Green Ed., New York: Frederick A. Praeger, Inc., 1951).

The best policy to prevent Taiwan's secession is to continue China's peaceful development strategy and keep an active role in the international community.

A CRITICAL ANALYSIS ON WOMEN RIGHTS IN INDIA UNDER HINDU LAW

Raj Ranjan* & Harsh Vardhan Dhanik**

INTRODUCTION

“Of all the evils for which man has made himself responsible, none is so degrading, so shocking or so brutal as his abuse of the better half of humanity; the female sex.”

- Mahatma Gandhi

We all are said to be human beings and the term human beings itself emanates from the human beings as the other terms emanate and considered as one of the best art of god, the nature has made us without making any discrimination, then who are we to make any discrimination in fairer sex, caste and religion. According to Manu “*a wife, son and a slave are declared to have no property and if they happened to acquire it would belong to male under whom they are in protection.*” We all are regarded as natural person in the eyes of law irrespective of sex, caste and religion. Our constitution gives us the right to sue and to be sued in case of infringement of our any of the rights against who infringed and who got legal injury respectively.

Every citizen of India is guaranteed equality before law and equal protection of the laws irrespective of his gender, caste, creed, and race. The Constitution of India also contains provisions for empowerment of women. The concept of equal social status to women also includes their right to hold and inherit property like the male members of the family. Despite the equality guaranteed by the law of the land, women in India had suffered a lot of inequalities. Prior to the enactment of the Hindu Women’s Right to Properties Act 1937, women were not entitled to a share in the Joint Family Property and succession was governed by survivor ship. As per the rule of survivor ship, on the death of a member of joint and undivided family, his share in the joint family property would pass on to the surviving coparceners, which was inclusive of only the male members of the family.

The Hindu Succession Act, 1956 gave women equal inheritance rights with men. But the daughters were not given a birth right in the ancestral property under the Mitakshara coparcenary. Coparcenary refers to equal inheritance which was restricted only to male members of the Hindu Undivided Family. It is a narrower body of persons within a joint family. Coparceners jointly inherit property and have unity of possession.

Coparcenary is limited to three generations next to the holder. If a man has sons, grandsons and great grandsons living, all of these constitute a single coparcenary with him. The share of coparceners in the joint coparcenary property was fluctuating which diminished and enlarged

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with the birth and death of a coparcener in the family. No female was a member of the coparcenary in Mitakshara Law before the Hindu Succession (Amendment) Act, 2005. If the family owned a dwelling house, then the daughter's right was confined only to the right of residence and not possession or ownership. The daughter has been made a coparcener by birth in the joint property after coming into force of the Hindu Succession (Amendment) Act, 2005.

RIGHT OF WOMEN UNDER HINDU SUCCESSION ACT, 1956

The Hindu Succession Act, 1956 dealt with law relating to intestate succession among Hindus. The properties of a Hindu male dying intestate devolves, in the first instance, equally on his sons, daughters, widow and mother and include the specified heirs of predeceased sons or daughters. Section 6 of the Act deals with devolution of interest in the coparcenary property, according to the Section 6 of the Act prior to the passing of the Amendment Act of 2005, the interest of a coparcener who died intestate shall devolve on others coparceners by rule of survivorship. According to the un-amended Section 6, if the deceased died leaving behind a surviving female relative specified in Class I of Schedule I, or a male relative specified in that Class who claims through such female relative, or a male claiming through such female, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or interstate succession under this Act and not by survivorship. Thus, in Mitakshara coparcenary females could not inherit ancestral property. Thus, the provision contained in the un-amended Section 6 of the Act, by excluding the daughters from participating in coparcenary ownership not only contributed to an inequity against females but had also led to oppression and negation of their right to equality. The Hon'ble Supreme Court in the case of **V. Tulasamma v. Sesha Reddy¹** held that, a Hindu widow is entitled to maintenance out of her deceased husband's estate irrespective whether that estate may be in the hands of male issues or coparceners. She can follow the estate for her right of maintenance, even if it is in the hands of third person having notice of her rights.

