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"Mind is action of its own nature. Mind-activity means creation. The thought is followed by the word, and the word by the form. All of this creating will have to stop, both mental and physical, before the mind can reflect the soul."

- Swami Vivekanand

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Lex Revolution
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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Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.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 II Issue 1 of our Journal ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

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

We owe our sincere gratitude to Prof. Gopal Krishna Chandani & 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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SEPARATION OF POWER: ENCROACHING BOUNDARIES

Jyoti*

Abstract

The Montesquieu's theory of separation of power states that all the organs of the government are equally powerful and independent from one another, if concentration of power in one branch or two bodies, it would diminish liberty of an individual. Each branch of the government while performing its functions tends to interfere in the sphere of working of another functionary because in strict sense the complete demarcation of function is not possible while dealing with general public. Here the main question arises whether this theory would have any utility in India and what is the actual position of separation of power in Indian Constitution. To what extent the different organ of the state have encroached into the domain of others in India. Another question which assumes the significance of this doctrine what should be the relation among these organs of the government. In real sense legislature and executives are closely connected with each other; the executive is responsible to the legislature for its action and derives its power from legislature. Indian parliamentary form of government does not make any express a provision for the separation of power in absolute form still lots of overlapping and combination of power has been given to each other organ.

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INTRODUCTION

Due to the given complexities of democracy all over the world, the overlap of jurisdictions bound to arise. The doctrine of separation of power envisaged by Indian Constitution and recognized as basic structure of constitution but there is no clear straight jacket formula to determine this principle. No doubt each branch of the government must keep internal check and balances to ensure that they do not end up violating the rights of people.¹

The Doctrine of separation of power deals with the three main organs of government legislature, executive and judiciary, and having mutual relation among these three organs. The principle of separation of power already existed in different forms of powers and function, and defined by different scholars and jurist classified the functions of government. Aristotle first time classified the functions of government into three categories such as deliberative, magisterial and judicial functions. On the other hand John Lock categories three powers of government, continuous executive power, discontinuous power and federative power. Here, continuous executive power implies the executive and judicial power, discontinuous legislative implies rule making power and federative power implies the power regulating foreign affairs.² In 1798, French jurist Montesquieu articulates the principle of separation of power in his book ‘spirit of laws’.³ He argued that neither a single person nor group of persons exercise all the powers of government legislature, judiciary and executive. Therefore each organ should restrict within its own sphere and restrain them from encroach the power of other organ. When same person exercise both the executive and legislative power it would leads to the infringement of freedoms or liberty, and they will act arbitrarily.⁴

In strict sense the complete and absolute separation of power is not possible in actual practice and theoretically. It is necessary to give broad meaning to this doctrine:

- 1) The same person should not form part of more than one of the three branch of government.
- 2) One branch should not control or interfere with other branch of government.
- 3) The branch should not exercise the function of other branch.

The whole notion of the separation of power is that collective amalgamation of power of state not only to be confined with single individual or group of person due to individual biases and prejudices. The power of the state should operate independently of one another for the rights and liberties of an individual to be preserved. At present in the modern iteration of separation of power it is more likely to be considered or prudent to be considered the independence of the judiciary because there are overlaps between executive and legislature. The judiciary should be considered paramount to be independent it is completely set aside from executive and legislature.

¹ Nidhi Singh and Anurag Vijay, “Separation of Power: Constitutional plan and Practice” 3 IJSRP 1 (2013).

² Tej Bahadur Singh, “Principles of Separation of Power and Concentration of Authority”, 2 JTRI 1, (1996)

³ Durga Das Basu, *Administrative Law* 23, (Kamal law House, Kolkata, 6th ed., 2004)

⁴ *Supra* note 1 at 2

Due to this theory, the main significant principles that there is no concentration of powers, enhanced the system of check and balances, no organ having controlling power other, and this theory is necessary to preserve the liberty of the individual and for avoiding tyranny.

The American Constitution have applied this theory to certain extent and giving judiciary unique position. The framer of U.S Constitution strictly adheres to the doctrine of separation of power but in actual practice it has been seen that it cannot be applied in rigid and absolute form. In *Liver Sidge v. Anderson*⁵ case, in which lord akin has contributed to the evolution of this doctrine of separation of power.⁶ In US Constitution, Art. I related to the legislative power of congress, Art. II vests executive power in president, and Art. III vests judicial power in the Supreme Court. In US this principle would help to prevent the rise of tyrannical government by making it impossible for single group or branch to exercise too much power. Despite the explicit provision in US constitution, it incorporated certain exception to the principle of separation with a view to introduce check and balances.⁷ Under non delegation doctrine, the congress may not delegate its law making power to any agency or department. In *Clinton v. City of New York*⁸ case it was held that the Congress could not delegate a line-item veto to the president. In *INS v. Chadha*⁹ case, the Supreme Court decide that the presumption of legislature action under Article I section I vests with all law making power with Congress and require every bill passed by the House and Senate, before becoming law presented to the president and, if he disapproves, to be re passed by two thirds of the Senate and House. It was further clarified in the case that even both Houses acting together cannot override Executive veto's without a 2/3 majority. Legislative may always prescribe regulations governing executive officers. In land mark case, *Marbury v Madison*¹⁰, it was first time when US Supreme Court declared something unconstitutional and accept the principle of judicial review. The main idea to nullify and oversee the actions of another branch of the government to maintains check and balances in American form of government.¹¹

Here the main question arises whether theory would have any utility in India and what is the actual position of separation of power in Indian Constitution. To what extent the different organ of the state have encroached into the domain of others in India. In other word, performing the functions of other organ does not invalidate that action due to the reason that such functions belongs to other organ.

⁵ (1942) AC 206

⁶ *Supra* note 1 at 1

⁷ Information Technology Act 2000, India, Available at: <http://www.legalserviceindia.com/article/116-Separation-Of-Powers.html> (Last visited on October 11, 2015)

⁸ 524 U.S. 417 (1998)

⁹ 462 U.S. 919 (1983)

¹⁰ 5 U.S. 137(1803)

¹¹ Information Technology Act 2000, India, Available at: <http://www.legalservicesindia.com/article/article/separation-of-power-in-india-&usa-483-1.html> (Last visited on October 11, 2015).

CONSTITUTIONAL PERSPECTIVE: DOCTRINE OF SEPARATION OF POWER (INSTANCES OF ENCROACH THE POWER OF OTHER ORGANS)

In Indian Constitution, it is explicit provision that executive power of the Union shall be vested in the President and the executive power of the state shall be vested in the Governor of the state. The legislative power vested with parliament as provide under Article 79 of the Constitution. In The judicial power lies with Supreme Court as specified under Article 131 and succeeding Articles. In aforesaid provisions, no where we can find the word “exclusively”, it shows that framer of our constitution did not consciously approving the theory of separation of power.¹²

The Constitution lays down the function separation of branch of the government. Article 50 states that state shall take steps separation of judiciary from the executive to ensure the independence of judiciary. In the judgment, *Pandit M.S.M. Sharma v. Shri Krishna Sinha*¹³, the Supreme Court observed that Art. 122 and 212 provides of proceedings in Parliament and legislature cannot be called into question in any court. This ensures the separation and immunity of the legislature from judicial intervention on the allegation of procedural irregularity. Similarly the executive power of union and state shall be vested president and governor under Art. 53 and 154 respectively and they can enjoy immunity from civil and criminal liability.

The legislative vested with law making power but exercise judicial powers in cases of breach of its privilege, impeachment of the president and the removal of the judges. The executive may further affect the functioning of judiciary by making appointment to the offices of Chief Justice and other judges. The legislature having amending power, if amendment is against constitution provision the judiciary can declare it void and revalidating it.¹⁴ The legislature discharging the function judiciary while disqualifying its members and impeachment of the judges. Legislature can impose punishment for exceeding freedom of speech in the parliament (under the powers and privileges of the parliament). It is always necessary for legislature that they exercise their power in conformity with due process.¹⁵

On the other hand, the provisions of Indian Constitution do not lay down prohibited areas of these three organs of the government. Due to which there is liberal mixture of function performed by one and other organ. There are many instances where each organ exercising the function of other organ. The legislature exercising the functions of executive such as Voting in the election of president and vice – president and their removal (Article 55, 66 and 67 respectively), control of council of ministers (Article 75), and removal of the judges of Supreme Court and High Court (Article 124 and 217).

The legislature performs the functions which are judicial in nature such as impeachment of the president (Article 61) and certification of money bills through speaker (Article 110). The

¹² P. M. Baxi, “Comparative Law: Separation of Power in India” 42 ABAJ 553 (1956)

¹³ AIR 1960 SC 1186

¹⁴ *L Chandra Kumar v. Union of India*, 1995 1 (SCC) 400

¹⁵ *Keshav Singh v. Speaker, Legislative Assembly*, 1965 1 SCR 413

executive performing legislative functions such as ordinance making power of the president (Article 123), President power to make recommendation on money bills (Art. 117 and 304), president power to certify state law (Art. 31), President having legislative power to proclaim emergency due to failure of constitutional machinery (Art. 357), Article 372 and 372-A power has been conferred on president to adapt any law in country whether by way of repeal or amendment as may be necessary for making necessary or expedient to bring the provision of law in accordance with the provisions of constitution¹⁶, president power to give assent to the amendment of the constitution (Art. 368), pardoning power of the president (Art. 72) and so many others article relating to president power. The judiciary performs the functions of legislature such as making rules for regulating its practice and procedure (Art. 145). The executive perform the functions of judiciary such as appoint officers and servants of High Court (Art. 46).¹⁷ In Article 103(1) president exercise judicial function; if any question arises as to the weather member of either house of parliament has become subject to disqualification in Article 102 (1) the question shall be referred for the decision of president and his decision shall be final.¹⁸ In actual practice, executive exercise power judiciary in appointment of judges under Article 124, 126 and 127. On the other hand legislature also exercises judicial function in removal of president under Article 56. Judiciary also make certain rules which are legislative in character whenever High Court or Supreme Court finds certain provisions of law against the Constitution or public policy and it declares the law null and void, and amendment to be made for formulate the law. Sometimes it is expedient for High Court or Supreme Court to formulate the principle on the point where law is silent.¹⁹

Adam Smith in his book, '*The Wealth of Nation*' explained the concept of Montesquieu theory of separation in relation with property rights, and offered two explanations first in function sense and another in structural sense. The functional explanation invoked to critique judicial activism and structure of regulatory bodies. In structural sense, it akin to the Montesquieu theory of separation of powers that concentration of power in one branch leads to the violation of rights and liberties. At present the growing economics literature understand this principle in structural sense.²⁰

DUE PROCESS AS SEPARATION OF POWER

The doctrine of basic structure has caused power imbalance between judiciary and parliament especially in respect of constitutional amendment. At the time when constitution was made, the importance of due process was consciously deleted which has led to unjustifiably decisive supremacy of the judiciary over all other branches of the government.²¹ In Maneka Gandhi case²², "it was held while interpreting the Article 14 that all the articles on fundamental rights

¹⁶ *Ibid.*

¹⁷ *Supra* note 6 at 554

¹⁸ *Supra* note 1 at 6

¹⁹ *Ibid.*

²⁰ Jaivir Singh, "Separation of Power and the erosions of 'rights to property' in India" 17 CPE 314 (2006).

²¹ Pran Chopra (ed.), *The Supreme Court Verses The Constitution: A Challenge to Federalism* 63 (SAGE Publication, New Delhi, 2006).

²² *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

bear the relationship with one another and any law depriving the rights and liberties any person must not satisfy the requirement of Article 21 ‘procedure established by law’ but also article 19 equality before the law. By interpreting the article 14 with the principle of reasonableness or non-arbitrariness which is essential attribute of equality impacting on the freedoms under article 21.” That was the indeed a clever way to introducing ‘due process clause’ in place of the ‘procedure established by law.’ The extraordinary power of Indian Supreme Court under the basic structure and due process of law led threat to the democratic system itself.²³

JUDICIAL REVIEW AND SEPARATION OF POWER

The power and function of each organ is subjected the restriction which would function of other organ to maintain check and balance in democracy. The laws made by the parliament and state legislature which would subject to judicial review. Art. 13 states that any law that is contravention to the part III would be declared ultra vires by the Supreme Court and High Courts in exercise the function of judicial review. It was held by Supreme Court in the Judgment *Keshavanand Bharti v. State of Kerala*, that the power to amend the constitution by the parliament is subject to the scrutiny of the court. The Court may declare any law void if it affects the basic structure of the Constitution.

The judicial review are the power of the Supreme Court and High Courts under article 32 and 226 respectively, the courts to check the constitutionality of every law made by parliament and the legislatures. This power of judiciary applicable to executive action and can be challenged on the golden trilogy of Article 14, 19 and 21. The Judicial review in India is based on assumption that the constitution is the supreme law of the land, and all governmental organs which owe their origin to the Constitution and derive their power from its provisions, must function within the frame work of the Constitution.²⁴

The supremacy in appointment of judges to the higher judiciary is with the Executive with the consultation of the Chief Justice, this is while ensuring the independence of judiciary. The land mark Judgment *Minerva Mills Ltd. v. Union of India*²⁵, the apex Court observed:

“In our country, the “Constitution is supreme lex, the paramount law of the land and there is no authority, no department or branch of the State, which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority. Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution.”

²³ *Ibid.*

²⁴ V. N. Shukla, *Constitution of India*, 52 (Eastern book company, Lucknow 10th ed., 2006)

²⁵ (1980) 3 SCC 625

The Constitution divides the legislative power between the centre and the state, and forbids either of them to encroach upon the power given to another. Who is to decide whether legislature or executive has acted in excess of its power or in contravention to the restriction imposed by the constitution on its power? So obviously this function assigned to court. Dr, Ambedkar had stated that judicial review and writ jurisdiction that gave quick relief against the infringement of fundamental right constituted the heart and soul of constitution.²⁶

JUDICIAL PRONOUNCEMENT

In re Delhi Law Act case²⁷, The Chief Justice Kania observed that, “*Although in Indian constitution there is no explicit provision relating to separation of powers. Under constitution the duty to make law is primary function of legislature. Does it not imply that unless it can be gathered from other provisions of the constitution, other bodies’ executive or judicial functions are not intended to discharge legislative function?*” Our Constitution does not contemplate assumption, by one organ of the government, of function that essentially belongs to another. In *Ram Jawaya v. State of Punjab*²⁸ case, it was held by the Supreme Court that we follow separation of function, not a separation of power. The apex court observed that executive power connotes the residue of government functions that remain after legislative and judicial function taken away. The Indian Constitution ha not indeed recognized the federal principle or doctrine of separation of power in rigid way but the functions of the different parts or branches of the government have been sufficiently differentiated. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when empowered, exercise judicial functions in a limited way.

Golak Nath v. State of Punjab²⁹, The Supreme Court observed, “*Constitution brings into existence different constitutional entities, namely the Union, the States and the Union Territories. It creates three major instruments of power, namely legislature, executive and judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without over stepping their limits. It is clear that the doctrine of separation of power has not been accepted in India in strict sense. The Supreme Court has power to declare void the laws passed by legislature and the actions taken by the executive if they violate any provision of the constitution. The executive can affect the functioning of judiciary by making appointment to the office of Chief justice and other judges*”.

In the judgment of *S.P. Gupta v. Union of India³⁰* regarding the appointment of the judges, the Supreme Court held that Article 124(2) is to be made by the President in consultation with such of the judges of the Supreme Court and the High Court as the President may deem fit. The consultation with Chief Justice of India is mandatory in case of appointment of a

²⁶ S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 34 (Oxford University Press, India , 2nd ed., 2003)

²⁷ AIR 1951 SC 332

²⁸ AIR 1955 SC 549

²⁹ AIR 1967 SC 1643

³⁰ AIR 1982 SC 149

judge other than the Chief Justice. This had created a balance of power in appointment of judges to the higher judiciary. The Hon'ble Supreme Court has through a series of judicial interpretations have shifted the supremacy from the President to itself. The Hon'ble Court has created an extra-constitutional body called collegiums and vested with the power of appointment.³¹

In landmark judgment of *Kesavanand Bharti v. State of Kerala*³², it was held that separation of power is a part of the basic structure of the Constitution. The Justice Chandrachud in the judgment of *Indra Gandhi Nehru v. Raj Narain*³³, also observed that "the political usefulness of the Doctrine of the Separation of power is not widely recognized. No constitution can survive without a conscious adherence to its fine check and balance. The principle of separation of power is a principle of restraint has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of valour". The Supreme Court observed the strict adherence to the Doctrine of separation of power. The entire debate on this doctrine has gone through a drastic change in the past two decades. Justice Pathak in *Bandhua Mukti Morcha v. Union of India*³⁴ case observed that, "it is well recognized that in certain sphere the legislature is possessed of judicial power, the executive possesses a measure of both legislative and judicial functions, and it is duty of court to interpreting the law, accomplishes in its perfect action in a marginal degree of legislative existence. Nonetheless a fine and dedicated balance is envisaged under our constitution between these primary institutions of the state. It was clearly inferred that one branch may exercise functions of another up to limited extent".

CRITICISM

It is not desirable that there should complete separation of power, if this doctrine exist in absolute form it leads to non-co-operation and disharmony between the different organs. That will result into frequent deadlock which may bring the government machinery to a standstill. According to Mill, the Doctrine of separation of power result into clash between the three organs of the state, as each organ will take interest only in their own powers. If each branch become independent and separate each will try to safeguard their own interest or power not protect the power of other branch that will expose to unattainment of administrative efficiency. The gradual growth of delegated legislation and administrative adjudication leads against the doctrine of separation of power.

CONCLUSION

The general proposition that each branch of the government should perform functions within their own sphere, if each organ overlaps or usurps the function of other organ it may further

³¹ Information of Technology Act, 2000 India, Available at: http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=3014 (Last visited on October 12, 2015)

³² AIR 1973 SC 1461

³³ AIR 1976 SCC 321

³⁴ 1984 3 SCC 161

held to be void on the ground that it discriminates against any person or group without justification, individual will infringe the rights of others without compensation or unreasonable restrain, or it may lead to undue delegation of powers. The purpose of separation of powers, to retain the autonomy of the organs without compromising the functional zone of the other organs, remains only in theory. Separation of powers, quintessential in a democratic country with a parliamentary form of government, has to be recognized and enforced in its true sense.

The Montesquieu theory of separation in strict sense cannot be applied in modern government or a developing democratic country like India. However, it does not mean it has no relevance. If there will be complete separation of powers the government cannot run effectively. For smooth running of government mutual the harmony and co – operation among the different organs will be at paramount.

CYBER TERRORISM: THE DANGER IS REAL, AND THE COUNTRY MUST READY TO CURB

Dr. Deepak Kumar Srivastava* & Ankit Awasthi**

INTRODUCTION

There are two issues over which individuals are having common apprehensions as they recognize them as threat for nation viz. corruption and terrorism, but the threat which is more dangerous in 21st century specifically in Indian scenario is cyber terrorism. Cyber space is regarded as the meeting place for criminal groups.¹ Cyber space has recently emerged as the latest battleground in this digital age.² The convergence of the physical and virtual worlds has resulted in the creation of a "new threat" called cyber terrorism.³ At this juncture it is pertinent to note that the threat of cyber terrorism with respect to India's infrastructure is real and immediate. Computers and servers, especially those belonging to the Governments, are the most aggressively targeted information systems in the world, with attacks increasing in severity, frequency, and sophistication each year.⁴

India is one of the most developing economies in the world which based on service sector specifically information technology but it is having threat (attack) at both internal and external level. These attacks can threaten our nation's economy, public utility works, power generation systems, communication systems, computer networks and cripple them for a longer duration, if not protected properly and immediately.⁵ In this respect it would be apt to quote the observations of EC Council President and CEO Jay Bavisi as he said that, "*India's response to cyber terrorism is dis-jointed. To begin with, there is no central cyber command and there is a non-existent cyber-security training programme.*"⁶ Further he said that, "*India is not prepared to handle a sophisticated cyber-attack as it also faces a serious shortage of trained professionals. There is a lot of talk, but things need to be figured out. There is an understanding that data is important, but nothing substantial is being done,*"⁷

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¹ *Tushabe and Baryamureeba, 2005*, World Academy of Science, Engineering and Technology, 66.

² *Veerasamy, 4th International Conference on Information Warfare and Security, 26-27 ,March,2009.*

³ It should be noted that the physical world refers to the place where we live and function, whilst the virtual world refers to the place in which computer programmes function

⁴ Addressing the Threat: Cyber terrorism Defense Initiative (CDI); Criminal Justice Institute University of Arkansas System; available at

[http://cyberterrorismcenter.org/Documents/CDI%20Cyber%20Classes%20\(v.3\).pdf](http://cyberterrorismcenter.org/Documents/CDI%20Cyber%20Classes%20(v.3).pdf)

⁵ R. Ramamurthy, Chairman, Cyber Security & Privacy Foundation available at
<http://issuu.com/mcci200/docs/mcci-july2k12>

⁶ India not prepared to handle cyber terrorism threat: EC Council, PTI Feb 19, 2014, 06.28PM IST, EC Council President and CEO Jay Bavisi, The Economic Times Feb 19, 2014, available at
http://articles.economictimes.indiatimes.com/2014-02-19/news/47489884_1_cyber-ddos-participants

⁷ id.

In this backdrop the aim of this article is to envisage an understanding of the nature and undesirable impact of Cyber Terrorism and making an exertion to study and analyze the steps taken by India to address this issue and anticipate what more can be done in this regard but before we do that it is highly required to conceptualize the concept with the help of definitions.

DEFINING CYBER TERRORISM

“*Cyber Terrorism*” is the combination of two terms viz. Cyber and Terrorism. According to American Heritage Science Dictionary the term Cyber or Cyberspace means “*the electronic medium in which online communication takes place.*”⁸ In other word it denotes a virtual world in which computer programs function and data moves from one source to another. Other part of the mentioned term is “*Terrorism*” which is a much used term both at national as well as international level, with many definitions but again universally accepted definition is not a single one because of its nature and scope. For the purposes of this understanding in the light of present paper, we will use the definitions observed by some departments of United States. These are as follows:

According to The United States Federal Bureau of Investigation terrorism means, “*The unlawful use of force or violence, committed by a group(s) of two or more individuals, against persons or property, to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.*”⁹

According to The United States Department of Defense terrorism means, “*The unlawful use of or threatened use of force or violence against individuals or property, to coerce and intimidate governments or societies, often to achieve political, religious or ideological objectives.*”¹⁰ The United States Department of State defines it as, “*premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine agents*”¹¹

Again if we talk about the “*Cyber Terrorism*” it also doesn’t have any common universally accepted definition. According to Sarah Gordon, “*The term cyber terrorism is becoming increasingly common in the popular culture, yet a solid definition of the word seems hard to come by. While the phrase is loosely defined, there is a large amount of subjectivity in what exactly constitutes cyber terrorism*”¹² The most widely cited paper on the issue of Cyber terrorism is Dorothy E. Denning’s CYBERTERRORISM Testimony before the Special Oversight Panel on Terrorism Committee on Armed Services U.S. House of Representatives,

⁸ Published by Houghton Mifflin, available at <http://dictionary.reference.com/browse/cyber->

⁹ The United States Federal Bureau of Investigation (FBI-2002); available at <https://www.fbi.gov/stats-services/publications/terrorism-2002-2005>

¹⁰ The United States Department of Defense (DOD-2002); for details refer Gus Martin, Understanding Terrorism, pg. no. 38, 4th edition, Sage Publications Ltd. (2013)

¹¹ Id. for details refer The United States Department of State (DOS-2002)

¹² Sarah Gordon and Richard Ford, Cyberterrorism? Available at <https://www.symantec.com/avcenter/reference/cyberterrorism.pdf>

in which at the outset he mentioned and researchers quote that, “*Cyber Terrorism is the convergence of terrorism and cyberspace. It is generally understood to mean unlawful attacks and threats of attack against computers, networks, and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives. Further, to qualify as Cyber Terrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. Attacks that lead to death or bodily injury, explosions, plane crashes, water contamination, or severe economic loss would be examples. Serious attacks against critical infrastructures could be acts of Cyber Terrorism, depending on their impact. Attacks that disrupt nonessential services or that are mainly a costly nuisance would not.*”¹³

As per researchers understanding this is one of the most comprehensive definitions of cyber terrorism. But even this has a limitation as observed by Col. S.S. Raghav that, “*it states that for an attack to qualify as a cyber-attack it should lead to violence. This is more conventional. Terrorist may direct attack only to disrupt key services. If they create panic by attacking critical systems/infrastructure there is no need for it to lead to violence. In fact such attacks can be more dangerous.*”¹⁴

Now after conceptualization it would be relevant to have some idea about the Cyber Terrorist’s weapons, Methods and Techniques.

CYBER TERRORIST’S WEAPONS, METHODS AND TECHNIQUES

According to Col. S. S. Raghav as he mentioned in his article titled, “*Cyber Security in India’s Counter Terrorism Strategy,*” that, “the most popular weapon in cyber terrorism is the use of computer viruses and worms. That is why in some cases of cyber terrorism is also called ‘computer terrorism’.”¹⁵ Further he discussed the weapons or methods on the computer infrastructure which can be classified into following categories¹⁶:

- **Physical Attack:** In Physical Attack generally computer infrastructure is damaged by using conventional methods like bombs, fire etc.
- **Syntactic Attack:** In Syntactic Attack unlike Physical Attack computer infrastructure is damaged by modifying the logic of the system in order to introduce delay or make the system unpredictable. Generally Viruses, Trojans etc. are used in such attacks.
- **Semantic Attack:** In comparison to Physical and Syntactic attacks, Semantic Attack is more treacherous as it exploits the confidence of the user in the system. During the attack the information keyed in the system during entering and exiting the system is

¹³ Dorothy E. Denning’s CYBERTERRORISM Testimony before the Special Oversight Panel on Terrorism Committee on Armed Services U.S. House of Representatives, available at
<http://www.stealth-iss.com/documents/pdf/CYBERTERRORISM.pdf>

¹⁴ Col. S.S. Raghav, CYBER SECURITY IN INDIA’S COUNTER TERRORISM STRATEGY, pg. no. 2, available at
http://ids.nic.in/art_by_offids/Cyber%20security%20in%20india%20by%20Col%20SS%20Raghav.pdf

¹⁵ id

¹⁶ id

modified without the user's knowledge in order to induce errors which may cause disastrous effects.

After discussing the Methods of Attacks he mentioned that, “*Cyber terrorism is not only limited to paralyzing computer infrastructures but it has gone far beyond that. It is also the use of computers, Internet and information gateways to support the traditional forms of terrorism like suicide bombings. Internet and email can be used for organizing a terrorist attack also. Most common usage of Internet is by designing and uploading websites on which false propaganda can be pasted. This comes under the category of using technology for psychological warfare.*”¹⁷

TECHNIQUES OF CYBER TERRORISM

There are various types of techniques used by Cyber terrorists to give a free rein to terrorism.¹⁸ These are Hacking¹⁹, Trojans²⁰, Computer Viruses²¹, Computer Worms²², Unauthorized Intrusions²³, E-Mail Related Crime²⁴, Domain Name Service (DNS) Attacks²⁵,

¹⁷ id

¹⁸ Id at pg. no. 3. Infra no. 21, 22, 23, 24, 26, 29 and 30 are also cited from the same source that is available at http://ids.nic.in/art_by_offids/Cyber%20security%20in%20india%20by%20Col%20SS%20Raghav.pdf

¹⁹ The most popular method used by a terrorist, it is a generic term used for any kind of unauthorized access to a computer or a network of computers. Some ingredient technologies like packet sniffing, tempest attack, password cracking and buffer overflow facilitates hacking.

²⁰ Programmes which pretend to do one thing while actually they are meant for toeing something different, like the wooden Trojan Horse of the 12 Century BC

²¹ It is a computer programme, which infects other computer, programmes by modifying them. They spread very fast

²² The term 'worm' in relation to computers is a self contained programme or a set of programmes that is able to spread functional copies of itself or its segments to other computer systems usually via network connections

²³ It means viewing private [accounts](#), [messages](#), [files](#) or [resources](#) when one has not been given permission from the [owner](#) to do so. Available

at <http://www.businessdictionary.com/definition/unauthorizedaccess.html#ixzz3vbzXTUzL>

²⁴ Usually worms and viruses have to attach themselves to a host programme to be injected. Certain emails are used as host by viruses and worms. E-mails are also used for spreading disinformation, threats and defamatory stuff

²⁵ According to Steve Saint-Claire, “*Computers connected to the Internet communicate with one another using numerical IP addresses. Domain name servers (DNS) are the .Yellow Pages. that computers consult in order to obtain the mapping between the name of a system (or website) and the numerical address of that system. If the DNS server supply an erroneous numerical address for the web site, the user's system would connect to the incorrect server. Making matters worse, this fake connection would likely be completed without arousing the user's doubt. The result would be that the user is offered a web page that he believes is on the desired web server but, in reality, is on the attacker's server. An attacker could distribute fake information with a triumphant attack on a select DNS server (or group of servers), bypassing the need to break into the actual web servers themselves. Moreover, a DNS attack would prevent access to the original web site, depriving the site of traffic.*” As he mentioned in his article titled, “Overview and Analysis on Cyber Terrorism.” Available at http://www.iiuedu.eu/press/journals/sds/SDS_2011/DET_Article2.pdf

Distributed Denial of Service (DDoS) Attacks²⁶ or Denial of Service in general²⁷, Cryptology²⁸ etc.

CYBER TERRORISM IN INDIA

India is one among the prime victim of cyber-crime across the world. The report of the Security and Defence Agenda (SDA), a leading defence and security think tank in Brussels and McAfee ranked India as the fifth country in the world severely harmed by cyber-crimes.²⁹ The rise of cyber-crimes from 2012 to 2013 is 2876 to 4356 cyber-crime cases were registered under the Information Technology Act, 2000 and 601 to 1337 cases were registered under the Indian Penal Code, 1860 reported by National crime record bureau evident the far reaching growth of cyber-crimes in India.³⁰ In this context the then Home Minister of India has stated cyber space as fifth domain after land, sea, air and space where much of country's critical infrastructure lies and challenged with terrorist threats.³¹

In this context it would be helpful to quote the observation of James Lewis, "*it is the use of computer network tools to shut down critical national infrastructures or to coerce or intimidate a government or civilian population'*³² As discussed earlier under Techniques of Cyber Terrorism such attacks in the forms of viruses and other means to disrupt the system, hacking and theft of data and denial of services by damaging networks etc., create harm especially in the government as well as essential service sectors. Several government and security establishment sites in the country were constantly targeted by such attacks. The IT Minister on November 30, 2011 in Lok Sabha stated that many government web sites have been defaced by various hacker groups in the year 2008, 2009, 2010 and January- October 2011.³³ This statement shows the position and helplessness of India in such matters.

It was observed by S. Sreejith in his article titled, "*Varying Faces of Cyber Terrorism in India,*" that, "The terrorist had also used the cyber field for facilitating their activities as communication, banking, financial fraud etc. The investigation of David Hardly in US revealed that the hardly team used Mail service for communicating each other by saving

²⁶ id. as he observed DDoS Attacks means, "DDoS attacks utilize armies of .zombie machines taken over and controlled by a single master to overpower the resources of victims with floods of packets. These."

²⁷ These attacks are aimed at denying authorized persons access to a computer or computer network.

²⁸ Terrorists have started using encryption, high frequency encrypted voice/data links etc. It would be a Herculean task to decrypt the information terrorist is sending by using a 512 bit symmetric encryption

²⁹ Sanchita Bhattacharya (2012), Cyber terrorism: the fifth domain, South Asian Intelligence Review, Vol. 10 (48), Retrieved from: http://www.satp.org/satporgtp/sair/Archives/sair10/10_48.html, Accessed on: 14/02/2015.

³⁰ National crime record bureau (2013), The Crime- 2013 statistics, New Delhi. Available at <http://ncrb.nic.in/CD-CII2011/cii-2011/Chapter%2018.pdf>, Accessed on: 1/03/2015.

³¹ Supra no.31

³² James Lewis (2010), "Assessing the Risks of Cyber Terrorism, Cyber War and Other Cyber Threats," Center for Strategic and International Studies, Available at

http://csis.org/files/media/csis/pubs/021101_risks_of_cyberterror.pdf, Accessed on: 28/2/ 2015.

³³ Staff reporter (2012), 112 govt. Website hacked in three months, Economic times, Retrieved from: http://articles.economictimes.indiatimes.com/2012-03-15/news/31197171_1_government-websites-internet-frauds-sachin-pilot, Accessed on: 23/02/2015. For more details see <http://pib.nic.in/newsite/PrintRelease.aspx?relid=77958>

messages in the draft and members visited the mail by using same passwords without sending each other. Terrorist in several attacks in India such as Ahmadabad (2008), Jaipur (2008), Delhi (2005) Varanasi (2010) and Delhi High court (2011) etc., have used the internet and mail services to further their attacks in Indian soil. Mumbai 26/11 operation reveals the extensive use of internet, mobile and satellite phones to communicate the directions from the planners and perpetrators in different spots.³⁴ Further he mentioned that, “*Terrorist groups also use the web bases to recruit, train and motivate the followers for the jihad. Al Qaida, Laksher e Taiba, Indian Mujahideen etc., is having their own IT wings which carry terrorist activities in the cyber field. The extensive arrests of IT professionals in terrorism related activities in the country in the immediate past give more weight for the claim of cyber terrorism in the country. Ronald Nobel, former Head of United States Secret Service who is the secretary general of the Interpol says in an interview that the internet is giving terrorists new ways to plot mass murders.*”³⁵

TRENDS IN INDIAN CONTEXT

According to R K Ragavan, “*A number of cases of hacking of Indian internet sites have been traced to Pakistan but it would be difficult to nail them.*”³⁶ Reason of this problem was mentioned by the President of India's National Association of Software and Service Companies (NASSCOM), Dewang Mehta as, “*Indian companies on an average spent only 0.8 percent of their technology budgets on security, against a global average of 5.5 percent.*”³⁷ Recently some computer experts managed to break into the high security computer network of Bhabha Atomic Research Center but were luckily detected.³⁸ “*GForce,*” a group of anonymous hackers, whose members write slogans critical of India and its claim over Kashmir, have owned up to several instances of hacking of Indian sites run by the Indian government, private companies or scientific organizations.³⁹

As mentioned by Lidia Mariam Benozi in her article titled, ‘*Cyber Terrorism- Quick Glance*’ that, “*as tensions between the neighboring regions of India and Pakistan over Kashmir grew over time, Pro- Pakistan cyber-terrorists and recruited hackers began to target India's Internet Community. Just prior to and after the September 11th attacks, it is believed that the sympathizers of Pakistan (which also included members of the Al Qaeda Organization) began their spread of propaganda and attacks against Indian Internet based communities. Groups such as G- Force and Doctor Nuker have defaced or disrupted service to several major entities in India such as the Zee TV Network, The India Institute of Science and the Bhabha*

³⁴ S. Sreejith, *Varying Faces of Cyber Terrorism in India, Volume : 1 / Issue : 5 / Nov 2012 ISSN No 2277 – 8160; available at* [*http://worldwidejournals.com/gra/file.php?val=November_2012_1353498262_2f441_40.pdf*](http://worldwidejournals.com/gra/file.php?val=November_2012_1353498262_2f441_40.pdf)

³⁵ id

³⁶ INDIAN WEBSITES ARE NEW TARGET OF HACKERS; available at [*http://www.cyberlawsindia.net/cases2.html*](http://www.cyberlawsindia.net/cases2.html)

³⁷ id

³⁸ id

³⁹ id

*Atomic Research Centre which all have political ties.*⁴⁰ These instances are enough to say observed by the then CBI Director, R K Ragavan that, “Cyber Crime is the crime of the future.”

LEGAL RESPONSE TO CYBER TERRORISM IN INDIA

According to Rohit K. Gupta, “*There was no statute in India for governing Cyber Laws involving privacy issues, jurisdiction issues; intellectual property rights issues and a number of other legal questions. With the tendency of misusing of technology, there arisen a need of strict statutory laws to regulate the criminal activities in the cyber world and to protect the true sense of technology the Information Technology Act, 2000 (IT Act, 2000) was enacted by Parliament of India to protect the field of e-commerce, e-governance, e-banking as well as penalties and punishments in the field of cyber-crimes. The above Act was further amended in 2008 in the form of IT Amendment Act, 2008.*⁴¹ So we can say that the cyber law of India received a fatal blow in the form of Information Technology Act 2008 (IT Act, 2008).⁴²

It is pertinent to mention here that Information Technology Act, 2000 was planned to regulate the use of internet only. But it is because of 2008 amendment government got power to block websites if they come within the purview of section 69A⁴³, 69B⁴⁴ and for such activities 66F⁴⁵ shall be applicable. In addition to the amendment Government of India⁴⁶ also notified Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, the information Technology (Electronic Service Delivery) Rules, 2011, Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, Information Technology (Procedure and safeguards for blocking for access of information by public) Rules, 2009, The Digital Signature (End entity) Rules, 2015, The Electronic Signature or Electronic Authentication Technique and Procedure (Amendment) Rules, 2015, The Information Technology (Security Procedure) Rules, 2004, The Information Technology (Other Powers of Civil Court vested in cyber appellate tribunal) Rules, 2003, the Information Technology (Qualification and Experience of Adjudicating Officers and Manner of Holding Enquiry) Rules, 2003 and Information Technology (Certifying Authorities) Rules, 2000 etc.

⁴⁰ Lidia Mariam Benoji, *Cyber Terrorism- Quick Glance;* available at <http://www.legalservicesindia.com/article/article/cyber-terrorism-quick-glance-1263-1.html>

⁴¹ Rohit K. Gupta, India: An Overview Of Cyber Laws vs. Cyber Crimes: In Indian Perspective; available at <http://www.mondaq.com/india/x/257328/Data+Protection+Privacy/An+Overview+Of+Cyber+Laws+vs+Cyber+Crimes+In+Indian+Perspective>

⁴² ICT TRENDS IN INDIA 2009 BY PERRY4LAW AND PTLB; available at <http://hrpic.blogspot.in/2009/12/ict-trends-in-india-2009-by-perry4law.html>

⁴³ Power to issue directions for blocking for public access of any information through any computer resource.

⁴⁴ Power to authorize to monitor and collect traffic data or information through any computer resource for Cyber Security

⁴⁵ Punishment for cyber terrorism

⁴⁶ In exercise of the powers conferred by clause (ob) of subsection (2) of section 87 read with section 43A of the Information Technology Act, 2000 (21 of 2000), the Central Government has power to make rules. Available at <http://deity.gov.in/content/notifications>

Apart from abovementioned legislative steps 2nd July, 2013 Department of Electronics and Information Technology (Deity) under the Ministry of Communication and Information Technology notified first of its kind, National Cyber Security Policy – 2013 (NCSP - 2013).⁴⁷ According to Sanjiv Tomar, “*The Cyber Security Policy aims at protection of information infrastructure in cyberspace, reduce vulnerabilities, build capabilities to prevent and respond to cyber threats and minimize damage from cyber incidents through a combination of institutional structures, people, process, technology and cooperation.*”⁴⁸

CONCLUSION

In concluding remark researchers would like to cite the observation of National Research Council that, “*Tomorrow’s terrorist may be able to do more damage with a keyboard than with a bomb,*”⁴⁹ as observed by Frank Cilluffo that, “*While bin Laden may have his finger on the trigger, his grandchildren may have their fingers on the computer mouse.*”⁵⁰ In such circumstances government has to develop workable strategy and invest more and more on research activities to find out the solution for such attacks, if they happen. Apart from this mere enactment of a plethora of statutes is not a solution per-se but we have to give emphasis on proper implementation. Judicial and quasi-judicial bodies have to take active steps in interpretation and enforcement of existing laws. At last researcher would like to say that apart from state and non-state actors it’s the duty and responsibility of common individuals to think in this respect and always ready to defend and defeat the so called threat.

⁴⁷ National Cyber Security Policy – 2013; available at [http://deity.gov.in/sites/upload_files/dit/files/National%20Cyber%20Security%20Policy%20\(1\).pdf](http://deity.gov.in/sites/upload_files/dit/files/National%20Cyber%20Security%20Policy%20(1).pdf)

⁴⁸ Sanjiv Tomar, National Cyber Security Policy 2013: An Assessment; available at http://www.idsa.in/idsacomments/NationalCyberSecurityPolicy2013_stomar_260813

⁴⁹ GABRIEL WEIMANN, Cyberterrorism: The Sum of All Fears? *Studies in Conflict & Terrorism*, 28:129–149, 2005; Routledge Taylor & Francis Inc. available at <https://www.princeton.edu/~ppns/Docs/State%20Security/Cyberterrorism%20-%20sum%20of%20all%20fears.pdf>

⁵⁰ id at pg. no. 146

FISCAL FEDERALISM AND TAXATION: AN ANALYSIS OF GOODS AND SERVICE TAXES AND THE PROPOSED LAW IN INDIA

Aesha Patel*

Abstract

Most of the world's nations, including India, are Federal systems, in which there is a system of power sharing in all areas, including the power of taxation. In a Constitutional system like India, however, it is a natural tendency for the Central to retain more power in matters such as taxation. For many years, taxation in India has been a federal subject leaning slightly in favour of the Centre.

The concept of Fiscal federalism is very wide in nature, and therefore for the purpose of this project, the study of this concept is limited only to the introduction of the GST in India, in as much as it is expected to cause a large shift in the balance between the Centre and the States. There are many countries which have implemented the GST in their systems, of which France was the first one. New Zealand is one of the first nations to have successfully implemented the GST in its own country, whose system was taken as a base by many other countries. Canada has been given the status of 'Quasi Federal' by K. C. Wheare, as has been India. Australia is a federal country which has a highly centralized structure. All these nations have successfully implemented GST in their own nations. India shall, if all goes as per plan, have the Goods and Service Taxation system installed in India in the coming years. The Article studies the evolution of tax law in India right up to the introduction of the Constitution (One Hundred and Twenty Second Amendment) Bill, the provisions of the Bill and the probable impacts.

Keywords: GST, Fiscal Federalism, Taxation, Fiscal Law, Constitutional Bill

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INTRODUCTION

India is a part of the ongoing struggle for the restructuration of economies in a bid for progressing towards an enhanced, economically developed world. For any country, their scheme of taxation plays an extremely important role, in as much as the tax revenue is the most important factor that keeps any Government running. Taxation in any country is comparable to a contribution that a member of each household makes to the running of a house, each of whom takes on responsibilities of equal distribution of debt payment, and other fiscal responsibilities. Except that in a nation, the contribution is made on a much larger scale. Any nation is composed not solely of one entity that a single nation is, but is made of several Units or States. For a federation, which divides the powers of taxation and revenue equally between the Centre and the states, the policy decisions that are made by the Central Government have to be made, keeping in mind the states along with their allegiance at each juncture. The revenue generated by taxation is needed equally by the Centre as well as the States. Apart from fiscal independence, some amount of equality in the division of the taxation powers is required to ensure the fiscal federalism in any country. To check whether a system in any nation is indeed fiscally federal, three major questions can be posed, *firstly*, whether the nature of the Government is Federal or Unitary. If the nation is a federal nation then *secondly*, how are the states represented in the Centre? and *thirdly* how should taxing and spending responsibilities be allocated among central and state or lower tiers?

A game changing concept in the history of India, in the way of Goods and Services Taxes, is proposed to be established in India. The concept of a unified system of indirect taxation is not novel and has been implemented by a large number of countries. However, the taxation system for indirect taxes that is proposed to be implemented in India, is not only new to the Indian system, but introduces new system of taxation, i.e. Dual GST. It is proposed by the Government that a system of taxation with taxes levied at both the Centre and the state level be established. This system of taxation is ‘destination based’, which means that the taxation on multiple levels would be changed into only a final consumer paying the taxes that would ‘stick’. It has been said frequently with regards to the introduction of GST in India, that it would enable seamless transfer of goods and services across India. In this paper, the concept of Goods and Services tax is explored, along with the Constitution 122nd Amendment Bill that has been passed by the Lok Sabha and is pending in the Rajya Sabha as of the time when this project is submitted. The introduction of this tax in India, shall be a tricky business. As mentioned earlier, Dual GST is proposed to be introduced in India, and there shall be not only one integrated GST law at work in the nation but one law for each state in India, who shall follow a model law for the purpose of enacting this law in their own state.

EVOLUTION OF GOODS AND SERVICES TAX

The Goods and Services Tax has been on the back burner in the Indian system for quite some time and it is proposed to be introduced into the system finally, in a short time. The system has been implemented and used successfully in quite a few countries. However, before discussing the different countries, the proposition of the introduction of the law in the Indian system, the method of introduction along with related concepts are discussed here.

The Concept of Fiscal Federalism

Fiscal Federalism in the Indian context deals with the division of Government functions that are financial in nature between State and Centre. Countries generally aim for federal structures to improve their public sectors, and therefore decentralization is in vogue¹.

The proper goal of improving the public sector cannot be merely de-centralization. This public sector consists of many different levels and sub levels in most countries. The responsibilities and fiscal instruments have to be aligned with the proper levels of Government in each country, and it is here that the issue lies. This allotment of responsibility has to be done in accordance with the nature of the Constitution of the Country as well as the need of the hour. The federal system must have been created in nations with the intention to combine the various advantages, thoughts and ideologies which would result from multitude in the state units. However, in order to realize the different advantages, which functions and instruments are best centralized and which instruments are best placed in the sphere of decentralized levels of government have to be understood. To carry out their functions, the various levels of government require specific fiscal instruments. On the revenue side, governments will typically have access to tax and debt instruments. But in a federal system there is a further method for allocating funds among the different levels of the public sector: intergovernmental grants. One level of government may generate tax revenues in excess of its expenditures and then transfer the surplus to another level of government to finance part of the latter's budget.²

Therefore, basically the concept is related to the performance and improvement of the public sector, and their services by ensuring that there is a proper alignment of the different layers of their administration, responsibilities and fiscal instruments³. Other than the impact of globalisation and deepening of democracy, reasons for introduction of greater fiscal federalism are, *firstly* the central governments find that it is impossible for them to meet all of the competing needs of various constituencies, and are attempting to build local capacity by delegating responsibilities to their sub-national governments; *secondly* Central governments are dependent on sub-national governments to assist them on national economic development strategies; and *thirdly* sub-national political leaders are demanding more autonomy and want the taxation powers that go along with their expenditure responsibility⁴.

Therefore the concept of fiscal federalism, is an important factor taken into consideration while making amendments to the tax structure of a country, which is studied in the present project with reference to the Goods and Services Tax.