There is disparity in inheritance by the Hindus so far as females are concerned. Prior to the enactment of Hindu Succession Act, 1956 Hindus in India were governed by Shastrik and customary laws which varied from region to region and sometimes it varied on caste basis. The multiplicity of laws in India diverse in their nature and made the property law even more complex. A Hindu wife was not capable to hold any property separate from her husband. In fact, the wife was considered to be a cattle and property of her husband and she could not own property herself. Of the two types of property women were to hold-'stridhan and women's estate. Women's estate has the following features:-

- 1) It gives women an absolute ownership of property,
- 2) She has the right of alienation and even she can dispose,
- 3) She can sell ,gift, mortgage ,lease, exchange or if she chooses , she can put it on fire,
- 4) Her property can be passed on to her own on heirs on her death.

¹ AIR 1977 SC 1944

The old law of succession has put an end by The Hindu Succession Act, 1956. As per Section 15 of the Hindu Succession Act, 1956:

General rules of succession in the case of female Hindus are as follows

The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16:

- a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
- b) secondly, upon the heirs of the husband;
- c) thirdly, upon the mother and father;
- d) fourthly, upon the heirs of the father; and
- e) lastly, upon the heirs of the mother.

In the constitution of India, equality to women was guaranteed for the first time. To secure equality of status to improve Hindu women's right to property, Hindu Succession Act, 1956 came to force. At the time of enactment of this act, daughters could not become members of the co-parcenary and the Act did not afford right of natural inheritance to daughter because of the very concept of right by birth and by reason of sex as only males can be coparcener. To do away with these obstacles in achieving equality right of inheritance for women and to give right to the women by birth as coparcener was demanded in order to bring equality before law as a fundamental right.

RIGHT OF INHERITANCE OF PROPERTY FOR HINDU WOMEN

When we check the systems of inheritance in Hindu law, there can find two different systems of inheritance, namely:

1. The Mitakshara System
2. The Dayabhaga System

The former system prevails in Bengal and the latter system prevails in other parts of India. Both the systems are based upon the text of Manu that "to the nearest Sapinda the inheritance next belongs; after them, the Sakulyas, the preceptor of the Vedas, or a pupil." The guiding principles of the two systems are different. Under the Mitakshara system the law of inheritance shall be based according to the nearest heir ie; based on the principles of consanguinity. Whereas according to Manu, the dayabhaga system is based on the principle of religious efficacy.

MITAKSHARA SYSTEM

Devolution Of Mitakshara School Can Be In The Form of:

1. Separate Property Of The Last Owner;
2. Joint Family Property.

The Classification Of Heirs Under Mitakshara Are As Follows:

- Sapindas
- Samanodakas, And
- Bandhus

Under Mitakshara law, females could take only limited estate whereas males took absolute interest in the estate. When it comes to males succeeding as heirs , from a male or a female they took absolutely. Now when it comes to females succeeding as heirs to a male they took a limited estate in the property except in certain cases. If a separated Hindu under Mitakshara or any Hindu under Dayaghaga died leaving a widow, and brother the widow succeeded to the property as his heir but she being a female did not take the property absolutely. She was entitled to the income of the property. She could not make a gift of the property nor could she sell it unless there was some legal necessity. On her death, the property would pass not to her heirs, but to the next heir of her husband, ie; his brother.

DAYABHAGA SYSTEM

Under Dayabhaga system, there is only one mode of devolution of property i.e; succession.

The Order of Succession Has The Following Features;

1. Religious efficacy
2. One mode of succession

Under the first order of succession, the right to inherit the property is bestowed with spiritual benefit on the deceased owner. And under the second order, there is no right by birth or survivorship.

It does not recognize the rule of survivorship in the Joint Family property. Moreover, 2 or more persons can become joint tenants but with the exception of widows and daughters. The joint family property is passed on to heirs, males or females or even to his legatees as if he were absolutely seized thereof and not to the surviving coparceners on the death of owner. It cannot be found in Mitakshara law.

THE STATE AMENDMENTS

The Hindu Succession Act containing the discriminatory provision was followed for about 49 years. But there were five states in India namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka who took the initiative to treat women equally both in the economic and the social spheres. States of Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka had inserted provisions wherein the daughter has been made a coparcener by birth in the joint family property in her own right in the same manner as the son. The state of Kerala, in addition to making the daughter as a coparcener has also abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family. It has abolished the Joint Hindu family system.