The Concept of Goods and Services Tax (GST)

¹ William E. Oates, 'An Essay on Fiscal Federalism', (1999) 33 Journal of Economic Literature 1120-1149

² William E. Oates, 'An Essay on Fiscal Federalism', (1999) 33 Journal of Economic Literature 1120-1149

³ 'Issues for Parliamentarians', Parliamentarians' Forum on Economic Policy Issues, (2011) <https://www.google.co.in/url?2011Fiscal_Federalism_in_India_Call_to_Revisit_the_Debate.pdf> accessed on 18 October, 2015

⁴ Ibid

Goods and Services Tax (GST) is a form of value Added Tax. It is a unified taxation system, which aims at reduction in the multiplicity of central and state indirect taxes in order to streamline the taxation system. GST will be levied at the central and state level given the federal structure of Indian polity. In other words, central GST or CGST will incorporate taxes such as the central excise duty, additional custom duties, sales tax. The state GST or SGST shall include taxes such as electricity duty, sales tax, value added tax (VAT), entertainment tax, luxury tax, lottery tax. Further, it is proposed that the octroi (entry tax) will be discontinued altogether.

The Union government solely will be responsible for deciding on the levy of GST on imports and the inter-state trade and commerce. The revenue from the tax collected shall be distributed between the Central and state governments in a manner to be provided by the Parliament, based on the GST Council's recommendations. Certain goods will be kept outside the purview of GST until there is clarity between the states and the Centre on their taxation. These include crude petroleum, high speed diesel, petrol, natural gas, aviation turbine fuel, and alcohol for human consumption.

14th Finance Committee Report

The 14th Finance Committee Report was required to consider the impact of the proposed Goods and Service Tax on the finances of Centre and States and the mechanism for compensation for the states, in case of any revenue loss. While doing so, the committee was required to take into account the impact of the proposed goods and service tax (GST) on the finances of the Centre and States and the mechanism for compensation in case of revenue loss.

While the introduction of the GST would have a favourable impact on both the Union and State finances, there may be a need for revenue compensation to States by the Union Government for the transitional years. The Commission's mandate was to recommend the mechanism to be adopted for such compensation. Since the structure of the GST is yet to be decided, it is difficult to arrive at reliable estimates of the nature of gains and losses it could entail. Specifically, in the absence of clarity on the taxes to be merged into GST, rate structure, exemption thresholds and design, an amount required for GST compensation to States cannot be determined. However, in case there is a revenue loss to States due to the introduction of the GST, the Union Government should be able to make resources available for compensation, it was recommended.

Views of the State Governments

The States had been approached by the Finance Committee for their own views on the subject and the states had generally favoured the implementation of GST while expressing reservations on five critical issues- *firstly* Revenue compensation mechanism along with a proper estimation of revenue loss, *secondly* there are different views regarding the list of goods to be subsumed under GST, as per which they have suggested that alcohol and motor spirits should stay outside the purview of GST., some states have proposed that they should

be allowed to levy a separate entertainment tax or other such taxes for the purpose of transferring it to other local bodies. Some flexibility in the design of GST to enable the levy of a Green Tax on certain polluting goods has been suggested by the states, *thirdly* a few states have argued that although a uniform tax is desirable, they should be able to fix their own taxes within a band fixed by the government, and *lastly* a few states have also suggested that a one-time grant for the purpose of building capacity and strengthening the administration would be desirable.

The evolution of taxes in India

Before the current system of Value Added Taxes (VAT) was introduced in India, in the Centre and States, a Central Excise Duty was charged at the Centre and the states had a Sales Tax system. In the *Central Excise Duty* system the producer of any Commodity has to pay taxes on two instances, when he buys the raw material, or on the *Inputs*, and then Output tax on the Produced Commodity or the *Output*.

In the *State Sales Tax* system there was a system of multi-point sales taxation at each progressive level of trade. The sales tax was added on purchase made at each level. This was in addition to the existing input tax load. This caused a burden on each consumer of multiple taxation with cascading effect.

Reformation in the indirect taxation occurred with the introduction of the Modified Value Added Tax (MODVAT) in 1986 for selected commodities at the Central level. Gradually this tax was extended to all the commodities through the Central Value Added Tax (CENVAT), and later to Services. At the State level, reform was occurred in phases through introduction of Value Added Tax (VAT), between April 2003 and January 2008. In the system of Value Added Tax that was introduced in India in place of Central Excise Duty, a set-off is given from the tax burden for input tax. There is a system of checks in this system of taxation, which results into relaxation on the issue of multiple taxation and related burden of the cascading effect is removed. Since, the benefit of Set-Off can only be obtained if tax is regularly and duly paid on the inputs at the Centre level, and on both the Inputs as well as previous purchases, at the State level. The Value Added Tax system was also very beneficial since there was a built in check in the VAT structure on tax compliance in the Centre as well as the State, with increased transparency and reduction in tax evasion.

Because of the federal nature of our nation, introduction of Value Added Taxes to states was a challenging exercise. The reason behind this is that each state has been given the power of being sovereign in the matter of levying and collecting state taxes. Another problem in this regards was that each state had the autonomy to some extent, on the fixing the sales tax in different commodities among the states. This resulted in an unhealthy competition among states in terms of tax rates, often resulting in counter-productive situation⁵.

⁵ Empowered Committee of State Finance Ministers, 'First Discussion Paper on Goods and Services Tax in India' 10 November 2009

During the UPA (United Progressive Alliance) regime, the 2006-07 Union Budget announced that the GST law would be introduced by 2010 and a roadmap for the same would be sketched and finalized⁶. In the budget speech P. Chidambaram had announced that the country needs to move towards a national level Goods and Services Tax that should be shared between the State and the Centre. He proposed that April 1, 2010 be set as the date for the introduction of GST in India. Instead of directly enacting the system of GST, it was proposed that the system of taxation should progressively converge the service tax and the CENVAT rate. Later, there was mention of preparation of the road map for introducing a national level Goods and Services Tax, by the empowered committee of the state governments via their finance ministers, in the budget speech for the year 2007-08⁷. In the budget speech of 2009-10⁸, it was announced that the committee had decided upon a basic structure for the tax while keeping the principles for fiscal federalism in our Constitution intact. It was then, that the structure of GST which was to be dual in nature was laid out.

The first discussion paper on GST in the public domain was submitted in 2009. In 2011-12, as a step towards the roll out towards GST, the budget proposed introduction of a Constitutional Amendment Bill, in the parliament session, which was introduced in March 2011. The structure of GST Network was approved and it was proposed to be set up as a national information Unit, by the Empowered Committee of State Finance Ministers. In the budget speech for 2015-16, in which as part of the movement towards GST a state of art indirect tax system is to be put in force with effect from 1st April, 2016⁹. The 122nd Constitutional Amendment Bill was tabled for the introduction of GST in India, in Lok Sabha on December 19, 2014. The Bill was passed in May 6, 2015, in the Lok Sabha. The bill has not been passed in the Rajya Sabha, as of the date of submission, as the ruling party does not have a majority in the Lok Sabha.

Currently, the model Goods and Services Tax Law for the Centre and the States has been drafted, along with an integrated GST which will be put up in public domain from November.¹⁰

THE CONSTITUTION (ONE HUNDRED AND TWENTY SECOND AMENDMENT) BILL, 2014

The Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 has been introduced in order to make significant changes to the Constitutional provisions pertaining to the taxation powers of the Centre and the State. The Bill inserts definition of the terms,

⁶ Ministry of Finance-Government of India, ‘Union Budget and Economic Survey, Budget 2006-07’ (India Budget) <<http://indiabudget.nic.in/ub2006-07/ubmain.htm>> Accessed 15 October, 2015

⁷ Ministry of Finance-Government of India ‘Union Budget and Economic Survey, Budget 2007-08’ (India Budget) <<http://indiabudget.nic.in/ub2007-08/ubmain.htm>> accessed 15 October 2015

⁸ Ministry of Finance-Government of India ‘Union Budget and Economic Survey, Budget 2009-10’ (India Budget) <<http://indiabudget.nic.in/ub2009-10/ubmain.htm>> accessed 15 October 2015

⁹ Ministry of Finance-Government of India ‘Union Budget and Economic Survey, Budget 2015-16’ (India Budget) <<http://indiabudget.nic.in/ub2015-16/ubmain.htm>> accessed 15 October 2015

¹⁰ <<http://www.gstindia.com/centre-circulates-model-gst-laws-among-states/>> accessed 16 October 2015

‘Goods and Services Tax’, ‘Services’, and ‘State’. (12A) “goods and services tax” means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption. (26A) “Services” means anything other than goods; (26B) “State” with reference to articles 246A, 268, 269, 269A and article 279A includes a Union territory with Legislature;’.

The insertion of *Article 246A* of the Constitution of India, is a major departure from all previous laws. The insertion in fact is of major implication in comparison to all the other previous laws, in as much as the amendment brings a federalist change to the taxation system in India. It states that the legislatures of all states have power to make laws for goods and services tax imposed both by the Union or the concerned State. However, Article 246A(2) states that, only the Parliament has the power to make laws for supply of goods or services or both in course of inter-state trade or commerce.

Another significant amendment by way of insertion to the Constitution is ***Article 269A***. In the course of inter-state supply of Goods and Services, tax shall be levied by the Government of India and the collected tax shall be apportioned between the Union and the States. The explanation appended to the Article states that the import of goods, services or both shall be deemed to be supply of goods, services or both in the course of inter-state trade and commerce. Art. 269A (2) states the principles for determining the place of supply, and when the trade of goods, services or both takes place in course of inter-state trade and commerce.

Also inserted by the amendment is *Article 279A*, which provides for the establishment of a Goods and Services Tax Council (Hereinafter referred as the GSTC). It provides that the council shall be set up by the President within 60 days of the commencement of the Constitution (One Hundred and Twenty Second Amendment) Act, 2014. The provisions of Article 246A shall take effect from the date recommended by the GSTC. The GSTC shall be responsible for advising the Union and States for tax related matters and making recommendations on *Firstly* taxes, cesses and surcharges levied by the Union, States and Local bodies, which may be subsumed in the goods and services tax; *Secondly* the various goods and services that may be subjected or exempted from the Goods and Services tax; *Thirdly* construction of model Goods and services Tax Laws, principles of levy, apportionment of Integrated Goods and services Tax, and the principles governing place of supply; *Fourthly* the threshold limit of turnover below which goods and services may be exempted from goods and services tax; *Fifthly* the rates including floor rates with bands of goods and services tax; *Sixthly* any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster; *Seventhly* special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and *Eighthly* any other matter relating to the goods and services tax, as the Council may decide.

It also provides that that the GSTC shall determine the procedure in the performance of its functions. The Centre and all the States shall be proportionately represented in GSTC in the ration of 2:3, wherein the Centre and all the States shall have a weightage of one-third and two-thirds, of the votes cast, respectively.

Comments of the Rajya Sabha Select Committee on the Constitution (One Hundred and Twenty Second Amendment) Bill¹¹

The Bill was introduced in Lok Sabha on December 19, 2014 and passed on May 5, 2015. Post that, for the purpose of further examination, the Bill was referred in the Rajya Sabha to a select Committee. The Committee in turn submitted their report on July 22, 2015.

The Bill had propositioned that the States should be provided compensation for a period *up to* five years, however the Committee was of the opinion that the States should be provided compensation *for* a period of five years, thereby suggesting that the period for compensation should be, under no circumstances, less than five years. There were certain notes of dissent in the Committee Report. On this point however, they had just further built on the already existing provisions and stated that the states should be provided with compensation up to 100% and the compensation should be deposited in a GST compensation fund under the GST council.

The Bill suggests that the alcoholic liquor for human consumption should remain outside the purview of GST. The tax would be imposed on petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel at a later date. With regards to Tobacco, the bill proposed that it shall come within the purview of GST and that additional levy shall be imposed on it. Although on this point the committee proposed no changes, the dissenting opinion suggested that tobacco, alcohol and electricity supply and consumption should be brought within the purview of GST within a period of five years. It was further proposed that the States should also be allowed to levy taxes on tobacco, and that petroleum products should be kept outside the purview of GST.

With reference to the proposed GST council, the dissenting opinion in the Committee stated that there was no need for a separate GST council, and that a body like the empowered Committee of state finance ministers would be adequate. While the Bill has proposed that the GST council should have the power to decide upon the modalities to resolve disputes, the dissenting opinion in the Committee, suggests that the GST disputes settlement authority as was provided for in the 2011 Bill, should be included.

CONCLUSION

With the introduction in India of the new GST regime, fiscal federalism shall take on a new role, with respect to the division of powers between the States and the Centre. India has emerged as one of the top investment destinations in the world, in a global survey of top decision makers in multinational corporations. ‘Ready, set, grow : EY’s 2015 India’s attractiveness survey’, was conducted during March and April, 2015 and includes the

¹¹ Prianka Rao, ‘Goods and Services Tax (GST): Comparison of the 2014 Bill with the recommendations of the Select Committee’ (2015) PRS legislative Research, July 23, 2015 <www.prsindia.org> accessed on 30 September,2015

opinions more than 500 decision makers from multinational organizations across sectors¹². The implementation of GST in India was considered as an important factor towards attracting FDI. The introduction of GST in India is definitely going to be path breaking.

In the Indian context, the Constitution system can be found midway between the Constitution system in Canada and Australia, as it is not highly decentralized nor does our federation lean heavily towards the Central system. The existing system of the State VAT has been devised by the State legislature under Entry 54 of List II of the Seventh Schedule to the Constitution, which states that *Tax on sale or purchase of goods other than newspapers except tax on interstate sale or purchase*. Inter-State purchase or sale of Goods cannot be legislated upon by the State. The Canada system encourages free trade between States, and has put protective provisions for this very purpose in its Constitution. The Indian system has withdrawn the very power of making laws pertaining to the transaction between states from the legislative powers of the states. This is for the very obvious objective that since up until now each state could determine its own law for certain subjects, subject to the central laws, each state was likely to look out for its own interests. Article 301 of the Indian Constitution which provides that Trade, commerce and inter-course throughout the territory of India shall be free, subject to provisions of Article 302 to 304 of Constitution, find their counter-part in the Canadian Constitution too. Much like the judicial review of the free trade between states in Canada as has been mentioned above, in *Jindal Strips Ltd. v State of Haryana and others*¹³, Entry tax in Haryana was held as ultra vires of article 301 by Punjab & Haryana High Court.

From a perusal of the laws of all the three above mentioned countries, one aspect that particularly comes forth is that in each case, a threat had been posed to the State Governments as the reduction of the revenue income is one of the common effects of the introduction of the GST Bill. It is probable that the compensation scheme that is proposed on a five year basis for all the states will make the situation better and ensure the smooth transition that is needed for the introduction of major changes such as the GST Bill in India.

Perhaps the most significant departure from the tradition adopted by all the countries is the proposition of the introduction of the dual GST in India, which shall certainly serve to look after the interest of the fiscal federalism in India, and to some extent, shall also give it a major boost. One of the problems that New Zealand had faced upon introduction of the GST was the enormous amount of paper work that the registration and other stages involved as there was multiplicity on the levels at which the taxes would be charged. However to avoid this and also to avoid the menace of Black Money which is the evasive companion of taxation, the Government is planning to link the permanent Account number with cash transaction in order to combat black money. This would mean that records of cash transactions beyond a

¹² Puja Mehra, 'India most attractive investment destination', The Hindu, 15 October, 2015 <<http://www.thehindu.com/business/Economy/india-most-attractive-investment-destination-ey/article7762268.ece>> accessed 15 October, 2015

¹³ (2007) 29 PHT 385 (P&H)

certain limit would be accessible by the Income Tax department¹⁴, and the online transactions would mean reduction in tedious paper work.

Other similarities or disparities between these nations, can only be chalked after the final outline of the GST, as it shall be implemented, is obtained. On a *prima facie* perusal of the systems which have successfully implemented the GST system, albeit minor glitches, it seems to work fine. However, it also appears that the working of the GST comes at the cost of a nation's federalist policies. GST in the present context is not discussed in view of the political parties and the conflict in their ideologies; it is instead linked to the concept of fiscal federalism in the Indian Constitution. One of the major impediments to the fiscal federalism in India lies in the uncertainty in the law and the intention of the law makers as to the implementation of the proposed structure. Although the intention of the Government seems very strong on the implementation of a Bill which was long pending, the path for GST shall only become clear after the model draft bill which is proposed to be circulated in various states, is inculcated in the system. The dual GST system shall mean that there will be one integrated Union law and about 28 State laws, and since it is apparent there is no compulsion for each state to adopt one uniform set of laws in view of the fact that the situation in each state is different, there will certainly be a lot of disparities in the way the law is implemented.

If the GST model fails or the GST council which is to be the institutional mechanism for most transactions is not able to act fairly and acts arbitrarily instead, then the failure of the fiscal federalism will be on a rather large scale. The herculean task of drafting the Central GST, the State GSTs and the inter-state GSTs is yet to be completed, and there is no way of predicting what will be the substantive and procedural law that the Acts shall contain. The Government has not yet decided a cap or declared the rate at which this tax shall be chargeable. For a nation which is infested with the problem of Black Money, a very high cap is likely to result into large scale tax evasion.

The relation of taxation with the consumers can be explained with the help of a certain illustration. For instance if a person in a certain system has Rs. 50/- to buy a certain commodity and the certain commodity costs Rs. 30/- then the person can buy the commodity and have some surplus left over. However, with the GST structure in place, suppose the price of the commodity rises beyond Rs 50/-, then the person will not buy a certain commodity. Therefore, it is necessary that the dual GST to be imposed at both the state and the centre level should not go beyond a certain level so that it does not hinder the buying power of the economic backward section.

It is important for a federal polity like India that not only the Centre is made strong but each of the States should be made stronger, as a chain is only as strong as each of its links. Thus, all the states should be pulled up to provide a market-friendly ecosystem.

¹⁴ Santosh Tiwari, 'FM Arun Jaitley's Facebook post: Linking PAN with cash transactions will hit blackmoney hard' *Financial Express*, 5 October, 2015

The position of all states in India is not similar and some of these states are in a better position to carry out trade. The system in its content promises to be a successful one, but a correct view can only be obtained after the Government is able to implement it successfully. The compensation policies that the Government promises to provide to the states, is likely to be an important factor that shall help the states in the long run, by compensating the revenue lost and also enable them to prepare themselves for the future after the experimentation stage is over. To ensure, that the states also remain in a strong position, attain a stronger position, and to ensure that the fiscal federalism in India is maintained, having a policy is not simply enough, it has to be implemented properly. GST is made for a brighter future for taxation in India, but it is necessary that along with the Centre, Revenue, Inter-state relationships, the people of India should also benefit.

One of the most important and encouraging factors of the introduction of GST in India is the concept of Cooperative Federalism, that the Government claims, shall be boosted in the new tax regime. Cooperative federalism aims to rebalance powers between the Centre and the states. The idea is that it is, perhaps, easier for the Centre to allow states to implement their own reforms agenda than try to impose reforms, sometimes contentious, on the entire nation. That is the correct and the most important factor that has to be looked after, to effect enhancement of the smallest Unit of the Centre and thereby the Centre itself, in order to give our country the boost it requires to move towards federally, fiscally, politically and economically stable times.

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 JS Kheher, J. Chelameswar, MB Lokur, Kurian Joseph and AK Goel JJ. 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 favoritism. 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.

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 AIR1994 SC 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)

However, the constitution nowhere provides for the collegiums system. This collegiums 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, favoritism, Casteism, sexism, corruption, mediocrity 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 criterion 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.

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

REFORMS IN THE COLLEGIUM SYSTEM

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.

ROLE OF AGE DETERMINATION IN CRIMINAL JURISPRUDENCE

Archita Prajapati*

Abstract

With advancement in science and technology the concept of crime as well as the methods adopted by criminals in its commission has undergone drastic change. On one hand the intelligent criminal has been quick to exploit science for his criminal acts; on the other hand the legal system as well as the police authority is no longer able to rely on the former methods of interrogation. The traditional methods no longer sustain in the society.

Age has obviously an important bearing on identification. The determination of age may be required for the identification of an individual, living or dead. In criminal cases, it is necessary in connection with offence of rape, abduction and infanticide, also to determine whether a child has reached the age at which the law holds it responsible for its act, and if so, what manner of punishment or restraint should be imposed in it.

The most important function of scientific evidence is to convert suspicion into a reasonable certainty of either guilt or innocence. The evidentiary value of expert report with regard to determination of age is admissible but documentary evidence stands at better position than medical evidence. Medical evidence fails to disclose the exact age therefore conviction solely on the basis of such evidence is not reliable.

Keywords: Scientific aptitude, Age determination, Medical Evidence, Juvenile delinquency.

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If you were a detective engaged in tracing a murder, would you expect to find that the murderer had left his photograph behind at the place of the crime, with his address attached?

Or would you not necessarily have to be satisfied with comparatively slight and obscure traces of the person you were in search of?

- Sigmund Freud

INTRODUCTION

Crime- in some form or the other has existed since the beginning of human existence. With advancement in science and technology the concepts of crime as well as the methods adopted by criminals in its commission have undergone drastic change. On one hand the intelligent criminal has been quick to exploit science for his criminal acts; on the other hand the legal systems as well as the police authorities are no longer able to rely on the former methods of interrogation. The traditional methods no longer sustain in the society.

Emile Durkheim – the most prominent French sociologist stated the interrelation of law and society on the basis of solidarity. According to him, as and when the complexity in the society arises, the controlling mechanism too keeps on changing its degree of control and its manner. Thus, Law becomes more and more stringent for the maintenance of justice according to the disparity in the individuals committing crimes.

Thus, criminology has also developed forensic science as a means to deliver justice through proper investigation by undergoing technical and scientific analyses, of the evidentiary materials. Thus, since its inception, forensic has now developed a lot of branches of study in itself.

Forensic science- is derived from the Latin word *forensic* which means belonging to the courts of justice or to public discussions and debate. Forensic science has grown as a profession since early 1880s and into a science in its own right in the early twenty first century. Given the public's interest in using science to solve crimes, it looks as if forensic science has an active, even hectic future. Forensic science describes the science of associating people, places, and things involved in criminal activities; these scientific disciplines assist in investigating and adjudicating criminal and civil cases.

Forensic science would therefore mean the science which is used in the courts of justice. It can be defined more broadly as that scientific discipline which is directed to recognition, identification, individualization, and evaluation of physical evidence by the application of the principles and methods of natural sciences for the purpose of administration of criminal justice. Anthropometry, finger prints, foot prints, documents ballistic, odontology, serology, were essentially developed to aid the criminal justice administration.

Prior to the establishment of the forensic science in India, there were a few rudimentary scientific facilities available to the police in the form of finger print bureau and scientific sections which provided examinations of fire-arms, foot prints, questioned documents and

photography. All these were available under the state CID set up. In the second quarter of the twentieth century, forensic science laboratories were established in different parts of the world. In India, too, the growing awareness among the police and the judiciary, the role science played in scientific evaluation of material clues, led to setting up of forensic science laboratories in the states as well as at the center.

The most important function of scientific evidence is to convert suspicion into a reasonable certainty of either guilt or innocence. The various reasons for which a scientific examination may be made can be classified under the heads of the following questions:

Has a crime or tort been committed, how and when was the crime committed, what information can in general way be obtained as to the identity of the perpetrator are the question probably arises when an article of clothing has been left at the scene of the offence. A proper examination of this may disclose the hair color, approximate height, occupation, etc. but the ultimate and the most vital question is: are the accused man and the person characterized as having committed the crime in fact one and the same person? The investigation of a single crime perhaps needs answering to all these points.

Among men, the investigating officer is the most important person. In fact, it is he whose work determines the success or failure of the application of forensic science in the processing of a criminal case.

BETTER EVIDENCE

The physical evidence evaluated by an expert is objective. If a fingerprint is found at the scene of crime, it can belong to only one person. If this person happens to be the suspect, he must account for its presence at the scene. Likewise, if a bullet is recovered from a dead body, it can be attributed to only one firearm. If this firearm happens to be that of the accused, he must account for its involvement in the crime. Such evidence is always verifiable.

ESTABLISHMENT OF IDENTITY OF A PERSON

By the identification of a person is meant the establishment of his individuality. Identification may be complete or partial.

The data are supplied by the bodies which assist in the establishment of identity:-

Race, Sex, Age, Religion and caste, Social standing, General development, congenital peculiarities (eyes, hair, appearance, finger prints, birth marks), Acquired peculiarities (scars, tattoo marks, stains, malformations)

DETERMINATION OF AGE

Age has obviously an important bearing on identification. In this connection absolute accuracy is seldom if ever required, except in the case of the new born child or to determine the age approximately; and in most cases this is all that is possible.

Apart from the question of identification the establishment of age may be required in several other connections.

In the absence of reliable documentary evidence, questions regarding age are always referred to a medical man. In the circumstances in which these questions are often referred to the practitioner, they must be difficult. It is only when doubt exists that the doctor's opinion is sought. No court will call for expert's evidence to prove that an obviously adult woman is or is not over the age of fourteen. It is in the case of the girl who is just under or just over the age of fourteen that the medical man will be consulted. When it is realized that if, for instance, a girl is one day under the age of fourteen, a man may be guilty of a serious offence, while if she has reached that age no offence has been committed, the great responsibility laid on the medical man will be apparent. The medical witness should, in such case, not only exercise the greatest caution in coming to an opinion but should be prepared to admit the possibility of his estimate being wrong, as it quite possibly may be.

The determination of age may be required for the identification of an individual, living or dead. In criminal cases, it is necessary in connection with offence of rape, abduction and infanticide, also to determine whether a child has reached the age at which the law holds it responsible for its act, and if so, what manner of punishment or restraint should be imposed in it. In civil cases, the question arises in numerous relations, e.g. in the making of wills, capability as witness, employment under the Indian factories act, etc.

METHODS OF ESTIMATING AGE

All the human beings occupying this globe belong to the same species i.e. Homo sapiens. No two individuals are exactly alike in all their measurable traits, even genetically identical twins differ in some respects. These traits tend to undergo change in varying degree from birth to death and disease, and since skeletal development is influenced by a number of factors producing differences in skeletal proportions between different geographical area, it is desirable to have some means of giving quantitative expression to variation which such traits exhibit.

- Age of fetus can be determined by noting the presence or absence of the developmental changes that take place at the different period of intra-uterine life.
- Age of an infant can be decided based on weight. Also, the first teeth begin to appear.
- Age of a child can usually be formed by anyone who has / had to do with children, the indications being the general physical and mental development of the child. A mother of the children will generally be a better authority than the doctor. Milk teeth also appear during this time.

- ⊕ Age of adolescent boys can be noticed by change in voice, traces of muscularity, pubic and axillary hair appears, beard and mustaches begins to appear, external genital organs begins to approximate adult type. Penis loses its infantile character.
- ⊕ Age of adolescent girls can be noticed by swelling breasts, widening hips, pubic axillary hair appears, the period of puberty is initiated by menstrual flow.
- ⊕ The average child on reaching the age of puberty is already in possession of a complete set of permanent teeth but for the four wisdom teeth.
- ⊕ Age of an adult can be estimated by five factors:-
 1. Teeth- the young adult is normally equipped with a set of 28 teeth plus one or more wisdom teeth, in good condition. The teeth show no signs of wear and tear nor, in spite of early adoption of pan chewing practice.
 2. General appearance-An estimate based entirely on appearance may well be faulty by ten or more years. In forming an opinion as to the age of a person by his appearance a medical man has no advantage over an observant layman.
 3. Height and weight- age can be estimated based on average of height and weight.
 4. Ossification-the extent of ossification may give evidence that a person though an adult is still young; later it may form an indication of old age.
 5. Degenerative changes- Wrinkles, grey hair, etc. are signs that an individual has passed his prime. The extent to these changes may enable one to form an idea as to a person's age.

EVIDENTIARY VALUE OF MEDICAL OPINION

Forensic science is the science used for legal interpretation of evidence. It is a law relating to experts and scientific evidence. Experts are defined under section 45 of the Evidence Act, 1872:

“When the court has to form an opinion upon a point of foreign law, or science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in question as to identify handwriting or finger impressions. Such persons are called Experts.”

Medical Opinion as to the age of injury cannot be regarded as conclusive as in the medical examination it is only approximate tenure of time can be ascertained, and the opinion can never be exact and allows concession of sometime upward or downward.¹ Medical opinion cannot have any binding force and cannot also be said to be last word on what he deposes is to be implicitly accepted; on the other hand his evidence like the evidence of any other witnesses is liable to be shifted, analyzed and tested.

Expert evidence must be used not as a piece of substantive evidence of a conclusive nature but as a piece of corroborative evidence to other evidence in the case. The corroborative evidence in order to be of any value must be on material particulars and the facts relied on for the corroboration must be established by reliable and independent evidence. The expert

¹ *Shanabhai Madhurbhai Koli Patel v. State* 2004 CrLJ268 (Guj.)

evidence is weighed in the same way as other evidence. The court is not bound to accept the opinion of an expert automatically, but the grounds on which he gives his opinion would carry value to the evidence.

For the purpose of proving the age of a person the only surer is School Leaving Certificate. But often courts are reluctant to accept such certificates under corroborated by some other relevant evidence. There is every possibility of false age being recorded. But the documentary evidence has to be given priority in proof of the age over the Medical opinion since there is always possibility of variation of two years either way on various in the medical estimation of the age². Whenever the age of a person is in question and in absence of substantial proof of the correct age, opinion of medical expert becomes a matter of importance. Medical evidence cannot be regarded as conclusive proof of age and the accused is entitled for benefit of doubt.³

REQUIREMENT OF DETERMINATION OF AGE

Very often medical opinion is sought to be proved in civil and criminal proceedings for the purpose of estimating the age of a person. In civil cases, age is required to be estimated in the absence of other evidence to find out whether the person was a minor or major when a document was executed by him. In criminal case the age of a person is required to be proved in order to know whether the person is below 7 years or juvenile. Under the following circumstances the determination of age is required:

- When the age of accuse is uncertain i.e. whether he is juvenile
- When the age of prosecutrix is uncertain under sec. 375 of IPC
- When the party executing the contract is minor or major
- For the Custody of the child
- For marriage
- For determining Judicial punishment
- Child labor under Factory and Mines Act

ISSUE OF DETERMINATION OF AGE

In India, it is evident that responsibility increases with age. From the various instance, it can be envisaged that the accused, who is minor is given benefit of their immaturity and always being forgiven for their misconduct/ mischief. Indian Penal Code is not exception to this therefore, under Sec. 82 of IPC any offense committed by the child who is below the age of 7 years is cover under the general exception so he will neither be penalized nor imprisoned. Nothing shall be an offence which is done by a child under 7 years of age. But there is Criminal responsibility on the accused who is of 7 yr to 12 yrs. As per sec. 83 of IPC nothing shall be an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion. It was held in *Queen v. Lukhini* that non-attainment of maturity in

² *Sanjeev v. State* 2004 (3) Crimes 124 (All)

³ *S.K.Belal v. State of Orissa* 1994 CrLJ 467 (Ori.)

case of a child over 7 and below 12, would have apparently to be specially pleaded and proved. Under sec. 105 of the Indian Evidence Act, the burden of proof is on the accused to show that he comes under the General Exception of IPC or under any other proviso of the section.

The repercussion of the circumstance where the accuse is minor after determining its age by documentary evidence or medical evidence then accuse will come under the ambit of Juvenile Justice Act and will have separate trial by the Juvenile Justice Board. In the context of juvenile legislation in India, a juvenile is a person who has not completed eighteen years of age.⁴ Age of majority as per Indian perspective is 18yrs.⁵

He will be exempted from the criminal proceeding. With regard to this the accuse will be send to observation home where he is taken care and protected from the other hardcore criminals. The motto of such separate trial from other criminals is to adopt the reformatory approach by diverting the mind of juvenile from criminality.

Section 360 of Criminal Procedure Code, 1973, provides that when any person under 21 years of age is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the court before which he is convicted, regard being had to his age, character, or antecedents of the offender and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a good bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding 3 years) as the court may direct and in the meantime to keep peace and be of good behavior. Section 6 of The Probation of Offenders Act, 1958, unlike section 360 of CrPC, makes it obligatory for the Court not to sentence offender to imprisonment when he is under 21 years of age and has committed an offence punishable with imprisonment, but not with imprisonment for life. The court has to record its reasons for not dealing with the offender under section 3 or 4 of the Act. In not taking action under section 3 or 4 of the Act, the court has to consider the circumstances of the case including the nature of offence and the character of the offender.

The best evidence of age is the entry in the birth and death register as it is made by competent authority, but when such evidence is not available the accused should be medically examined, and a definite finding with regard to age should be recorded by the magistrate in each case, and if the accused on inquiry is found to be a juvenile, the matter should be transferred to Juvenile justice board.

To make the report of the radiology admissible it is necessary to see that the all the factors for determining age are considered. Age determination has been a tricky and controversial issue

⁴ Sec.2(k) of JJ Act, 2000

⁵ Chakraborty Dr. Tapan, An International Comparison of Juvenile Justice Systems, The Indian Police Journal, LV No.3, July-Sept, 2008

in juvenile justice. In *Jaya Mala v. Home Secretary, Government of J&K*⁶ the apex court held that the age as ascertained by medical examination is not conclusive proof of age. It is mere opinion of the doctor and a margin of 2 years could be on either side. The question arises when the age of accuse is between 17-19 yrs then either inference can be drawn that accuse is considered as 17 yrs which will result him as juvenile and therefore he must be tried by Juvenile Justice Act. Otherwise, accuse is treated as 19 yrs then he will have to abide by regular criminal proceeding. Therefore, it is duty of the court to look after that justice is done and no juvenile becomes sufferer of the strict rule. Through judicial precedent it is settled rule that when there is ambiguity with respect to age of the accused then benefit of doubt goes to accused.

Generally the age of the prosecutrix is determined by her birth certificate. Otherwise, prosecutrix has to undergo medical test for determining her age. Thus, Forensic Science helps the court with radiological report to arrive at a conclusion with regard to the age of victim or accuse. For Instance, when the age of the prosecutrix is determined as 14-16 then as per sec. 375 when the girl is of below 16 years of age, the court shall presume that the girl has not consented for sexual intercourse therefore the accuse cannot take defense of consensus intercourse. It is more critical situation for the court to decide when the age of the prosecutrix is determined between 15-17 years either to consider minimum age i.e. 15 or latter age i.e. 17. After different judicial interpretation now it is settled law that when there is dispute regarding age of prosecutrix then benefit of doubt goes to accuse.

That medical evidence is not conclusive regarding age of a person is a well settled proposition of law. *M. A. Ajij v. State*⁷ was a case where the age of a girl in relation to an offence under S. 376, IPC was in question where the trial court had come to the conclusion exclusively basing on the evidence of PW 3 who had held the ossification test, which the age of the girl was below 18 years. After analyzing the evidence in detail the Court held that the case was a border line one, that the medical evidence of age cannot be of mathematical precision, that it is all the more risky to convict somebody solely on the basis of medical evidence which is likely to vary and that in a border line case it would not be proper to solely rely on the medical evidence regarding age. It was held that the onus lies squarely on the prosecution to prove the age as being below 18 years. The view of resolving the doubt in such a case in favour of the accused was also adopted in *Raunki Saroop v. State*⁸.

It is hard look of law where it's the juvenile at the end who faces it. Sometime many children who look older than their age, they themselves don't know how old they are, and they don't have proper age proof since they belong to a family of migrant workers these kids are then tried as adults and are thrown into prisons by traditional method of determining age but now with help of forensic science it is easy to derive the age in question by medical examination.

⁶ AIR 1982 SC 1297

⁷ (1972) 38 Cut LT 1238

⁸ 1970 Cri LJ 1383

In Criminal law, it is well said dictum that 'even though 100 accuse are set free but no innocent should be punished'. This maxim has outcome with rule that benefit of doubt must go to accuse. Therefore, it is prerequisite for the prosecution to prove its case beyond reasonable doubt to make conviction. Another golden thread that runs through the web of administration of criminal justice is that if two views are possible on the evidence - one pointing to the guilt and other towards innocence, the view which is favorable to the accused should be accepted. It seems to be very similar to the principle, called Benefit of Doubt goes to batsman in Cricket game. As per Interpretation of penal law when there is small particle of suspicion in the conviction then the court will take the view which is favorable to accuse. Similarly, when there is unspecified age by respect of radiology report and no other documentary evidence to support the prosecution case then the court will take a view which will be beneficial to accuse as per the cardinal rule that benefit of doubt will go to accuse.

CONCLUSION

The heinous nature of the crime, the cover-up afterwards, the denial. They were all, to me, earmarks of someone who was acting as an adult.

- Gary Gambardella

The above quote summarizes the methodology adopted to hoodwink the Indian criminal system by hardcore criminals. The lenient provisions of the juvenile justice act like a window of opportunity which can be exploited to the fullest.

The issue of age determination possibly the biggest loophole when it comes to misusing the statute that was legislated with the intent of being child friendly and the objective of meeting the requirements of Conventions on the Rights of the Child.

The reference to the Mumbai attack case is the best example which demonstrates the misuse of legislation where the terrorist-accuse pleaded himself to be juvenile and tried to defend himself. The court after medical examination arrives at the conclusion that accuse was not a juvenile and as such was to be tried at regular court and not at the juvenile justice board. It depicts the juvenile justice act as a weak link in the chain of our criminal system which can be exploited by anti-national elements waiting in the wings for an opportunity to endanger our national security. It has set a same yardstick for every criminal without distinguishing whether hardcore criminal or petty offender among young offenders.

Problems with regard to harsh treatment by police and difficulties with regard to age verification continue to plague this otherwise humane act. Skeptics believe that there is a chance that the guilty will misuse the law to get away with a lighter sentence.

There is a wide debate in India on the issue that whether laws hold promise of justice for victim who have been sufferer of violence or accuse. Justice cannot be for one side alone but must be for both.

One of the most admirable things about history is, that almost as a rule we get as much information out of what it does not say as we get out of what it does say.

And so, one may truly and axiomatically aver this, to wit: that history consists of two equal parts; one of these halves is statements of fact, the other half is inference, drawn from the facts...

When the practiced eye of the simple peasant sees the half of a frog projecting above the water, he unerringly infers the half of the frog which he does not see.

To the expert student in our great science, history is a frog; half of it is submerged, but he knows it is there, and he knows the shape of it.

- *Mark Twain*

PROTECTION OF HUMAN RIGHTS VIS-À-VIS CRIMINAL JUSTICE SYSTEM IN INDIA: AN ANALYSIS

Dr. Meena Ketan Sahu*

Abstract

Human Rights, which are considered to be universal, inalienable, interrelated, indivisible, fundamental and interdependent, are available to all human beings only due to being member of human family. Though, the term is of new origin but the essence of human rights is old as human civilization. Now-a-days , the term ‘human rights’ is used frequently by many scholars and educated people but there is less awareness and knowledge to common people in respect of human rights for common people, what are the human rights? What will be mechanism to protect our human rights? What is the relationship of human rights with criminal justice system in India? How human rights of accused, prisoner are protected under our criminal justice system? What are the deficiencies under our criminal justice administration system with regard to protection of human rights? These are some specific and important questions which require response for the stakeholders of the society. The present article mainly focuses on the abovementioned issues with regard to human rights. The author has made an attempt to highlight some of the leading cases where directions for protection of rights of the persons who are in police as well as in judicial custody and concept of fair trial has been emphasized by the Hon'ble Court with special reference to protection of human rights. The author has suggested some of the measures to be taken for strengthening and streamlining the criminal justice administration system in India.

Keywords: Human rights, Fundamental, Criminal Justice, Fair trial, Protection etc.

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INTRODUCTION

Human Rights may be regarded as those fundamental and inalienable rights which are essential for life as human being. Human rights are the basic norms of democracy and democratic values. So, in a democratic society, the state is having the responsibility to protect and promote such rights. All states' agencies whether the police department or any other organization should strive to prevent human rights violations and take necessary steps for the promotion of human rights of citizens. In this respect, the role of the police is significant because the police are entrusted with the responsibility of maintaining order and enforcing laws. But, most of the time, while discharging this duty, police actions conflict with human rights. It means those who have been given the responsibility of protection of human rights are often found to be the violators. In recent year's incidents of human rights violations by the police—the use of third degree methods to extract confessions and lock up deaths—often finds mention in the press and in public fora.¹

The Apex Court points out in the case² which is as follows:

"Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees, under-trial prisoners or suspects tarnishes the image of any civilized nation and encourages the men in Khaki to consider themselves to be above the law and to sometimes become the law up to themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization would itself risk the consequences of heading towards perishing."

CONCEPTUAL ANALYSIS

Human Rights, it is said, are those rights which inhere in every human being simply by virtue of being a “member of human family”. Chastened by the horrors of two World wars, mankind aspired for a decent civilized life in which the inherent dignity of each human being is well respected and protected. Human Rights are fundamental to our existence as human beings. They are universal and cut across all national boundaries and political frontiers. Indeed, the Universal Declaration of Human Rights (UDHR), 1948 has been hailed as the ‘common standard of achievement for all peoples and nations’. In my view, every aspect or attribute of human dignity is a human right.

The Preamble to the Universal Declaration of Human Rights proclaims:

".....it is essential if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression , that human rights should be protected by the rule of law."

¹ See U.K.Chowdhury, Cop with Hardship, The Telegraph, 6th December 1995 (Wednesday) at p. 8. Also see Dr. Manoj Kumar Sadual, “Custodial Violence: Human Rights Perspective” in HUMAN RIGHTS edited by Dr. P.K.Pandey, 2012 at p. 292.

² State of M.P V. Shyamsundar Trivedi, (1995) 4 SCC 262

Article 3 of the UDHR further provides that:

“Everyone has a right to life, liberty and security of person”.

Prof. Louis explained human rights as:

‘.....claims which every individual has, or should have, upon the society in which she or he lives. To call them Human Rights suggests that they are universal; they are the due of every human being in every society. They do not differ with geography or history, culture or ideology, political or economic system or stage of development. They do not depend upon gender, or race, class or status. To call them ‘rights’ implies that they are claims ‘as of right’ not merely appeals to grace, or charity or brotherhood or love; they need not be earned or deserved. They are more than aspirations or assertions of ‘the good’ but claims of entitlement and corresponding obligation in some political order under some applicable law, if only in a moral order under a moral law. When used carefully, ‘human rights’ are not some abstract, inchoate ‘good’. The rights are particular, defined, and familiar, reflecting respect for individual dignity and a substantial measure of individual autonomy, as well as a common sense of justice and injustice’

LAW AND LEGISLATIVE FRAMEWORK

There are also substantial and procedural laws which lay stress on strict observance of human rights in criminal justice administration. Section 220 of the Indian Penal Code punishes illegal confinement by a police official. The two specific provisions of the Indian Penal Code, 1860 namely, ‘hurt’³ and ‘grievous hurt’⁴ protects suspects from third degree method by the police to extort confession. It also makes it an offence to wrongfully confine a person to extorting confession or to compel restoration of property.⁵ The guilty policemen may also be booked under the other provisions of this statute like murder, giving false evidence or fabricating false evidence to procure conviction.

The Code of Criminal Procedure, 1973 which is the leading statute amongst criminal laws provides the legal framework intended to effectuate the above noted constitutional guarantees. Police officers are empowered to make arrest, but this power is not absolute or arbitrary. They have the authority to arrest without warrant, but the circumstances in which this can be done are provided in Section 41 of the Cr. P.C. Section 49 of the Cr. P.C ensures that a person after his arrest shall not be subjected to more restraint than is necessary to prevent his escape. Similarly, under Section 50, the person arrested has to be informed of the grounds of his arrest and of his right to bail in non-bailable cases. Further, the right against arbitrary and unreasonable searches and seizures is safeguarded through provisions contained in Sections 47, 51 and 100. There are also provisions against the use of third degree methods. Section 54 confers the right upon the arrested person to get him medically examined. Sections 161 and 162 deal with the procedure for examination of witnesses by the Police,

³ Section 330, I.P.C

⁴ Section 331, I.P.C

⁵ Section 248, I.P.C

recording of their statements and the use of such statements in subsequent trial. The recent amendment in Section 176 of the Cr. P.C to provide that in the case of death or disappearance of a person or rape of a woman while in the custody of the police, there shall be a mandatory judicial inquiry and in case of death, examination of the dead body shall be conducted with twenty four hours of death and this will go a long way to ameliorate the situation in the cases of custodial justice.

The Indian Evidence Act, 1872 prohibits use of confession made before the police officer and the one obtained through inducement, threat or promise in criminal trials.⁶ Also, it prevents the use of confession made by any accused person while he is in custody of police officer.⁷

In addition to the above, Section 7 of the Police Act, 1861 empowers the higher police officers to ‘dismiss, suspend or reduce any officer of the subordinate ranks whom they will think remiss or negligent in discharge of his duty or unfit for the same. Section 29, further, provides that any police officer who shall offer any unwarrantable personal violence to any person in his custody shall be punished with three months rigorous imprisonment.

Judicial Approach

It is pertinent to mention here that the judgment in *Joginder Kumar’s* case⁸ rewrites the law of arrest and detention in police custody in the newly developed human rights perspective and is pride of our system. The Supreme Court also has made it clear in *Citizen for Democracy v. The State of Assam*⁹ that in all the cases where a person arrested by police, is produced before the Magistrate and remand-judicial or non-judicial –is given by the Magistrate, the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand.

The Apex Court hopes that recommendation of the Government and Legislature would give serious thought to the recommendation of the Law Commission¹⁰ and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished.

In *D. K. Basu v. State of West Bengal*¹¹, the Supreme Court laid down an arrest and detention code requiring the police to carry identification, prepare a memo of arrest with full details arrested by a third party, notify a friend or relative of the accused of arrest, inform the

⁶ Section 24 and 25 of Indian Evidence Act.

⁷ Section 26

⁸ *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260

⁹ JT 1995 (4) SC 474

¹⁰ Recommendation of the Law Commission refers to its 113th Report which recommended amendments to the Indian Evidence Act so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the court may presume that the injury was caused by the police officer having the custody of that person during that period unless, the police officer proves to the contrary.

¹¹ 1997 Cr. L.J 743 (SC)

arrestee of the grounds of arrest, make an entry into a police diary, record an inspection memo on search and seizure, provide for medical examination within 24 hours, transmit all arrest documents to the District Magistrate, enable the accused an oversight by a police control room within 12 hours of arrest in each district. Failure to follow these instructions would result in departmental investigation and contempt of court proceedings. This judgment rewrites the law of torture for the benefit of arrestees and provides the human right basis to Articles 21 and 22 of the Constitution. Extension of ‘compensatory jurisprudence’ to cases of misuse of police powers makes this law justice oriented and a landmark in our human rights jurisprudence.