THE 174th REPORT OF THE LAW COMMISSION OF INDIA AND THE HINDU SUCCESSION AMENDMENT ACT OF 2005

Under the Principal Act the daughters were not given any independent right in respect of partition or to demand for partition. She only got the right to hold her father's share and that too after her father's death. And this led to violation of Article 14 and 15 of the Constitution of India encouraging gender discrimination. Realizing the dichotomy and gender discrimination, Law Commission of India undertook the study of provisions of Hindu Law with regards to the Laws of inheritance and with regards to the rights of daughters. An apprehension was also raised that a whole generation of woman contemporary to passage of this important enactment will lose out all their property rights. On 5th May 2000 The Law Commission of India submitted its 174th report to the Government of India in respect of "Property Rights of Women and hence proposed certain reforms under the Hindu Law." It started with, "*Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end. Recognizing this Law Commission in pursuance of its terms of reference, which, interalia, oblige and empower it to make recommendations for the removal of anomalies, ambiguities and inequalities in the law, decided to undertake a study of certain provisions regarding the property rights of Hindu women under the Hindu Succession Act, 1956. The study is aimed at suggesting changes to this Act so that women get an equal share in the ancestral property.*"

Henceforth, to enlarge the rights of a daughter is it married or married and to bring her at par with the male gender governed by the Mitakshara law The Hindu Succession Amendment Act, 2005 was enacted. The amendment sought to bring the female line of descent at an equal level with the male line of descent, including children of predeceased daughter of predeceased daughter. Now with the act the daughters were given the coparcenary rights. With this right the daughters came at par with the sons and now she shall also be liable along with the sons for debts of the joint family. She even got the right to dispose of her share of the coparcenary property or her interest thereof by way of a will. The Hindu Succession (Amendment) Act, 2005 was passed to remove gender discriminatory provisions in the Hindu

Succession Act, 1956 and to give equal rights to daughters in Hindu Mitakshara coparcenary property as the sons have. The Act aimed at making two major amendments in the Hindu Succession Act, 1956. Firstly it amended the provision which excluded the right of the daughters from the coparcenary property and secondly it omitted Section 23 of Act which disentitled a female heir to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs choose to divide their respective shares therein.

The main provisions of the Hindu Succession (Amendment) Act, 2005 are:

- 1) In a Hindu Joint Family governed by Mitakshara law, the daughter by birth shall become a coparcener in her own right in the same manner as a son.
- 2) She would have the same rights in the coparcenary property as that of a son.
- 3) She shall be subject to same liabilities in respect of the said coparcenary property as that of a son.
- 4) Any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.
- 5) Any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004 shall not be affected or invalidated by reason of the amendment of Section 6 of the Act.
- 6) Any property to which a female Hindu becomes entitled by virtue of subsection (1) shall be held by her with the incidents of coparcenary ownership and could be disposed of by her by testamentary disposition.
- 7) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place.
- 8) In case of notional partition:
 - a) The daughter is allotted the same share as is allotted to a son;
 - b) The share of the predeceased son or a predeceased daughter shall be allotted to the surviving child of such predeceased son or of such predeceased daughter;
 - c) The share of the predeceased child of a predeceased son or of a predeceased daughter, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter, as the case may be.
9. The interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death,
10. After the commencement of the Amendment Act, there shall be no obligation on the son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law.
11. Nothing contained in amended Section shall apply to a partition, which has been effected before the 20th day of December 2004.

RECENT JUDICIAL PROUNCEMENTS AND THEIR EFFECTS

Some of the most important recent judicial pronouncements are discussed to ascertain the actual effects of the Amendment Act of 2005. Hon'ble Supreme Court in the case of **Ganduri Koteswaramma v. Chakiri Yanadi**², held that, the new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son.