In *M.S.Gautam v. State of M.P*¹², Arijit Pasayat, J. on behalf of C.K. Thakkar, J. and himself observed that custodial violence, torture and abuse of police power are not peculiar to India. In this context, he asserted that the courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilized society governed by the rule of law and poses a serious threat to an orderly civilized society.

Despite the evolution of a plethora of international covenants, conventions, guidelines, principles etc., and despite the constitutional guarantees, it is our experience that human rights violations continue to abound. A number of them can be sourced to the far-from satisfactory criminal justice system.

The Criminal Justice Administration in India has deficiencies, both substantive and procedural. The National Human Rights Commission is deeply concerned over the phenomena of a docket-clogging, inefficient, unscientific police investigations; the innate vulnerability of prosecutions which depend mainly on fragile oral evidence, inept discharge of prosecutorial functions performed by prosecutors not adequately trained and certain other systematic and logistic inadequacies that characterise the present scenario.

Some amongst the more serious manifestations of these deficiencies are reflected in a distorted proportion between the numbers of convicted persons and under trial prisoners in the break-up of the prisoner population.

Right to Fair Trial

The right to fair trial which includes the right to a speedy trial is a part of our international obligations. So is our duty to organise our legal system and courts to comport with the mandate of Article 9(3) and Article 14(1) of ICCPR. This is also the content of Section 309 (1) of the Code of Criminal Procedure. Criminal cases require greater urgency in their settlement. A more rigorous time frame is needed where the accused person is in detention pending the outcome of the case. In such a case, a combination of obligations both for speedy trial and special diligence converge. Indeed, this right to a speedy trial is part of our

¹² 2005 (9) SCC 631

fundamental laws and Article 21 of the Constitution is so recognised by the Supreme Court of India in the Case of *A.R.Antulay v. R.S.Nayak*,¹³ the Court observed:

“...In other words, such laws should provide a procedure which is fair, reasonable and just. Then alone, would it be in consonance with the command of Article 21. Indeed, wherever necessary, such fairness must be read into such law. Now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of a criminal case is fair, just and reasonable? It is both in the interest of the accused as well as the society that criminal case is concluded soon. If the accused is guilty, he ought to be declared so. Social interest lies in punishing the guilty and exoneration of the innocent but this determination of guilt or innocence must be arrived at with reasonable dispatch- reasonable in all the circumstances of the case”.

There is an immediate need for massive de-criminalisation for auxiliary adjudicative services and a systematic assurance against the violation of human rights in the investigation of crimes. The affront to human dignity in the process has been enormous thus alienating the citizenry. Incivility and insolence of power towards law-abiding citizens has seriously affected the confidence of people in the system. Despite all the harshness of the prosecutions for heinous offences succeed. There needs to be an increasing dependence on scientific evidence through modern forensic science techniques the creation of modern forensic facilities, intensive training for investigators, prosecutors and judicial personnel is absolutely necessary.¹⁴

The three segments of the criminal justice system viz., the police, the judiciary and the correctional institutions ought to function in a harmonious and cohesive manner. But in practice, one often finds that it is not the case. The police, instead of protecting and promoting human rights, are often found to violate them. The National Human Rights Commission in one of its reports pointed out that:

“Nearly 60% of the arrests were unnecessary, and as such, unjustified. The Commission estimated that 43.25% expenditure in the connected jails was over such prisoners who in the ultimate analysis need not have been arrested at all”.

The need for systematic reform of the police as been a consistent theme of the National Human Rights Commission for the past five years. The Commission has highlighted the need for the insulation of the police from extraneous pressures, setting up of State Security Commissions, fixity of tenure for the Directors General of Police etc. Many of the ills afflicting the police can only be cured through these structural changes, through better training and modernisation of the force. The punishment of the delinquent officers, however important in individual cases, is simply inadequate to the needs of the situation.

When we turn our attention to the present penal system, it appears as if it believes in the philosophy that the efficacy of penal sanctions lies in their severity. It is apparent that it

¹³ 1992 (1) SCC 225

¹⁴ J.S.Verma, “The New Universe of Human Rights” 2004 Reprint 2006 at p. 128.

endorses the ‘repressive’ rather than the ‘restitutive’ course. There are the problems of over-crowding, the needs of special groups such as the under trials, women, first-offenders, juveniles, foreigners, etc. Observers feel that the “punishment paradigm” is slow in absorbing the reformatory mood of humanism that should prevail penal policy.

The prison administrators need to acquire greater professional management skills. The conditions of incarceration in Indian prisons generally fall far short of the Human Rights standards. The National Human Rights Commission has been highlighting areas in prison administration that need immediate attention if the prisoner are to shed the stigma of being human ‘warehouses’ and ‘penal dustbins’. Prison health services need to be streamlined. There is a spread of serious infectious such as Tuberculosis, Malaria, Hepatitis and HIV in the present prison conditions. At the instance of the Commission, an initiative was recently undertaken by the Rotarians to provide comprehensive medical examination of over 20,000 prisoners in various prisons in the country. The Commission has proposed comprehensive measures including the deployment of the commission’s visitors and investigators constantly to monitor the protection of Human Rights of prisoners.¹⁵

Suggestions and conclusion

I now wish to offer some suggestions for improving criminal justice system:

- The enormous burden on the criminal courts should be reduced by adopting a system of Honorary Judicial Magistrates on the lines of the Institution of “Recorders” and “Assistant Recorders” in the United Kingdom where trained and experienced lawyers would work part-time, on a specific number of days in a year, to deal with and dispose of a large number of cases involving minor offences. This system of dealing with minor offences and ensuring their speedy disposal can be strengthened by introducing, in a judicious and measured manner, the system of “plea-bargaining” (Nolo-Contendere as it is known in some jurisdiction)
- There is a need for a massive decriminalisation so that many of the wrongs which are now given the undeserved status of ‘crimes’ are dealt with as compoundable civil-wrongs.
- There is also need for a system of compensation for various crime on the analogy of the “Criminal Injuries Compensation” regime operating under statutory disciplines in many countries.
- It is important to promote NGOs for “Victim Assistance and Service” and for the protection of witnesses in collaboration with the police system.
- There is a need for appropriate training programmes for the members of magistracy in Human Rights jurisprudence and the National Judicial Academy of India has an important role to play in this regard.

The NHRC has recommended that these important and timely reforms in the system of administration of criminal justice be initiated. The Law Commission to drew the

¹⁵ J.S.Verma, “The New Universe of Human Rights” 2004 Reprint 2006 at p. 130.

Government's attention to the deficiencies in this behalf and made some valuable recommendations. It is important that these reforms be initiated without any delay, as otherwise there is the danger of our sliding into a far worse position than we are in now.

The importance of an efficient system of criminal justice system stems from the following:

- Sustainable development can neither be possible or enduring without the recognition of inter-institutional complementarities.
- A sound social infrastructure, the NHRC believes, is as indispensable for economic development as economic infrastructure.
- Efficient administration of order in society and the protection of human rights, as for economic development. The sound administration of justice, both civil and criminal, is indispensable foundation for the economic activity.

Last but not the least; delayed justice is also a major concern in the present day context. Major factors are responsible for the delayed justice in criminal cases. There may be also some other factors including lack of effective management, and lack of infrastructural support which can be remedied by imparting managerial skills and upgrading infrastructure of the Court. Lack of requisite sensitivity of the part of the Judge handling the case may also sometimes result in neglect of the case contributing to delay. A mind set necessary to deal with something of utmost importance to the system of administration of justice as well as society is always needed coupled with a determination to proceed in the right direction.

INSIGHT OF COMPETITION LAW

Iti Batra*

Abstract

The newly enacted Competition Act of India marks a shift in the Indian Economic Policy from prevention of monopoly to the promotion of competition in its behaviour in the domestic market. The Indian economy has been one of the strongest performers in the world. With our country progressing technologically, politically and socially, new laws and policies had to be enacted and the old ones to be replaced with better provisions, as *competition* became a driving force in the country. This research paper deals with the evolution of Competition Act, how it came into force with the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP) being replaced by Competition Act. The Competition Act, 2002 keeps in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain fair competition in the market and ensure freedom of trade. The Indian economy had always remained subject to controls and regulations for several decades such as Industrial licensing, Foreign exchange control on foreign investment, quantitative restrictions on imports, administered prices and control on capital issues. The domestic industry was thus insulated from competition. The scenario completely changed with the onset of the National Economic Policy, 1991 in the country. With this the need for liberalization processes were recognized and the need for a quasi-judicial authority was felt and hence The Competition Commission of India was formed (herein referred as CCI). The CCI ensures that free and fair competition is maintained in the market by keeping a regular check on companies and other business enterprises. The four main issues that the Competition Act, 2002 deals are Anti-Competitive Agreements, Abuse of Dominance, Combinations and Regulations & Competition Advocacy. These four major issues are dealt with in great length in this research paper and also include case laws.

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INTRODUCTION

Competition etymologically comes from a Latin word “Competitio” which means rivalry. Oxford dictionary defines Competition as: “*The activity or condition of striving to gain or win something by defeating or establishing superiority over others.*”

Competition is a market situation in which every business entity tries to achieve a particular position to make higher profits and better sales. However, this isn’t enough for achieving the objectives and goals of the economy as a whole. Welfare and Economic Objectives should be taken into consideration for a Utopian society.

After Independence, India followed the strategy of planned economic development which means that the Government imposed controls over entry and exit in the market. Plant and firm size were subject to the statutory limitations, imports & exports, foreign investment etc. were restricted. In other words, the market was partially dominated by the government. In this system there was little place for the Competition policy¹. But, in 1991 the National Economic Policy was introduced in which the regulation of market became a necessity in the economy. The economy was open to competition from within the country and from Abroad. There had to be an effective system implemented.

Ensuring a smooth and effective society, having sustained fair and healthy competition in the market, a mechanism was adopted that would deal with the arising market complexities in a fair manner. Hence, Competition Act, 2002 was enforced.

Competition Law enacted seeks to maintain effective and healthy competition in the market and to ensure that no anti-regulatory practices take place.

Talking about India’s fair trade watchdog the “Competition Commission of India” (herein referred as CCI) is one such body which is responsible for enforcing the Competition Act 2002 throughout the country to prevent activities like Anti-Competitive Agreements, Abuse of Dominance, Combinations, and Competitive Advocacy etc.

The Competition Act, 2002 provides keeping in view economic development of the country for Competition, to promote and sustain Competition in the market, to protect the interests of the consumers and to ensure freedom of trade carried on by other participants in the market in India and for matters connected therewith or incidental thereto.²

However, the first Indian Competition Act was enacted in 1969 and was christened as the Monopolies and Restrictive Trade Practices Act, 1969 (herein referred as the MRTP Act). The genesis of the MRTP Act 1969 is traceable to Articles 38 & 39 of the Constitution of India. The Directive Principles of State Policy in those articles lays down inter alia that the State shall strive to promote the welfare of the people by securing and protecting as

¹ Antitrust, Vol. 21 No. 2, spring 2007 by the American Bar Association.

² Economic and Commercial Laws (Pg 101) (The institute of Company Secretaries of India)

effectively as it may, a social order in which Justice- Social, Economic and Political- shall inform all the Institutions of the National life and the State shall, in particular, direct its policy towards securing-

1. That the ownership and control of material resources of the community are so disturbed as best to sub serve the common good.
2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.³

However, MRTP Act was all teeth and no bite. It failed to fulfill various objectives of the Act. The MRTP Act only dealt with Monopoly, Restrictive Trade Practices & Unfair Trade Practices which was not just enough to deal with other issues cropping up. There was a tremendous need felt to widen the scope of MRTP Act because it only created space for few aspects and did not include issues like Abusing Dominance which is the current hyped legal issue these days, Anti-Competitive Agreements, Competition Advocacy etc.

Hence, the MRTP Act was an incomplete Act and on the recommendation of *Raghavan Committee* which was constituted by the Central Government was dissolved and Competition Act, 2002 came into force.

MAJOR AREAS IN FOCUS

Chapter II (PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT POSITION AND REGULATION OF COMBINATIONS) of the Competition Act, 2002 deals with:

- A. Anti-Competitive Agreements (Section 3)
- B. Abuse of Dominant Position (Section 4)
- C. Combinations Regulations (Section 5&6)
- D. Competition Advocacy (Section 49)

These are the four main issues included in the Competition Act, 2002 and are dealt by the CCI.

(A) ANTI-COMPETITIVE AGREEMENTS

This statement of Adam Smith makes it abundantly clear for a need to have a proper regulatory mechanism for prevention of anti-competitive agreements which not only affect the market economy leading to monopolistic approach but also victimizes the consumers and thereby cause harm to the entire economy creating hindrance to the competition in the market.

Anti-Competitive Agreements are those agreements which cause or are likely to cause appreciable adverse effect on competition in markets in India. They are void agreements

³ Supra

while some Anti-Competitive Agreements are presumed to cause appreciable adverse effect on Competition. Others are to be proved so by Rule of Reason. The provisions of the Competition Act relating to anti-competitive agreements were notified on 20th May, 2009.

It is provided under Section 3(1) of Competition Act that no enterprise or Association of enterprises or person or Association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on Competition.

Section 3(2) further declares that any Competitive Agreement within the meaning of sub-section 3(1) shall be void. Under the law, the whole agreement is construed as void, if it contains Anti-Competitive clauses having appreciable adverse effect on competition.

Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or association of persons or person or enterprise or practice carried on or decision taken by any association of enterprises or association of persons including cartels⁴ engaged in identical or similar goods or services which-

1. Directly or Indirectly determines purchase or sale prices;
2. Limits or controls production, supply, markets, technical development, investment or provision of services;
3. Shares the market or source of production or provision of services by way of allocation of geographical area of market or type or goods or services or number of customers in the market or any other similar way; and
4. Directly or Indirectly results in bid rigging⁵ or collusive bidding; shall be presumed to have an appreciable adverse effect on the competition and the onus to prove otherwise lies on the defendant.

Efficiency enhancing joint ventures entered into by parties engaged in Identical or similar goods or services shall not be presumed to have appreciable adverse effect on Competition but judged by rule of reason.

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

Bidding as a practice is intended to enable the procurement of goods and services on the most favorable terms and conditions but the objective of securing the most favorable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

⁴ Section 2(c) of Competition Act, 2002

⁵ Any Agreement between enterprise or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.

Section 3(4) provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or price of or trade in goods or provision of services, including-

1. Tie in agreement- It includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other good.
2. Exclusive supply agreement- It includes any agreement restricting in any manner from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
3. Exclusive distribution agreement- It includes any agreement to limit, respect or withhold to output or supply of any goods or allocate any area or market for the disposal or the sale of goods.
4. Refusal to deal- It includes any agreement, which restricts, or is likely to restrict, by any method the person or classes of persons to whom goods are sold or from whom goods are brought.
5. Resale price maintenance- It includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the price stipulated by the seller unless it is clearly stated that the price lower than those prices may be charged. Shall be an agreement in contravention of sub section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

However, Section 3 does not restrict the right of any person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

- a. The Copyright Act, 1957;
- b. The Designs Act, 2000;
- c. The Patents Act, 1970;
- d. The Trade and Merchandise Marks Act, 1958;
- e. The Geographical Indication of Goods (Registration and Protection) Act 1999;
- f. The Semi-conductor Integrated Circuits Layout-Designs Act 2000.

Apart from that, the Act does not restrict any person right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provision of services for fulfilling export contracts. The exclusion of export business is in view of ‘effect theory’, and doctrine of “relevant market”.

(B) ABUSE OF DOMINANT POSITION

The Competition laws all over the world are primarily concerned with the exercise of market power and its abuse. Exercising market power by enterprises comprises as acting in a dominant position and having monopoly power. The Competition Act, 2002 also aims in preventing enterprises to act as dominant in their countries and maintain fair competition between the firms. The CCI does not restrict a business enterprise to hold a dominant

position. What is restricted is the abuse of such market power which would have a detrimental effect on the consumers.

DOMINANCE - The Act defines dominant position in terms of a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to:

1. Operate independently of the competitive forces prevailing in the relevant market, or
2. Affect its competitors or consumers or the relevant market in its favour.

It is the ability of the enterprise to act independently of the market forces that determines dominant position.

ABUSE OF DOMINANCE - An abuse occurs when a business enterprise acts in a dominant position in the relevant market. Abuse of dominance restricts fair competition between firms, exploits consumers and makes it difficult for other companies to compete with them. Abuse of dominance includes:

1. Imposing unfair conditions or price
2. Predatory pricing
3. Limiting production/market or technical development
4. Creating barriers to entry
5. Applying dissimilar conditions to similar transactions
6. Denying market access
7. Using dominant position in one market to gain advantages in another market.

Abuse as specified in the act fall into two broad categories:

1. **EXPLOITATIVE** – such as excessive pricing
2. **EXCLUSIONARY** – such as denial of market access

Determining abuse of dominance of an enterprise is a pre requisite to enquire into abuse. The criteria of 25% market share as it existed in the MRTP Act do not exist anymore. The Competition Act mandates the CCI to look into a host of factors which gives rise to multiple issues in deciding dominance. Abuse of dominance bears upon unilateral behaviour of dominant enterprise.

In order to know, that a particular group is abusing dominance, it involves a three stage process:

1. Determination of relevant market which is based on Relevant Market/ Geographic market

The relevant market means “the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”⁶

The relevant product market is defined in terms of substitutability.⁷

Relevant geographic market is defined in terms of “the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.”⁸

- 2. Determination of dominance in that relevant market
- 3. Determination of an abuse of the dominant position

Dominance of an enterprise is to be judged by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, an enterprise with a share of less than 25% of the market could also possibly be determined to be dominant.

In case, an enterprise is held by CCI to have abused its dominant position, there will be penalties that shall be imposed. It can impose a penalty of not more than 10% of the turnover of the enterprise. Also, the CCI would have the power to direct the enterprise to disclose information to its competitors.

In exercise of powers vested under section 19 of the Act, the Commission may inquire into any alleged contravention of section 4 (1) of the Act that proscribes abuse of dominance. Section 19 (4) gives a detailed list of factors that the Commission shall consider while inquiring into any allegation of abuse of dominance. Some of these factors are market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, dependence of consumers, entry barriers, and social obligations and costs in the relevant geographic and product market. The Commission, on being satisfied that there exists a *prima facie* case of abuse of dominance, shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is vested with powers of civil court besides powers to conduct ‘search and seizure’.⁹

There have been many cases of Abuse of Dominance that have been dealt by the CCI and other countries Competition Laws. Some of them are mentioned hereunder:

⁶ Section 2(r) of Competition Act, 2002

⁷ Section 2(t) of Competition Act, 2002

⁸ Section 2 (s) of Competition Act, 2002

⁹ <http://www.cci.gov.in/May2011/Advocacy/AOD.pdf>

1. BELAIRE OWNER'S ASSOCIATION V. DLF LIMITED AND HUDA

CONTENTIONS OF THE INFORMANT: The Informant (Belaire Owners Association) contended that DLF had abused its dominant position and inflicted several unfair and arbitrary terms of contract on the apartment allottees.

Each of the five multi storied buildings was to originally have 19 floors each with a total of 368 apartments. However, ignoring the fact, that this was the basis that the allottees booked their flats, DLF constructed 29 floors in each building.

DLF had conferred on itself the exclusive right to reject and refuse to execute any Apartment Buyers Agreement without assigning any reason for doing so. It could further carry out changes in the layout plan for which the consent of the allottee shall not be a necessity.

In case of failure by the DLF to deliver possession, the allottee is obligated to give a notice to terminate the agreement. DLF is not bound to refund the money.

Between the date of booking and the date of execution, the allottee had paid amounts to the tune of Rs 85 lakh without knowledge of the unfair terms and conditions that would be included.

DLF had reserved unilaterally the right to create any lien or mortgage to raise finances.

CONTENTIONS OF THE OPPOSITE PARTY: DLF contended at length that it is not a dominant player in the relevant market. It pointed out that there exist many competitors in the market and there is also stiff competition. They also contended that the conditions included in the agreement are ‘usual practices’ adopted by builders and are part of Industry Practice.

ORDER: The CCI observed that while assessing dominant position of an enterprise, the sole factor is not only the market share of the enterprise but also a host of other factors were to be considered which are mentioned under Section 19(4) of Competition Act,2002. It finally came to the conclusion that DLF is dominant in the market of Gurgaon. The CCI imposed a penalty of 630 crores for abusing its dominant position in the relevant market of Gurgaon by imposing unfair conditions in its agreement with the flat buyers. DLF was ordered to ‘cease and desist’ from imposing such unreasonable conditions with buyers in Gurgaon and such conditions within 3 months from the date of receipt of the order.¹⁰

2. DLF PARK RESIDENTS V. DLF LTD¹¹ - In this case, while the agreement had been made on one premise of building 19 floors in each tower, DLF subsequently scrapped the project and started constructing a new project with 29 floors in each tower without informing the buyers. This led to unreasonable delay in the completion of the project. Since the contravention committed by DLF in this case was similar to

¹⁰ <http://www.cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf>

¹¹ Case no. 18 of 2010

that in Belaire Owners' Association v. DLF and hence no separate penalty was imposed on DLF.

3. **M/S MAGNOLIA FLAT OWNERS ASSOCIATION & OTHERS. V. M/S. DLF UNIVERSAL LIMITED & OTHERS:** In this case, after the payment of 90 percent of the sale consideration by the buyers, DLF wanted to change the building plan thereby increasing the number of floors. The agreement also contained various one-sided clauses. DLF was ordered to cease and desist from imposing such unfair conditions and to suitably modify the terms of the agreement within three months.
4. **GOOGLE FACES INDIA PROBE (MAY 14, 2014):** The Competition Commission of India has ordered a fresh probe against Google for alleged abuse of its dominant position in the online search advertising space. The order came on a complaint by Vishal Gupta against Google incorporated. The Adword programme, which allows Google to sell keywords to advertisers and display them in the form of short ads online, is a big money spinner for the company. The Commission came to the decision that Google's practices *prima facie* stem to a large degree from its undisputable dominance in the online search market.
5. **TURKEY PUNISHES DIAGEO OVER ALCOHOL ABUSE DOMINANCE:** The Turkish Competition Authority has fined UK alcoholic beverage company Diageo 41.5 million lira for abusing its dominance in the market for raki.
6. **ACCC TAKES ACTION AGAINST PFIZER AUSTRALIA FOR ALLEGED ANTI-COMPETITIVE CONDUCT:** The Australian Competition and Consumer Commission has instituted proceedings in the Federal Court of Australia against Pfizer Australia Private Limited for alleged abuse of market power and exclusive dealing in relation to its supply of atorvastatin to pharmacies in contravention of the Competition and Consumer Act 2010.
7. **POLAND FINES NATIONAL HEALTH FUND FOR ABUSE OF DOMINANCE:** Poland's Office of Competition and Consumer Protection (UOKiK) has fined the National Health Fund in two parallel decisions for discriminating against smaller companies trying to enter the market.

(C) COMBINATIONS REGULATIONS (Section 5 & 6)

Combination under the act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are set in the Act in terms of assets or turnover in India and outside India. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.

Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give notice to the Commission disclosing details of the proposed combination. Such information should be submitted in 30 days of-

- a. Approval of the proposal relating to merger or amalgamation, referred to in Section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;
- b. Execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

A newly inserted sub section (2A) envisages that no combination shall come into effect until 210 days have passed from the day of notice or the Commission has passed orders, whichever is earlier.

The Competition Commission of India (CCI) has been empowered to deal with such notice in accordance with provisions of Sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under Section 6(2) is correct and whether the combination has, or is likely to have an appreciable effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

The provisions of Section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant or a loan agreement or investment agreement.

Under Section 6(5) the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement within seven days from the date of such acquisition or entering into such agreement, as the case may be.

It is noted that under the law combinations are only regulated whereas anti-competitive agreements and abuse of dominance are prohibited.

THRESHOLDS FOR COMBINATIONS UNDER THE ACT

India is one of the fastest growing economies in the world. The growth process is driven both by organic and inorganic (through the mergers and acquisition route) growth of enterprises. It is neither feasible nor advisable to review all the mergers and acquisitions. It is natural to presume that in the case of small size combinations there is less likelihood of appreciable adverse effect on competition in markets in India.

(D) COMPETITION ADVOCACY

Under Section 49, the Central/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the

Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within 60 days of making such a reference and the latter may formulate the policy as it deems fit. The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central/State Government in formulating such a policy. The Commission is also empowered to make suitable measures for the:

1. Promotion of competition advocacy;
2. Creating awareness about the competition; and
3. Imparting training about competition issues.

EXAMPLES OF COMPETITION ADVOCACY

1. Department of Posts – Indian Post Office (Amendment bill, 2006) – monopoly of letter mail, USO fee, new regulator, etc.
2. Department of Shipping- Shipping Conferences- tariff fixing; and Shipping Trade Practices Bill, 2005.
3. Department of Telecom and TRAI- number portability, spectrum allocation, additional merger regulation, open access to telecom infrastructure.
4. Department of Road, Transport and Highways- Competition oriented reforms in Passenger Road Transport (in States)
5. Planning Commission- Competition Policy for 11th five year plan document.

CONCLUSION

The Competition Act, 2002 has ushered a change in the global era of the economy. This new piece of legislation plays a significant role in shaping the country's growth and there has been a paradigm shift to the business environment in India. The Act is comprehensive enough and meticulously is carved out to meet the requirements of the market economy and is made in consonance with other set of policies such as liberalized trade policy, relaxed FDI norms, FEMA regulations etc. The synchronization helps in uniformity in the overall competition policy. The Competition Act is reflective of changing the economic milieu of the country and is well equipped to promote fair competition and safeguard the interests of consumers and bring stability in the Indian market. The Act has made an impact on the Indian Industry and is also anxious that the advantages to various sectors arising out of competition should percolate to consumers and businesses for a level playing field, redressal against anti-competitive practices, competitively priced inputs and optimal realization from sale of assets.

PLASTIC A LEADING ENVIRONMENTAL HAZARD: INDIAN PERSPECTIVE

Vijay Shekhar Jha*

Abstract

Plastic waste is a major environmental and public health problem in India and the World, particularly in the urban areas. Plastic shopping or carrier bags and its other products are one of the main sources of plastic waste in our country. Around most towns and cities in India the approach roads are bedaubed and littered with multi-coloured plastic bags and other garbage. Modern methods of disposal such as incineration and the development of sanitary landfills, etc. are now attempting to solve these problems. Lack of space for dumping solid waste has become a serious problem in several cities and towns all over the world. Besides, plastic bag wastes contribute to blockage of drains and gutters, are a threat to aquatic life and human survival when they find their way to water bodies, and this exigency is multiplied due to apathy of present plastic disposing administration.¹ Consequently, Government of India by notification has come up with Plastic Waste (Management & Handling) Rules, 2015 to tackle the problem which though is very innovative yet needs to be worked upon. Furthermore, general mass's attitude towards this problem needs to be overhauled because this problem's root is attached to them and Government needs to spur scientific community too to come up with solution to this conundrum, which presently is not apropos.

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¹ N. M. dana Gopal, P.Phebe, E.V.Suresh Kumar and B.K.K.Vani (2014). Impact Of Plastic Leading Environmental Pollution. Retrieved from <http://www.jchps.com/pdf/si3/20%20jchps%20si3%20N.%20M.%20dana%20Gopal%2096-99.pdf>

INTRODUCTION

Plastics are macromolecules, formed by polymerization and having the ability to be shaped by the application of reasonable amount of heat and pressure or any other form of forces. This great human creation changed the world and brought comfort to our lifestyle. Now plastics are in all human activity ranging from clothing to shelter, infrastructure to communication, agriculture to construction, hardware to packaging and entertainment to health care. Its attractive properties, lightweight and high strength meets a large share of the materials needs of man and that too at a comparatively lesser cost. Plastic that few decades ago considered to be boon for progressive society is now turned out to be a grim curse. It is *an elephant in the room* that we all are aware of but abstain to talk. Manufacturing of Plastic is very inexpensive process as compared to its ubiquitous purchase and use; but its unplanned production paying no heed as to its disposal system has led us to the most appalling and precarious situation where in the words of Supreme Court “India is sitting on a Plastic Time Bomb” and “Plastic bag is a threat more serious than atom bomb.” Moreover India has been ranked as Seventh among most environmentally hazardous country in the world by a new ranking released recently. The study is based on evaluation of “absolute” environment impact of 179 countries, whose data was available and has been done by researchers in Harvard, Princeton, Adelaide University and University of Singapore on January 12, 2011. Thus it has become imperative for welfare state that India is to circumscribe its blatant affect and we require law to act as panacea and obviate this staggering conundrum.

It is estimated that annual global plastic consumption has reached to an overwhelming figure of 297.5 million tons by the year 2015 as per 2012 of Global Industry Analysts. Tons and tons of plastic debris are discarded every year everywhere polluting lands, rivers, coasts, beaches and oceans. Around 300 tons of Marine plastic debris ended up on the shores of India's coasts in the year 2014.

Administrator's ineptitude and apathy is manifested from the fact that the ban on ‘gutka’ and ‘Paan Masala’ laced with Tobacco is not at all effective as manufacturers are playing truant with law and which is compounded by lethargic and indolent state machinery.

Around most towns and cities in India the approach roads are littered with multi-coloured plastic bags and other garbage. Waste is also burnt to reduce its volume. Modern methods of disposal such as incineration and the development of sanitary landfills, etc. are now attempting to solve these problems. Lack of space for dumping solid waste has become a serious problem in several cities and towns all over the world. Dumping and burning wastes is not an acceptable practice today from either an environmental or a health perspective. Today disposal of solid waste should be part of an integrated waste management plan. The method of collection, processing, resource recovery and the final disposal should mesh with one another to achieve a common objective.

As per central pollution control board's (CPCB) estimation around 56 lakh tonnes of plastic waste is generated annually in India. As per report around 9205 tonnes per day are collected and recycled and 6137 tonnes remain uncollected and litter in which Delhi accounts for 689.5

tonnes per day, Mumbai 408.3 tonnes per day Chennai 429.4 tonnes per day and Kolkata 425.7 tonnes per day and around 40% of plastic waste is not recycled.

As per the recent survey conducted by CPCB (Central Pollution Control Board) in 60 major cities found that 15,342.46 tonnes of plastic waste was generated amounting to 56 lakh tonnes a year. Commenting on this lamentable data Supreme Court hearing a PIL said, “We have a habit of collecting garbage from cities and dumping them in villages. Representatives of villagers have stopped being abreast with the problems arising from such dumping.”

CAUSES OF PLASTIC POLLUTION

Plastic Pollution means accumulation in the environment of man-made plastic products to the point where they create problems for wildlife and their habitats as well as for human population². Some of the causes of plastic pollution are:

- 1) Urbanization and Industrialization - Increasing urbanization and industrialization have contributed for increased plastic generation. This increase has been rapid since the middle of the 19th century which has affected the quality of environment.
- 2) As plastic is less expensive, it is overused. When it is disposed of in landfill sites, it does not decompose at a fast rate, and hence pollutes the land or soil in that area³.
- 3) Most people tend to throw plastic bottles and polythene bags away, even after a single use. This drastically increases its pollution rate on land as well as in the oceans, mainly in the developing and underdeveloped countries³.
- 4) Plastic bags, plastic bottles, discarded electronic components, toys, etc., clog the water bodies like canals, rivers, and lakes, especially in the urban areas³.
- 5) Every year, about 100 million tons of plastic are produced all over the world. Out of this, 25 million tons of non-degradable plastic gets accumulated in the environment³.
- 6) Approximately 70000 tons of plastic are dumped in the oceans and seas globally. Discarded fishing nets and other synthetic material are eaten by terrestrial as well as aquatic animals, by mistaking them for jellyfish or food, leading to the bio-accumulation of plastic inside their bodies. This can cause choking in them, ultimately leading to their death. Scores of fish and turtles die every year because of this³.

PLASTICS ARE MAINLY USED IN THE FOLLOWING INDUSTRIES

- | | |
|----------------|----------------------|
| a. Packaging. | b. Storage. |
| c. Disposables | d. Construction etc. |

TYPES OF PLASTIC POLLUTION⁴

² Moore, Charles; Plastic Pollution. Retrieved from <http://www.britannica.com/science/plastic-pollution>

³ Gaikwad, Amruta (2011, September 29). Plastic Pollution: Causes and Effects. Retrieved from <http://www.buzzle.com/articles/effects-of-plastic-pollution.html>

⁴ Different Types Of Plastics And Their Classification. Retrieved from http://www.ryedale.gov.uk/attachments/article/690/Different_plastic_polymer_types.pdf

The Society of the Plastics Industry (SPI) established a classification system in 1988 to allow consumers and recyclers to identify different types of plastic. Manufacturers place an SPI code, or number, on each plastic product, usually moulded into the bottom. This guide provides a basic outline of the different plastic types associated with each code number.

| Plastic Type | General Information | General Properties | Common Household Uses |
|--------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. PET | Polyethylene Terephthalate sometimes absorbs odours and flavours from foods and drinks that are stored in them. Items made from this plastic are commonly recycled. PET(E) plastic is used to make many common household items like beverage bottles, medicine jars, rope, clothing and carpet fibre | Good gas & moisture barrier properties, High heat resistance, clear, hard tough, microwave transparency, solvent resistant | Mineral Water, fizzy drink and beer bottles Pre-prepared food trays and roasting bags Boil in the bag food pouches Soft drink and water bottles Fibre for clothing and carpets Strapping Some shampoo and mouthwash bottles |
| 2. HDPE | High-Density Polyethylene products are very safe and are not known to transmit any chemicals into foods or drinks. HDPE products are commonly recycled. Items made from this plastic include containers for milk, motor oil, shampoos and conditioners, soap bottles, detergents, and bleaches. It is NEVER safe to reuse an HDPE bottle as a food or drink container if it didn't originally contain food or drink. | Excellent moisture barrier properties Excellent chemical resistance Hard to semi-flexible and strong Soft waxy surface Permeable to gas HDPE films crinkle to the touch Pigmented bottles stress resistant | Detergent, bleach and fabric conditioner bottles, Snack food boxes and cereal box liners, Milk and non-carbonated drinks bottles, Toys, buckets, rigid pipes, crates, plant pots, Plastic wood, garden furniture, Wheeled refuse bins, compost containers |



| | | | |
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| | | | |
|--------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 3.PVC | Polyvinyl Chloride is sometimes recycled. PVC is used for all kinds of pipes and tiles, but is most commonly found in plumbing pipes. This kind of plastic should not come in contact with food items as it can be harmful if ingested. | Excellent transparency Hard, rigid (flexible when plasticised),Good chemical resistance, Long term stability, Good weathering ability, Stable electrical properties, Low gas permeability | Credit cards, Carpet backing and other floor covering, Window and door frames, guttering, Pipes and fittings, wire and cable sheathing, Synthetic leather products |
| 4.LDPE | Low-Density Polyethylene is sometimes recycled. It is a very healthy plastic that tends to be both durable and flexible. Items such as cling-film, sandwich bags, squeezable bottles, and plastic grocery bags are made from LDPE. | Tough and flexible, Waxy surface Soft – scratches easily, Good transparency, Low melting point, Thick shopping bags (clothes and produce), Stable electrical properties, Good moisture barrier properties | Films, fertilizer bags, refuse sacks, Packaging films, bubble wrap, Flexible bottles, Irrigation pipes, Thick shopping bags (clothes and produce), Wire and cable applications |
| 5.PP | Polypropylene is occasionally recycled. PP is strong and can usually withstand higher temperatures. It is used to make lunch boxes, margarine containers, yogurt pots, syrup bottles, prescription bottles. Plastic bottle caps are often made from PP | Excellent chemical resistance, High melting point Hard, but flexible Waxy surface, Translucent plant, Strong | Most bottle tops, Ketchup and syrup bottles, Yoghurt and some margarine containers, Potato crisp bags biscuit wrappers, crates, plant pots, drinking straws, Hinged lunch boxes, refrigerated containers, Fabric/ carpet fibres, heavy duty bags/tarpaulins |
| 6.PS | Polystyrene is commonly recycled, but is difficult to do. Items such as disposable coffee cups, plastic food boxes, plastic cutlery and packing foam | Clear to opaque, Glassy surface, Rigid or foamed, Hard, Brittle, High clarity, Affected by | Yoghurt containers, egg boxes, Fast food trays, Video cases, Vending cups and disposable cutlery, Coat hangers, Seed |

| | are made from PS. | fats and solvents | trays |
|-----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------|
| 7. Others | Code 7 is used to designate miscellaneous types of plastic not defined by the other six codes. Polycarbonate and Polylactide are included in this category. These types of plastics are difficult to recycle. Polycarbonate (PC) is used in baby bottles, compact discs, and medical storage containers. | There are other polymers that have a wide range of uses, particularly in engineering sectors. They are identified with the number 7 and OTHER (or a triangle with numbers from 7 to 1 | Nylon (PA) Acrylonitrile butadiene styrene (ABS) Polycarbonate (PC) Layered or multi-material mixed polymers |

ADVERSE EFFECTS OF PLASTICS ON ENVIRONMENT

- a) Many stray animals end up eating plastic bags and other plastic material mistaking them for food due to improper disposal systems, and this ultimately cause their death. In small cities and villages of India, milch animals are reported to be the most suffered victims of this administrative apathy; as stated by NGOs *Karuna Society for Animal* and *Vishaka Society for Protection and care of Animals* -"Due to government neglect across the country, animals particularly cows and bulls are ingesting plastic from garbage dumps and plastic bags are littered across the landscape and oceans. The ingestion of plastic bags chokes the stomach of cows and up to 60 kg of plastic bags were found in the stomachs of cows. What appears to be a healthy cow is in fact a plastic-choked cow or a cow full of plastic". And thus we are way behind in achieving our Constitutional goal as provided under Article 48.
- b) Littering of plastics in the form of plastic bags causes blocking of the cities, municipalities sewerage systems leads to spreading of water borne diseases and increasing the cost of sewerage maintenance systems especially during the rainy season, the plastic rubbish that falls on the road gets washed away into the nearby water reservoirs, canals, and drains, leading to their choking up and overflowing. Flood that came in 1988 in the local areas of Mumbai is an epitome in this regard. And back flush of sewerage waters in such time *adds insult to injury* especially in small cities whose drainage system has not been planned to cope up the ever increasing population pressure causing variety of diseases like skin diseases, water borne diseases and vector borne diseases.
- c) When dumped in landfills, plastic materials interact with water and form hazardous chemicals. If these compounds seep down towards groundwater aquifers, they degrade the water quality, leading to groundwater pollution. Moreover, soil fertility is also affected due to plastic materials as they form part of manure remaining in the soil for years without natural degradation.

- d) Plastic pollution in marine water bodies leads to innumerable deaths of aquatic animals, and this also affects the aquatic plants to a considerable degree.⁵ More than 90% of the articles found on the sea beaches contained plastic. Turtles are highly susceptible to swallowing plastic bags as they strongly resemble their target prey - jellyfish & squid. According to National Oceanographic and Atmospheric Administration, plastics debris kills an estimated 100,000 marine mammals annually and various birds like Albatross. As per 2006 Greenpeace Report-*Plastic Debris In the World's Oceans* nearly 267 animal species are known to have suffered from plastic entanglement and ingestion⁵.
- e) Blockage due to plastic accumulation may form shelters for the breeding of mosquitoes and other harmful vectors insects, which might cause numerous diseases in humans.
- f) Plastic incineration emits very poisonous gases adding much to air pollution. Pollution of environment by industries manufacturing the plastic materials is another serious issue that is faced by the environmentalists and the governments globally. The manufacturers of plastic materials are polluting the environment by disposing of the plastic waste and chemicals used in the process of manufacturing plastic material into nearby water channels and open spaces thereby causing health hazards as well as environmental pollution in a vast area.
- g) Recycling requires laborers, who are at the risk of developing skin and respiratory problems due to inhalation of toxic chemicals.
- h) Styrofoam- Styrofoam is one of the most environmental toxins found in plastic. This highly durable spawn also known as polystyrene, is manufactured using benzene, from coal; styrene, from petroleum; and ethylene, a “blowing agent” used in the process since the crackdown on CFCs. Extracting these raw materials generates air and water pollution, and the process of whipping them together can lead to lung cancer and neurological problems in factory workers.

Like all plastics, polystyrene is non-biodegradable. Even after a take-out container has dissolved 500 years from now, its chemical components will still clog the eco-system. Research on whether polystyrene chemicals “migrate” from container to food is hotly debated, but it's a fact that styrene has been present in our fatty tissue and breast milk for the past 30 years⁶.

POISONOUS EFFECTS OF PLASTIC ON HUMAN BEINGS

Human beings are not untouched by the Poisonous effects of Plastics anymore. Some of the harmful effects of plastics are following:

- i. Hot food in Plastic Bags may cause cancer.

⁵ Claire Le Guern Lytle . When The Mermaids Cry: The Great Plastic Tide .Retrieved from <http://plastic-pollution.org/>

⁶ Protect our Planet from Plastic pollution. Retrieved from <http://www.gits4u.com/envo/envo20.htm>

- ii. Plastic poses serious environmental problem. The Plastic Bags used for packaging food are very dangerous as they contain polyethylene, polystyrene, polyvinyl chloride (PVC) which may cause *Minamata Disease* if we contaminated fish. And also a long continuous exposure (one to three years) in humans, vinyl chloride can cause deafness, vision problems, circulation disorders and bone deformities. Vinyl chloride can also cause birth defects⁷.
- iii. It is considered to be medically approved fact that if a person eats food items carried in Plastic Bags for a long period he or she is very likely to get serious health problems.
- iv. Chemicals including styrene and bisphenol maximized by chemical exchange at high temperature when comes in contact with human body may cause cancer, heart disease and reproductive problems.

ALTERNATIVES AND SIMPLE MEASURES TO MINIMISE THE USE OF PLASTICS MATERIALS

- a) Buy food in glass or metal containers as far as possible; avoid polycarbonate Drinking Bottles with Bisphenol A.
- b) Avoid heating food in plastic containers or storing fatty foods in Plastic containers or plastic wrap.
- c) Plastic toys must be abstained from purchase.
- d) Avoid all PVC and styrene products.
- e) Use paper or cloth bags for shopping and other purposes as much as possible and avoid bringing plastic bags at home.
- f) Recycling of plastic products. Few reasons for advocating Recycling process are⁸

- 1. To reduce global warming 2. To prevent air and water pollution and land
- 3. To obviate land scarcity problem.

But all types of plastics cannot be recycled. Thus, if we recycle the ones that we can, environment will be saved to some extent.

Basic steps involved in Recycling⁸

Step 1-collecting plastic waste from household as well as industrial Waste

Step 2-sorting the plastics waste in different categories such as PET bottles, Bags, Containers, etc.

⁷ Bharucha, E.(2004).Textbook of Environmental Studies for Undergraduate Courses. University Press (India) Pvt. Ltd

⁸ N. M. dana Gopal, P.Phebe, E.V.Suresh Kumar and B.K.K.Vani (2014). Impact Of Plastic Leading Environmental Pollution.

Step 3- The Plastic is cut in tiny pieces.

Step 4- Tiny pieces are thoroughly washed for any dirt or unwanted particles on them.

Step 5-Washed pieces are melted and poured into small containers for reuse.

- g) Road Construction - Wastes plastics are not disposed scientifically due to their non-biodegradability hence the disposal of waste plastic is now become a very big global problem. Recently these waste plastic materials were used as additives in road construction. Generally bitumen is used as binder in road construction and binding capacity of this bitumen is low but when plastic waste is mixed with hot bitumen and the resulted mix is used for road construction increase binding capacity of bitumen. The use of this innovative technology will not only strengthen the road construction but also increase the road life as well as will help to improve the environment. Plastic roads would be a boon for India's hot and extremely humid climate, where temperatures frequently cross 50°C and torrential rains create havoc, leaving most of the roads with big potholes. Dr. R. Vasudevan, Dean and Head of the Chemistry Department of the Thiagarajar College of Engineering (TCE) The man behind this mission is known as Madurai's 'Plastic Road Man'.The first ever plastic road (60 feet long) was laid inside the TCE campus in 2002, followed by a 700 m road in Lenin Nagar, Kovilpatti, the same year. Officially, the industrial town of Salem was the first in the country to lay a 350 m road on an experimental basis using plastic tar technology in 2004⁹.
- h) The German chemical company BASF makes **Ecoflex**, fully biodegradable polyester for food packaging applications which must be accepted and widely used.
- i) **The Koen Tech Co Ltd.** of Korea claims to have produced a machine that can produce fuel oils (gasoline, kerosene and diesel) from waste plastic and waste synthetic resin. "The dioxin materials in the exhaust gas created by the oil recycling device operation are neutralized during the process," says the product literature brought out by Koen Tech Co.

INDIAN LAWS ON PLASTIC WASTE AND MANAGEMENT

Right to public health is entailed in Article 21 of the Constitution and Supreme Court in *Vincent Parikurlagara v. Union Of India;(1987) 2SCC165* too upheld the same view stating the right to maintenance and improvement of public health is included in the right to live with human dignity enshrined in Article 21 of the Constitution. A healthy body is the very foundation of all human activities. In a welfare state this is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health.

Apart from article 21, article 47, article 48A and article 51A too set constitutional duty and goal to be achieved by us and our state. According to article 47 the State shall regard the

⁹ Ahmad,Wasseem.(2014,Nov 22).Use Of Plastic Material In Road Construction. Retrieved from <http://www.scind.org/48/Mindblower/use-of-plastic-material-in-road-construction.html>

raising of the level of nutrition and the standard of living of its people and the **improvement of public health** as among its primary duties. The improvement of public health also includes the protection and improvement of environment without which public health cannot be assured. According to the Article 48A which states that “the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country” and sub-clause (g) of Art. 51A which says, “It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures”. Thus above Articles above articles impose two-fold responsibilities, on the one hand, it gives directive to the State for protection and improvement of environment and on the other hand it casts/imposes a duty on every citizen to help in the preservation of natural environment.