Hon'ble Bombay High Court in the case of **Ms. Vaishali Satish Ganorkar & Anr. v. Satish Keshorao Ganorkar & Ors.**³. It was held that *Ipsa facto* upon the passing of the Amendment Act in 2005 all the daughters of a coparcener in a coparcenary or a joint HUF do not become coparceners. The daughters who are born after such dates would certainly be coparceners by virtue of birth, but, for a daughter who was born prior to the coming into force of the amendment Act she would be a coparcener only upon devolution of interest in coparcenary property taking place. Until a coparcener dies and his succession opens and a succession takes place, there is no devolution of interest and hence no daughter of such coparcener to whom an interest in the coparcenary property would devolve would be entitled to be a coparcener or to have the rights or the liabilities in the coparcenary property along with the son of such coparcener. A reading of Section as a whole would, therefore, show that either the devolution of legal rights would accrue by opening of a succession on or after 9 September, 2005 in case of daughter born before 9September, 2005 or by birth itself in case of daughter born after 9 September, 2005 upon them.

Two conditions necessary for applicability of Amended section 6(1) are:

- i. The daughter of the coparcener (daughter claiming benefit of amended section 6) should be alive on the date of amendment coming into force;
- ii. The property in question must be available on the date of the commencement of the Act as coparcenary property.

EFFECT OF THE AMENDMENT ACT ON THE POSITION OF THE WOMEN

The significant change that was brought by the Amendment Act was to make daughters coparceners in joint family property. After the amendment, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and she would have the same rights in the coparcenary property as she would have had if she had been a son. With the rights that she acquire in the joint family property she also is subjected to the same liabilities in respect of the said coparcenary property as that of a son and any reference to a Hindu Mithakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

² AIR 2012 SC 169

³ AIR 2012 Bombay 101

According to this amendment if the daughter dies intestate; her interest in coparcenary would devolve by succession in accordance with section 15 of the Hindu Succession Act, 1956. If the daughter is left alone by deceased male coparcener, she shall inherit his entire property of which she would become absolute owner and after her death, if she dies intestate shall devolve upon her heirs as per section 15. The daughter now has the right to dispose of her interest in coparcenary by making a will and if she is a lone heir she shall become absolute owner of the property and shall also have a right to alienate it during her life time. This amendment also created a right to have a share in the joint property during the partition favour of children of the daughter and her predeceased daughter, in case of their death, that is to say a son of a predeceased daughter of a predeceased daughter; daughter of a predeceased daughter of a predeceased daughter; daughter of a predeceased son of a predeceased daughter; daughter of a predeceased daughter of a predeceased son, are also now included in Schedule to Hindu Succession Act, 1956 as Class I heirs. The said heirs, not being coparceners, would not have right to demand partition. Any disposition, alienation, partition or testamentary disposition of property made before 20th December, 2004 shall not be invalidated by reason of the amendment of Section 6.

However, the right of the mother or deceased's widow in the joint family property has remained unchanged. They would be entitled to an equal share with other Class I heirs only from the separate share of the father and her husband respectively computed at the time of the notional partition. With the amendment Section 6, the actual share of the mother will go down with daughters also becoming coparceners in the joint family property.

According to the amended Section 6 of the Hindu Succession (Amendment) Act, 2005 if a Hindu dies after the commencement of the Amendment Act, his interest in the property of the joint Hindu family governed by the Mitakshara Law shall devolve by testamentary or intestate succession and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

CONCLUSION

The basic object of the amendment to the Section 6 of the Hindu Succession Act was to achieve equal inheritance for all. Daughter of a coparcener in a Hindu joint family governed by Mitakshara Law now is coparcener by birth in her own right in the same manner as a son; she has right of claim by survivorship and has same liabilities and disabilities as a son; now coparcenary property to be divided and allotted in equal share. But these laws cannot be successful unless and until there is social awareness amongst the women about their rights. Women themselves relinquish their rights and tend to suffer deprivation. The change which took about 49 years to bring daughters at par with the sons with respect to their right in their ancestral property cannot be lost sight of just because of ignorance of people. The judiciary should also make efforts to implement the law so as to achieve the objective behind the amendment of the law. Above all it's the woman herself who has to be aware of and assert her rights. Thus we can conclude here by saying that the recent Judgments and the amendments has paved way to many women, who are aspiring to assert their rights in coparcenary property. It has given a huge relief to the daughters to fight with the

discrimination on the ground of gender and the consistent oppression and negation of their fundamental right of equality.

“I rise up my voice not so I can shout but so that those without a voice can be heard, we cannot succeed when half of us are held back.”

Malala Yousufzai