Accordingly Environment Protection Act, 1986 came to achieve the goals set by above stated articles of our constitution and to achieve the objectives of Environment Protection Act1986, Air (Prevention and Control Of Pollution)Act 1981,Water(Prevention and Control) Act1974, Government drafted Plastic Waste & Management Rules,2015; some of its important provisions are as under

- i. This rule recognizes the service of waste pickers and in its preamble too it states to involve them in the Plastic Waste Management and as per sub-clause (x) of section 3 of this rule they have defined them as “individuals VOLUNTARILY engaged in the picking of Recyclable Plastic Waste” & in its sub-clause (2)-(f) of section 6, *Urban Local Body* has been entrusted to engage civil societies or groups working with waste-pickers.
- ii. In its section 4-conditions have been enunciated for the manufacture, stocking, distribution ,sale and use of carry bags , plastic sheets or like or cover made of Plastic sheet and multilayered shall be subject to following condition namely:-
 - a) Use of coloured carry bags and coloured plastics has been banned in food items.
 - b) Recycled Plastics or products made of recycled plastics shall not be used for storing, carrying, dispensing or packaging food stuffs.
 - c) Previously thickness of Plastic Sheets was used to be 40 microns which has now been increased to 50 microns.
 - d) Plastic material shall not be used in any package for packaging *Gutka, Pan Masala & Tobacco* in all forms
- iii. The Draft Rules have mentioned that Bio-Degradable, Dry recyclable & combustible waste & Domestic Hazardous Waste shall be segregated at source in accordance with Solid Waste Management (SWM) Rules, 2015 and also these rules shall be encouraged to use plastic waste in Road Construction ,Energy Recovery & other processes. And, to encourage the use of labelled plastic the draft rules have imposed fines as per the Bye -laws of the Union Labour Board on street vendors/retailers who use unlabelled plastics.
- iv. Price on plastic carry bags has been imposed to reduce their usage & shift people to other options.

- v. The Draft Rules have included the responsibility of the generator which was earlier neglected and this is provided in section 8 of the Plastic Waste (Management & Handling) Rules, 2015.
- vi. All imports and exports of Hazardous and other wastes have been banned with certain exception & this is provided under chapter 3 of Plastic Waste (Management & Handling) Rules, 2015.
- vii. This rule also imposes responsibility on street vendors and retailers, as per its section 14 clause (1): “Retailers or street vendors shall not sell or provide commodities to consumer in carry bags or plastic sheet or multilayered packaging, which are not manufactured and labelled or marked, as per section 11 prescribed under these rules”. And as per its clause (2)-” Every retailers or street vendors selling or providing commodities in, plastic carry bags or multilayered packaging or plastic sheets or like or covers made of plastic sheets which are not manufactured or labelled or marked in accordance with these rules shall be liable to pay such fines as specified under the bye-laws of the urban local bodies.”

FOREIGN COUNTRIES THAT HAVE SET EXAMPLES IN THIS REGARD

The ban in Bangladesh has led to a revival of the jute bag industry and other sustainable and bio-degradable alternatives in the country. Other countries have since moved to ban, discourage or promote the reuse of plastic bags, hundreds of billions of which are consumed each year.

Denmark and Ireland have both experimented with taxing plastic bags. Imposition of tax, imposed in Ireland, had reduced usage by more than 95%. Denmark employs a general waste tax that has proven to be very successful. The waste tax is differentiated so that it is most expensive to landfill waste, cheaper to incinerate it and tax-exempt to recycle it. It has been called a “green” tax on packaging and plastic bags.

In China about 2 billion plastic bags are used each day. To combat the growing problem of plastic bags in China, the government is planning to introduce a “bag tax” in a bid to help cut the demand for plastic bags and raise more money to tackle the pollution caused by the bags.

Taiwan has introduced a ban on the distribution of free single-use plastic bags by government agencies, schools and the military. The ban was expanded to include supermarkets and department stores, and to be applied later to street vendors.

In most of the European Countries manufacturers are required to collect back all plastic bags from society thus shifting responsibility on manufacturers than on State to make the process to function promptly.

SOME GENERAL SUGGESTIONS TO DEAL WITH PLASTIC PROBLEM AND TO IMPROVE THE WASTE MANAGEMENT RULE, 2015 SO AS TO MAKE IT EFFECTIVE IN TRUE REGARD

- 1) The laws requiring these manufactures to install anti-pollution machinery at their premises is not being strictly adhered to by these people. Thus just making a stricter rule is not going to compel them to abide by the rule unless skilled and effective enforcement machinery is established which could act as proactive watchdog and could vet the activities of these industries and manufacturing units quite meticulously.
- 2) Currently the object of the rule appears to be “where the plastic material goes after use” and it needs to be changed to “where the plastic material comes from” thus nipping the problem in the bud itself.
- 3) Establishing machineries at centre and state level are not at all sufficient and this is manifested by the ineffective enforcement of various acts and rules which is already in operation as these people manage to elude the vigilance of these machineries thus the only way out is establishment of various watchdog machineries at lower level which can keep a constant vigil on the manufacturers and producers and anti-corruption departments have to be empowered to abate corruption in these machineries.
- 4) As per the Rule of 2015, punishment provision is to be made by *Urban Local Bodies* and punishment that they impose is too lenient to deter its contravention thus stricter punishment with strict enforcement machinery is need of the hour.
- 5) In India the quintessential cause of all pollutions esp. plastic pollution emanates from attitude of people towards it. Some people abhor this but due to ineffectiveness of proper machinery or otherwise do nothing, some do not see it as worth noticing and is inured to it and consider it to be part and parcel of the system itself, some due to unawareness adds to pollution and some desire to eradicate it but do not know what to do, thus unless people's attitude towards it is overhauled, the problem will never cease to exist. Thus, it is the combination of awareness and punishment that may work. Street vendors and retailers must often be raided to check whether they are abiding by the rule or not, nominal fine on consumers too must be levied because all information as to fines disseminate in common mass the fastest & people from old to young ones must be made aware as to the ill effect of it and not theoretical but practical knowledge must be imparted so that people could do on their own to deal with this problem.
- 6) A new waste management policy is gaining popularity in Europe because it saves tax payers money and is significantly better for the environment and public health. Extended Producer Responsibility (EPR) also called “Producer Takeback” is a product and waste management system in which manufacturers take the responsibility for environmentally safe management of their product when it is no longer useful or discarded. This is an absolutely essential policy whereby the producers of products must be made financially, physically and legally responsible for their products. The principle of “Extended producer responsibility” requires continuing accountability on producers over the entire life-cycle of their products. The aim of EPR is to encourage producers to prevent pollution and reduce resource and energy use at each stage of the product life cycle through changes in product design and technology. Producers will thus have a financial incentive to design their products with less hazardous and more recyclable material. The successful example of EPR implementation is in Germany

which shows reduction in consumption of packaging fell from 40% (by volume) to 27% by reducing the use of plastic packaging, significant design changes in the process and development of new technologies ¹⁰. EPR (Extended Producer's Responsibility) in Plastic Waste (Management & Handling) Rules, 2015 is still loose & needs to be worked upon for better implementation of these rules. A clear directive of how EPR should be followed needs to be included therein.

- 7) A system must be devised where manufacturers must be mandated to collect back all plastic bags in the same manner as it happens in most of the countries Europe.
- 8) Plastic materials' use near water bodies be it lake, pond, river etc. must be totally prohibited as in present time plastic products have become a leading source of water pollution.
- 9) People must segregate the domestic waste products at their home itself, which helps municipal bodies to process the waste easily.
- 10) People must be encouraged to use cloth bags and paper bags for shopping.
- 11) There is staggering dearth of dustbins in cities and thus people throw their wastes on the road itself; especially it is very prevalent in small cities. Therefore our Government needs to install many more bins in cities. Moreover Municipal Corporation of different cities seem very lethargic and overburdened with respect to its burgeoning work load so Government of different states needs to rejuvenate its municipal corporation.
- 12) Scientific endeavours in this field must be highly supported by our government. In this relation following information is worth noticing: The IIP, a constituent lab of the Council of Scientific and Industrial Research, has for the first time in the country developed a technology to convert plastic waste into petroleum products. And, The Indian Oil Corporation Limited and the Department of Science and Technology are expected to establish India's first plant to convert waste plastic into petrol, diesel and LPG¹¹.
- 13) The establishment like Airport and Railways required to develop environmental friendly waste management system for disposal of plastic waste generated from their premises

CONCLUSION

Use of biodegradable and eco-friendly substitutes to Plastic carry bags besides creating awareness among the general public on the ill effects of indiscriminate use of plastic carry bags, the authorities should strictly implement the '*Plastic Waste (Management & Handling) Rules, 2015*' and encourage manufacture and use of qualified substitutes to plastic carry bags by way of granting subsidy to the manufacturers at least to begin with. The loss of revenue on this account may only be a fraction of the expenses incurred by the State and individual

¹⁰ Report of CPCB on "Assessment of Plastic Waste and Its Management at Airports and Railway Stations in Delhi". Retrieved from http://cpcb.nic.in/upload/NewItems/NewItem_155_FINAL_RITE_REPORT.pdf

¹¹ Bharucha, E.(2004).Textbook of Environmental Studies for Undergraduate Courses. University Press (India) Pvt. Ltd

citizens on curbing the pollution of the environment and on maintaining sanitation, hygiene and health and curing the diseases caused as a result thereof.

The Draft Rules need to be strengthened further. The main purpose should be to discourage the use of plastic in the country, but somehow the proper authorities and concerned incumbents have failed in the attempt to address this issue. EPR (Extended Producer's Responsibility) is still loose & needs to be worked upon for better implementation of these rules. A clear directive of how EPR should be followed needs to be included. The Penal provisions are weak and thus there should be inclusion of heavy penalty for non-compliance with the rules for effective implementation. But this conundrum will not be obviated unless every individual introspect as to how much he/she is adding to the problem and every individual should devise new ideas & take initiatives to abate the use of plastic materials in his/her daily life. On an individual level we can reduce the use of unnecessary items while shopping, buy items with minimal packaging, avoid buying disposable items and also avoid asking for plastic carry bags. Present time requires our introspection in which one needs to think about all the articles that one uses daily that are made from plastic, should make a list of those plastic articles and should ask oneself the following questions:

- (1) How can you reduce the amount of plastic you use?
- (2) What effects does plastic have on our environment?
- (3) Where did the plastic come from/ how is it made?
- (4) What happens to it when you throw it away/where does it go?
- (5) Are we using 3Rs principle of reduce, reuse, recycle and proper waste disposal?

MANDATORY CSR IN INDIA: LESSONS FROM OTHER DEVELOPING COUNTERPARTS

Palak Jain*

Abstract

Over the past few years, corporate social responsibility as a concept has been the focus of many deliberations and discussions. With the role of companies transitioning from mere profit-making enterprises to socially-responsible businesses, the importance of CSR has grown both academically and professionally. The present article aims to understand the need felt to introduce mandatory CSR in India and further predict the possibility of it being a success in at least augmenting the developmental efforts of our nation. This is done through a brief analysis of other developing countries which also seem to take a shift towards opting mandating corporate social responsibility for businesses as unlike the developed countries which hold the notion that CSR by its nature is voluntary. In the process, article also traces the legal journey of CSR in India and what does the term CSR comprises when we talk about it in Indian context. The article puts forward that the mandatory nature of CSR can be helpful only in presence of a strong accountable system both legally and publically. It is seen that the regulatory actions have helped increase the reporting of social, economic and development efforts undertaken by corporations, both nationally and globally. The impact of policy on upliftment and development of the marginalized is yet to be established as the CSR regimes across lack concrete steps for impact assessment of work done under CSR programmes. However, one can still be hopeful as the law is still in its nascent stage across all developing countries.

Keywords: Corporate Social Responsibility, Mandatory CSR, Developing countries, Impact, Social Development, Companies Act, 2013

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WHY INDIA NEEDED A MANDATORY CSR?

Corporate Social Responsibility (CSR) in India, having conceptual roots in ancient wisdom and evolving throughout the time span of modern history, saw a kick-start in its discourse after the Liberalization, Privatization and Globalization of Indian economy which in its fold brought various social, economic and environmental challenges. World Bank estimates that about 288.4 million people in India live on less than U.S. \$1.25 a day.¹ Poverty is further intertwined with illiteracy, gender inequality, and malnutrition. Vast environmental issues confront India, such as deforestation, loss of biodiversity, water pollution, air pollution, and the particular vulnerability of Indian populations to natural disasters, among others. In a country which has the highest concentration of people living below poverty-line, India has 90 billionaires and the number is expected to rise to 220 in next decade (in addition to 2.5 lakh millionaires which is likely to get doubled by 2023). This indicates the failure of the trickle-down effect in India.

With the poor remaining poorer and the corporates growing richer day by day, the significance of socially responsible behavior from companies becomes more pronounced. Many companies in India have been performing CSR activities but there still remains a huge gap to be filled.

It was only in the last decade that CSR, in India, has started been given express recognition by a regulatory and legal standpoint. The Indian Ministry of Corporate Affairs (MCA) made its first formal CSR-related efforts when it introduced the Voluntary Guidelines for Corporate Social Responsibility, 2009.² Since then, the Indian government has introduced several other efforts to address CSR concerns. The much discussed and awaited CSR provisions were notified by the Ministry of Corporate Affairs on February 27, 2014 giving effect to Section 135 of the new Companies Act dealing with CSR provision, Schedule VII³ and the Companies (Corporate Social Responsibility) Rules, 2014 (CSR Rules). India has apparently become the first country to have a legislation providing 2% mandatory CSR spending and disclosure for certain-sized companies.

The current approach towards mandatory CSR, continuously being shaped by laws and regulations, is driven by the belief⁴ that businesses and corporations reaping profits in the

¹ *Poverty & Equity Data - Country Dashboard - India.* (n.d.). Retrieved September 15, 2015, from World Bank, Poverty & Equity Data: <http://povertydata.worldbank.org/poverty/country/IND>

² *CSR Voluntary Guidelines, 2009.* (n.d.). Retrieved September 2, 2015, from Ministry of Corporate Affairs Website: http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf

³ Schedule VII deals with the activities which may be included by companies in their CSR policies

⁴ Then Minister of Corporate Affairs, Mr. Salman Khurshid, in proposing the Voluntary CSR Guidelines, 2009: *"We have seen the business sector generating wealth and value for the shareholders in the last sixty years, but simultaneously we also have the problems of poverty, unemployment, illiteracy, malnutrition etc. facing the nation. The corporate growth is sometimes seen as widening the gap between the India and Bharat through its income – skewing capability. This gap needs to be bridged. While the Government undertakes extensive developmental initiatives through a series of sectoral programmes, the business sector also needs to take the responsibility of exhibiting socially responsible business practices that ensures the distribution of wealth and well-being of the communities in which the business operates."*

society owe a responsibility to the very same society which, right now, suffers from wide income disparities and grave social problems. These entities, hence, should assist government in its developmental initiatives leading to equitable wealth distribution and inclusive growth.

Not just India, but many other developing countries have rejected the notion that CSR should be purely voluntary and have adopted the mandatory view of CSR. It is interesting to note that out of the top six countries having the largest share of global extreme poor (countries being India, Nigeria, China, Bangladesh, Congo and Indonesia⁵), four (India, Nigeria, China and Indonesia) have started mandating CSR in one way or the other.

PRE-2013 STATUS OF CSR IN INDIA AND THE BUILD-UP

Under the Companies Act of 1956, responsibility of companies was held to be only towards the shareholders. The High Courts in the different state jurisdictions noted that directors are agents of the companies and further the interests of the shareholders⁶ and private corporations are profit-making ventures of the shareholders.⁷ However, of late, the Indian Supreme Court called upon the legislature to safeguard the interests of the society at large by regulating the operation of the fraudulent companies functioning without any social responsibility.⁸ This goes on to show a transition in the judicial approach towards Corporate Responsibility from shareholder centric to stakeholder considerate. This shift has also pushed the government to issue guidelines facilitating and regulating interactions between corporate and society.

In the late 2009 MCA framed the groundbreaking *CSR Voluntary Guidelines*⁹ in what has been deemed to be the first concrete attempt to recognize CSR legally. In July 2011, the MCA issued the *National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (ESG Guidelines)*.¹⁰ They superseded the CSR Guidelines, 2009 in order to give way for more comprehensive guidelines.

To increase transparency and adoption of the ESG guidelines, in August 2012 SEBI issued a circular mandating that the top 100 listed companies based on market capitalization submit *Business Responsibility Reports (BRR)* regarding their ESG initiatives.¹¹ The BRRs were made to be submitted mandatorily as part of a company's annual report by inserting Clause

⁵ *Global Monitoring Report*. (n.d.). Retrieved August 28, 2015, from World Bank Web site: <http://www.worldbank.org/en/publication/global-monitoring-report/report-card>

⁶ *Dikshit and Co. Ltd. v. Mathura Prasad*, AIR 1925 All 71; *Albert Judah v. Rampada Gupta and Anr.*; AIR 1959 Cal 715

⁷ *Amarjit Singh v. Punjab National Bank and Others*, [1987] CompCas 153 (Delhi)

⁸ *K.K. Baskaran v. Secretary, State of Tamil Nadu*, AIR 2011 SC 1485

⁹ CSR Voluntary Guidelines, 2009, op. cit.

¹⁰ *National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business*. (2011, July). Retrieved from Ministry of Corporate Affairs Web Site: http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12Jul2011.pdf

¹¹ *FAQs on Business Responsibility Reports*. (2013, May 10). Retrieved September 2015, from SEBI Web Site: http://www.sebi.gov.in/cms/sebi_data/attachdocs/1368184343037.pdf

55 in the Listing Agreement by SEBI.¹² SEBI also encouraged other listed companies to voluntarily disclose information on their ESG performance in the BRR format.

In April 2013, the new “Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises” took effect (DPE Guidelines).¹³ These new guidelines viewed CSR as a core component of the work of public sector enterprises.

There were some commonalities between all these guidelines. CSR was seen as an activity beyond one-time charity and approach towards CSR was to take into account social, economic and environmental factors by the company. CSR for companies, irrespective of its size or sector, was seen as a voluntary act until the DPE guidelines came into force which made CSR mandatory for the Public Sector Undertakings.

AMENDMENT OF COMPANIES ACT

To keep in tune with the current economic realities and to redefine relationships between shareholders, stakeholders, company management and Board; an overhaul of the ages-old Companies Act, 1956 was sought starting with Companies Bill, 2008 which lapsed and got reintroduced as Companies Bill, 2009. The 2009 version of the Companies Bill did not include any provisions related to CSR. However, the 2009 version of the bill underwent extensive review by the Standing Committee of Parliament on Finance¹⁴ which included a discussion of the extent of CSR being undertaken by corporations and the need for a comprehensive CSR policy.

After a feedback period, on February 27, 2014 (Guidelines on CSR and Sustainability for Central Public Sector Enterprises, 2013), the MCA notified Section 135 of the Companies Act, 2013 and the CSR Rules, 2014 which came into effect from 1st April, 2014.¹⁵

Reflecting the controversial aspect of the provision, the then-secretary to the government at the MCA acknowledged that the MCA had taken a “considered view” in introducing the provision.¹⁶

¹² Vide circular no. CIR/CFD/DIL/8/2012 dated August 13, 2012

¹³ *Guidelines on CSR and Sustainability for Central Public Sector Enterprises*. (2013, April 1). Retrieved August 2015, from Department of Public Enterprises Web Site: http://www.dpemou.nic.in/MOUFiles/Revised_CSR_Guidelines.pdf (superseded Guidelines for Central Public Sector Enterprises, 2010 issued by Department of Public Enterprises)

¹⁴ Standing Committee on Finance. (2010). *The Companies Bill, 2009 - 21st Report*. Ministry of Corporate Affairs. 15th Lok Sabha. Retrieved August 2013 from National Foundation of Corporate Governance website: http://www.nfcgindia.org/pdf/21_Report_Companies_Bill-2009.pdf

¹⁵ *The Companies (Corporate Social Responsibility Policy) Rules, 2014*. (2014, February). Retrieved September 1, 2015, from Ministry of Corporate Affairs Web Site: http://mca.gov.in/Ministry/pdf/CompaniesActNotification2_2014.pdf

¹⁶ Standing Committee on Finance, op.cit., Para 9.43.

SALIENT CSR PROVISIONS

The CSR provision is applicable to companies, including foreign companies, with an annual turnover of INR 1,000 crore and more, or a net worth of INR 500 crore and more, or a net profit of INR 5 crore or more during any financial year. Companies that trigger any of the aforesaid conditions must spend at least two per cent (2%) of their average net profits made during the three immediately preceding financial years on CSR activities.

Although the Act mandates CSR disclosure, it does not mandate CSR spending per se. The unique comply-or-explain perspective envisioned by the Act means that a spending of 2% will be required, or its absence will be scrutinized.

- **CSR expenditure to exclude those incurred in the normal course of business**

Mandatory CSR as envisaged by the Act and Rules is in addition to the initiatives undertaken by corporations in their regular course of business. It is to be noted that “Shared value”¹⁷ concept has been ruled out from the ambit of CSR in India wherein the idea is to create economic value in a way that also creates value for the society by addressing its needs and challenges.

- **Scope of Activities Expanded**

Revised Schedule VII indicates an exhaustive list of CSR activities which can be undertaken by a company to fulfill its CSR obligations limiting a company’s autonomy to choose a CSR activity. The accompanying rules seemed to give some flexibility to companies to conduct CSR but on a careful scrutiny, no deviation was possible from Schedule VII. This was opposed by the companies. However, responding to stakeholder representations, the MCA issued June 2014 Circular. Crucially, the Circular explains that the items in Schedule VII are “broad-based and are intended to cover a wide range of activities.” For instance, the MCA clarified that “trauma care around highways in case of road accidents” would be considered CSR under “healthcare”.

- **Third party entities and Pooling of Resources permitted**

Companies belonging to the same group can set up a registered trust or a registered society or a company established under section 8 of the Act or engage such a third party, to undertake CSR activities. Companies can also join hands with other companies and pool resources to undertake CSR projects jointly, in such a manner that such companies can report separately on such projects. This is a positive development as it would allow groups and companies operating in an area to come together and undertake projects of a larger scale.

¹⁷ Porter, M. E., & Kramer, R. M. (2011, February). Creating Shared Value. *Harvard Business Review*

- **Tax Treatment**

Amount spent on CSR cannot be allowed as deduction under section 37 for computing the taxable income of the company as has been cleared by the CBDT circular. The circular states that the objective of CSR is to share burden of the Government in providing social services by companies having net worth/turnover/profit above a threshold. If such expenses are allowed as tax deduction, this would result in subsidizing of around one-third of such expenses by the Government by way of tax expenditure.¹⁸ In order to further provide certainty on this issue, said section 37 has been amended. However, the CSR expenditure which is of the nature described in section 30 to section 36 of the Income-tax Act shall be allowed as deduction under those sections subject to fulfillment of conditions, if any, specified therein.

- **Employees' contribution towards CSR**

Companies are permitted to train their employees and/or personnel of their implementing agencies to build CSR capabilities. Any expenditure incurred in providing such training up to a ceiling of 5% in one financial year is permitted under the CSR budget. Moreover, salaries paid by the companies to regular CSR staff as well as to volunteers of the companies (in proportion to company's time/hours spent specifically on CSR) can be factored into CSR project cost as part of the CSR expenditure.

- **Reporting**

It is mandatory for companies to disclose their CSR Policy, programs/projects undertaken and amount spent in their report and the CSR Rules provide for a separate format. The report containing details of such activities and CSR policies have to be made available on the company's website for informational purposes. If a company fails to meet its CSR obligation, the Board will have to specify reasons for non-compliance in its report. Failure to report on CSR obligation may have penal consequences for the company up to a maximum of INR 2.5 million.

Mandatory CSR reporting is a welcome regulation and is followed in many other countries. Such a regulation is motivated by the idea that increased disclosure can trigger additional stakeholder interest and pressure; as a result, the corporations covered by the regulation become more socially responsible.¹⁹

¹⁸ Vide CBDT Circular no. 01/2015 dated 21/01/2015, Ministry of Finance

¹⁹ Ionnou, I., & Serafeim, G. (2014, August 20). *The consequences of mandatory corporate sustainability reporting: Evidence from four countries*. Retrieved August 12, 2015, from Harvard Business School Web Site: http://www.hbs.edu/faculty/Publication%20Files/11-100_7f383b79-8dad-462d-90df-324e298acb49.pdf; Weil, D., Fung, A., Graham, M., & Fagotto, E. (2006). The effectiveness of regulatory disclosure. *Journal of Policy Analysis and Management*, 26(1):155-181; Jorgensen, A. V., Oyer, P., & Greenstone, M. (2006). Mandated disclosure, stock returns, and the 1964 Securities Acts Amendments. *Quarterly Journal of Economics*, 121(2): 399-460.

MANDATORY CSR POLICY IN OTHER DEVELOPING COUNTRIES

There are very few relevant national and international studies on the impact of CSR programs on community development or poverty reduction. Most of these impact assessment studies concentrate on CSR's impact on companies' reputation and profits. Another fact is that mandatory CSR as a policy has been very recently introduced in all these countries. Thus, it is not a ripe time to come to any conclusions about the failure or success of this model. What one can get is a perspective about what kind of challenges are these countries fraught with while implementing mandatory CSR and what potential CSR holds in assisting the development of these countries. Another issue lies in the ever contested debate of the definition of CSR and different nations defining CSR differently for mandating or regulating it. Although such contestation is not uncommon with social science concepts, it presents difficulties in theoretical, empirical and comparative analysis of CSR and its impact.

Indonesia, one of the first nations to take a mandatory CSR approach, enacted Limited Company Liability Act No. 40/2007 on the premise that companies exploiting natural resources have an added responsibility towards society thus mandating CSR for natural resources based companies. A company in this category is obligated to allocate funds for CSR implementation, and the allocated funds are considered corporate operational expense. Failure or neglecting this obligation carries with it sanctions.

The Nigerian government promulgated the NEITI Act 2007 which mandated due process and transparency in extractive revenues paid to and received by government as well as its application. Thus, the primary objectives were to promote transparency, responsible governance and accountability in the mineral industries and secondary objectives were to foster growth and reduce poverty. This was done through a system of audits. There were sanctions on breach of NEITI provisions against companies or their officials and government officials who give false information or report, render false statement or account, refuse or delay to render statements or account that result in loss of revenue to the federal government of Nigeria.

In China, the new company law that came into effect in 2006 explicitly recognized CSR.²⁰ Although, many opine that the wordings of the CSR provision in the new law is exhortatory rather than mandatory but still there seems to be a strong support for CSR by the government which can be seen in the way guidelines have been passed regulating CSR spending and disclosure.

As CSR gains traction in these countries, the regulation has helped make CSR reports accessible for public scrutiny, thus involving stakeholder engagement. However, the challenge is with respect to the impact or reforms, if any, created because of such regulation. In Nigeria, the government is yet to declare where it has invested the money, if any, realized

²⁰ Article 5 of Chinese Company Law, 2006 – “*In the course of doing business, a company must comply with laws and administrative regulations, conform to social morality and business ethics, act in good faith, subject itself to the government and the public supervision, and undertake social responsibility.*”

from NEITI's activities. Indonesia lacks CSR standardization which is required in order to monitor and evaluate CSR programs. In China, the very enforceability of CSR is unclear, thus, leaving CSR activities relatively unchecked.

CONCLUSION AND WAY FORWARD

India is widely regarded as a country where CSR has played a key role in social development, much before it started globally. However, the involvement of the business community has always been concentrated among a few of the long established family-owned companies that contribute significantly towards social development. Till date, the idea does not seem to have penetrated into the numerous smaller family-owned and medium-sized enterprises in the country. Recent policy interventions by the Government have catalyzed the sector to some extent. In 2010-11, 336 firms had disclosed their donations and expenditure on community and environment related activities. This number rose to 1,470 in 2012-13 with 162 firms disclosing their environmental performance information.²¹ A combination of both regulatory and societal pressures has forced companies to take CSR more seriously than before. In fact, the board of companies is now directly responsible for effective utilization and reporting of CSR funds under the new Act.

A careful analysis of the mandatory CSR regulation and its social environment suggests that compulsory regulation can only be a good CSR tool when it is created in an enforceable and transparent process. Compulsory regulation is not alien to CSR but needs to be defined, coherent, specific, and practicable. Taking a lesson from these countries, India has taken a very cogent approach towards mandating CSR which will fructify if it gets strong civic accountability and strong enforcement of penalty against any breach.

As it comes out from the issues faced by our counterparts, impact assessment of the work done by corporations or government under the CSR model is crucial for understanding the contribution of this policy in development of the country, if any. It would be important to gauge the effectiveness of efforts being put by the corporation and its affiliates. It would also help in refining the model further by incorporating independent feedback from the direct beneficiaries of the program. Especially in cases where a social investment is made, calculation of SROI could give an insight into the effectiveness of the investment.

Apart from private sector, Government needs to revisit the policies in order to increase the effectiveness of the programs undertaken by the private sectors. In the decade to come, the Government should more clearly articulate the expectations from the private sector towards development activities so that they can put a concerted effort in a given direction. Moreover, the concept of shared value, which will eventually be of high interest for private sector, needs to be encouraged. The Indian corporations should be made aware of how they can tap economic value by creating social value through their CSR programs. This will change their

²¹ Bansal, Sangeeta & Rai, Shachi (2014), "An analysis of Corporate Social Responsibility in India", Economic and Political Weekly, Vol - XLIX No. 50

attitude towards CSR as being an opportunity rather than a liability. Only then can will they take the present CSR regime seriously and strive to make it better and more encompassing.

The CSR provisions in India are not free from legal predicaments and there are certain grey areas which require sober clarifications. One should be hopeful that this will come in time as the law is still in nascent stage of implementation. Over the next 10 years, India needs to move ahead from just CSR towards sustainability and ideally towards creating a shared value with an increased focus on the emerging needs of the country in the decade to come.

PLEA BARGAINING AS A SOLUTION TO HEAVY PENDENCY OF CRIMINAL CASES

Anish Ghosh*

Abstract

Heavy pendency of criminal cases is a problematic issue for Indian courts. The right to a speedy trial is guaranteed under the Indian constitution as a component of the right to life under Article 21. Therefore, the courts are constitutionally bound to ensure speedy trial of cases. However, the judiciary has largely failed to achieve efficient disposal of cases. The reasons for the pendency of cases include, inter alia, the shortage of judicial man power and laxity in court culture. To remedy the situation plea bargaining provides an effective and workable solution. In plea bargaining the parties in a criminal proceeding decide the outcome of their case by mutual agreement under the judiciary's supervision. The parties avoid the trial process of the courts by doing so. Avoiding trial allows for the quick resolution of the case. The settlement of the case by the parties frees up the time of the court which otherwise would have been used in adjudicating the matter. Such reduction in the burden on the court's time allows the courts to dispose cases pending on their registers in an expedient manner. This paper aims to propose plea bargaining as a solution to the problem of huge pendency of cases in India. This paper highlights the positive aspects of the plea bargaining process which allow for speedy justice delivery.

Keywords: Plea Bargaining, Pendency, S. 265 of CrPC, Speedy Trial, Criminal Procedure etc.

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INTRODUCTION

The legal maxim of “*Justice delayed is justice denied*” illustrates the miscarriage of justice pendency of criminal cases in India cause. The heavy pendency of criminal cases is a huge problem for India. At the end of 2013 the total number of cases pending was a mammoth 31,367,915 in all courts.¹ The heavy pendency of cases in India is an important issue because delay in court proceedings erodes the confidence of the public in the effectiveness of the criminal justice delivery system. Naturally, the public will tend to grow weary of the efficacy of the courts if the courts are not doing their job of dispensing justice in a timely manner.

The Indian criminal justice system suffers from a number of problems which lead to the heavy pendency of cases. The 245th report of the Law Commission defines ‘*pendency*’ as “*all cases instituted but not disposed of*.² One major problem causing pendency is the lack of adequate number of judges to carry out timely justice dispensation. The number of judges in Indian courts is far below the required number. As of December, 2013 out of 19,518 positions for judges in the subordinate courts, 4,403 seats remain vacant.³ Further, the Indian criminal law system does not impose any limitations on the time in which each stage of a case has to be completed. The lack of a clear guideline leads to criminal cases continuing for long periods.

Solutions to the gargantuan problem of pending criminal cases are incredibly important in light of the threat to delivery of justice such pendency causes. In the light of looking for solutions, introduction of the concept of plea bargaining is a step in the right direction. Plea bargaining was introduced in India by the Criminal Law (Amendment) Act, 2005. Plea bargaining is a system in which the parties in a criminal case enter into a pre-trial agreement to determine the consequences of their dispute. Plea bargaining has been implemented with great success in countries like USA. The impact of plea bargaining is so significant in USA that 90 to 95 per cent of guilty pleas are through negotiated settlements and not court trials.⁴ And, with proper implementation plea bargaining can prove to be successful in India as well.

This article aims to enumerate the constitutional basis for speedy trial. Also, adverse effects of pendency of criminal cases are analysed. Further, problems with the Indian criminal justice system which lead to heavy pendency of cases are presented. And finally, the plea bargaining system is proposed as the possible answer to the huge problem of heavy pendency of criminal cases in India.

CONSTITUTIONAL BASIS OF SPEEDY TRIAL

¹ Tom Lasseter, *India's Stagnant Courts Resist Reform*, Bloomberg, available at: <http://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases>.

² 245th Law Commission of India Report, *Arrears and Backlogs: Creating Additional Judicial (Wo)man Power*, (2014)

³ Rashme Sehgal, *Why the Backlog of 3 Crore Cases in Indian Courts will continue to Grow*, Scroll, available at: <http://scroll.in/article/759809/why-the-backlog-of-over-3-crore-cases-in-indian-courts-will-continue-to-grow>.

⁴ S. Kathuria, *The Bargain Has Been Struck: A Case for Plea Bargaining in India*, 19(2) Student Bar Review 55, (2007)

The state is duty bound to ensure timely justice delivery. Indeed, the right to a speedy trial has been recognised to be a part of the right to life under A. 21 of the constitution.⁵ While determining the rights of the accused to a right to an appeal in *A R Antulay v. R S Nayak*⁶, the Supreme Court held that the right to a speedy trial was a part of fair, just and reasonable procedure implicit in Article 21 of the Constitution. Further, the right to a speedy trial is implicit at each and every stage of the investigation process. The Court held speedy trial is in the interests of everybody concerned including the general public as the justice delivery system serves the entire community and not only the parties in the proceeding.

The Indian state is also bound under the Directive Principles of State Policy as enumerated in A. 38(1), 39 and 39-A of the Constitution of India to ensure speedy trial. In *L Babu Ram v. Raghunathji Maharaj*⁷, the Supreme Court held while interpreting A. 38(1) that “social justice” includes “legal justice”. And legal justice means that justice administration system should provide a cheap, expeditious and effective instrument for realisation of justice.

ADVERSE EFFECTS OF PENDENCY OF CRIMINAL CASES

The pendency of criminal cases in Indian courts is a huge cause of concern. The concern arises because huge pendency of cases in the courts erodes public confidence in the whole justice delivery system. The judiciary is a tool by which the state ensures the social welfare of the citizens of the country. In India we have a situation where citizens knock at the doors of justice and get only ignorance in return. Such apathy threatens the credibility of the whole judicial system. Therefore, undermining of the judiciary by delay in justice delivery challenges the foundation of the democratic structure of our society.⁸

Long delays in criminal cases have sometimes the effect of not only delaying justice but also denying justice. As a result of delay, the statements of witnesses may become unreliable due to the memory of the witness fading or because of death of a witness. In such a situation even a legitimate case may not be granted proper remedies just because of the slowness of the judicial proceedings.⁹

In India criminal trials sometimes do not commence for as long a period as three to four years after the accused has been remitted to judicial custody.¹⁰ In certain cases the time spent by the accused in judicial custody exceeds the maximum punishment for the crime they have been charged for. Such extension of judicial custody is especially common for poor people who are unable to get a bail due to the monetary requirement in getting a bail.¹¹ The bail procedure under Code of Criminal Procedure, 1972¹² is such that the accused is required to

⁵ *Hussainara Khatoon v. Home Secretary, State of Bihar*, 1979 AIR 1360.

⁶ 1988 SCR Suppl. (1) 1

⁷ AIR 1976 SC 1734

⁸ 77th Law Commission of India Report, *Delay and Arrears in Trial Courts*, 1978

⁹ Ibid.

¹⁰ 142nd Law Commission of India Report, *Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any bargaining*, 1991

¹¹ Supra 3

¹² Hereinafter, CrPC

furnish a personal bond guaranteeing payment of a certain sum of money if he fails to appear for a trial. The situation is further aggravated by the requirement of sureties who are again required to furnish a certain amount of money as guarantee for the accused's appearance in trial. Therefore, the bail provisions impose economic barriers on the poor who can neither get their cases heard nor leave jail while their case is pending.

PROBLEMS LEADING TO PENDENCY OF CRIMINAL CASES

There are numerous reasons for pendency of criminal cases in Indian courts. One of the problems is the deficit in the number of judicial officers. The 120th Law Commission recommended a judge to population ratio of 50 to 1.¹³ However, the current ratio is a long way off that mark. This results in most courts in India functioning below their capacity. Since the courts are not able to handle all the cases under their jurisdiction due to a lack of judges, cases start to pile up and pendency of cases reaches high levels. On a related note, the *National Court Management Systems (NCMS)* formed in 2012 by the Supreme Court suggests the amount of cases in Indian courts will increase to 15 crores by 2040.¹⁴ In light of such a figure the suggestion of the 120th Law Commission report becomes even more pertinent.

Cases in India run for long periods because no time periods are set for completion of different stages of the case. The lack of a guideline also allows the courts to adjourn cases without having the fear of accountability. The 245th report of the Law Commission mentioned the efficacy of time tables in benchmarking performance of courts.¹⁵ Such time tables are used in other countries like the USA, UK and Canada. However, no such tool for measuring the performance of cases exists in India. Therefore, courts enjoy the benefit of not being accountable for the time taken by them to dispose cases.

Generally, Indian criminal courts are unable to cope with the humungous work load in Indian litigation. Naturally, adjudging over the rights of more than a billion people is a herculean task any system of justice will have problem tackling. However, the main cause of the pendency of cases in India is the lack of manpower in the judiciary. The lack of manpower is complemented by the laxity in enforcing accountability on the courts. These two issues, *inter alia*, represent the general culture of delay in Indian court proceedings. Ultimately, such delay causes the problem of heavy pendency of cases in India.

PLEA BARGAINING AS A SOLUTION TO THE HEAVY PENDENCY OF CRIMINAL CASES IN INDIA

Plea bargaining is a possible solution to the huge pendency of criminal cases in India. Plea bargaining refers to pre-trial negotiations between the defendant and the prosecution. During negotiations the accused pleads guilty in exchange for concession in the sentence of

¹³ 120th Law Commission of India Report, *Manpower Planning in Judiciary: A Blueprint*, 1987.

¹⁴ R. Gogoi, *Challenges Facing the Indian Judiciary – Identification and Resolution*, 1 Law Weekly, Chennai, 1 (2014)

¹⁵ Supra 2

punishment. The court does not decide the outcome of the case; the concerned parties decide the outcome between themselves. The independent settlement of the case by the parties removes the burden each hearing takes on the court's time. Consequently, the workload of the court is lowered. And therefore the court is able to deliver judgments on the remaining cases under its jurisdiction faster.

The plea bargaining system in India has a significant degree of judicial supervision. The concept of plea bargaining has been added only recently by the Criminal Law (Amendment) Act of 2005. Plea bargaining was added in Chapter XXI of the CrPC by the amendment. The provisions under CrPC enable an accused to file a plea-bargaining application in the court where trial is pending.¹⁶ After the plea-bargaining application is filed the court must examine the accused in camera to find out whether he filed the application voluntarily.¹⁷ After the court is satisfied with the voluntariness of the application, the court must issue notice to the complainant or public prosecutor to negotiate a mutually agreeable consequence of the case. If an agreement is reached the court can award compensation to the victim and then decide the punishment to be conferred. Thereafter, the court may release the accused on probation if the law allows for it. Otherwise, the accused may be punished to half the length of the minimum sentence prescribed for the offence. If no minimum punishment is mentioned then the accused may be sentenced to one-fourth of the time mentioned as punishment for the offence.

After the plea-bargaining settlement between the parties, the court may announce the settlement in open court as the court's judgement. Importantly, the judgement of the court is final and no appeal can be filed except for a writ petition under A. 226 and 227 of the constitution or a special leave petition under A. 136 of the constitution. The finality of the court's judgment with regard to the plea bargaining agreement allows for the expedient settlement of the case. If appeals are allowed then the case may drag on for long periods of time. Conferring finality on the plea bargaining settlement saves the time of the courts because future proceedings on the case are avoided. Such proceedings act as a burden on the court's time. The courts can focus on expediting the disposal of cases pending before them if the burden upon their time imposed by appeals is reduced.

If the accused spends an amount of time in judicial custody before the plea-bargaining settlement is agreed, he can avail of S. 428 of the CrPC.¹⁸ S. 428 of the CrPC allows the accused to undergo punishment for a period subtracting the time he has already been in detention.

There are numerous positive aspects of the plea-bargaining system as introduced in India. For instance, the offences for which plea-bargaining is allowed are limited. Only an accused charged for an offence prescribing punishment less than seven years can file an application for plea bargaining.¹⁹ Accused persons in serious offence like sedition or culpable homicide

¹⁶ S. 265 B (1), CrPC

¹⁷ S. 265 B (4), CrPC

¹⁸ S. 428, CrPC

¹⁹ S. 265 B(1), CrPC

cannot avail recourse to plea bargaining. Therefore, only accused of offences which are not excessively grave can get lowered sentences through plea bargaining. Further, the judge supervises the whole process of plea bargaining.²⁰ Judicial control over the process is ensured. Therefore, the accused cannot take the liberty to coerce or bully the alleged victim into a plea bargaining agreement. Another point to note is the plea-bargaining system does not allow habitual offenders to avail of the system.

Plea bargaining is as rational and effective as the trial process. The process of bargaining benefits all the parties involved in a case. Further, plea bargaining saves the accused of incurring the costs, time and anxiety that a trial entails. The alleged victim gets the benefit of a settlement as per his consent. In a trial an element of risk is always present. By entering into a plea bargaining agreement the alleged victim can bypass this risk and settle the case on his own terms. The judiciary can save time and resources by transferring its duty of justice dispensation to the parties involved in the case. Even prosecutors benefit from the plea bargaining system because they are able to secure high conviction rates without incurring the risk, cost and uncertainty associated with a trial.

CONCLUSION

Addressing the issue of heavy pendency of criminal cases should be a priority for India. The state is duty bound to ensure the speedy trial of every case in India. Such a right to speedy trial is included within the right to life under A. 21 of the Constitution of India. Further, some Directive Principles of State Policy in the Constitution like A. 38(1) and 39 impose a positive obligation on the state to ensure fast justice delivery

The heavy pendency of criminal cases causes distrust in the entire system of law in India. The courts are obliged to ensure speedy trial by the constitution. If under such a framework the courts are unable to meet their responsibilities questions arise about the efficacy of their functioning. Such questions arise especially when justice is denied to a fit case because of delay in court proceedings. Such instances are common in criminal proceedings as witnesses may lose memory of events concerning the case or may even die or change their testimony.

Numerous problems exist for the delay in court proceedings in India. Prime amongst these causes is the deficit in the required number of judges in the judicial system. Most courts in India are unable to function at their full strength because of vacancies in bench. Further, the lack of a guideline or time table as to completion of hearings in a case add to the general culture of delay in the criminal courts of India.

Plea bargaining is a viable procedural solution to the problem of heavy pendency of cases in India. Plea bargaining is a system in which a negotiated settlement is entered into between the parties to a case before the start of trial. Such a system is extremely useful in expediting the pace of the criminal justice system. Plea bargaining disposes cases without occupying the time of the court. Therefore, plea bargaining frees up the court's time by taking care of some

²⁰ S. 265 C(a), CrPC

of its workload. Further, because of the reduced number of cases to look after, the court can focus on cases which are more important. Plea bargaining has been introduced in the CrPC by the Criminal Law (Amendment) Act, 2005. Provisions for plea bargaining have been included in Ch. XXI of the code under S. 265-A. Following from the success of plea bargaining in countries like the USA, it can be hoped plea bargaining will be a success in India too. And therefore, reduce the heavy pendency of cases in India.

DEGRADING ENVIRONMENT, EVOLVING LAWS AND IGNORANT US

Harshit Kumar

Abstract

Saddling through the ‘oxymoronic’ development, mankind is witnessing its 21st century of existence. Hitherto pollution has been an imp of which a panache could not have been found. It is a matter extreme gawkiness to face the unabated levels of pollution despite several efforts being taken for such a long time. At one place where people keep discussing about the ill effects of pollution, they have been showing their squanderous attitude of hedonism in their life. The idiosyncratic trifle between the need of development and snowballing pollution levels has made it an exigency to solve the pollution imbroglio.

Initially the paper will discuss the bitter-sweet sources of pollution such as the current religious practices, advertisements and e-waste problem, for which there is no such significant codified laws and on the other hand it has proved very hard to regulate them because of them being coveted. The later part of the paper will elaborate on the legal background of the pollution issue, which consists of the existing laws and then the judicial intervention in this field. Finally the paper ends with conclusions and suggestions by the author.

INTRODUCTION

Although substantial proportion of our country's population faces the effects of the snowballing pollution but at the same time is ignorant about it. If this remains the *status quo*, then this will upend our country's environment's beauty. It is not just that the human populations are the sufferers but flora and fauna of the country has also been affected badly. India once known for its rich biodiversity and heritage, now houses the most number of the twenty most polluted cities of the world and most number of polluted rivers in top five polluted rivers of the world. The consequences of the pollution has left a majority of the population high and dry as it has resulted in the cause of myriad water borne and air borne diseases. Pollution has also resulted in change of climate creating an indirect pressure on the agro-based industry of the country.

The tussle between the religious practice and faith and environmental issues can be greatly observed. Earlier, the ancient Hindus and Greeks used to worship nature as a gift from God. But nowadays the way in which worship is performed in any temple is too swanky in nature and involves a lot of tantrums and complexities. This also plays a major role in creating such a waste to which we don't have any answer to. The type of waste created by these comprises of flowers, leaves, the idol and fruits coated with vermillion, coconut skull, ashes of incense sticks and small diyas, ashes of dead person¹. These type of waste releases nitrogen compounds and foul smell in the air which pollute the environment. Somewhere the practice of ablution of the idol by milk, honey, curd and other edible stuffs add to the wastage problem. These wastes are not hazardous per se, but the amount at which they are produced pose a greater problem. Later either these are made to flow on streets or dumped in river creating water pollution. In recent cases, Supreme Court has tried to highlight the inter-relationship between religious faith and environmental concerns. The Court in a subsequent case², restricted the time of bursting the crackers during the festival of Diwali and observed that "*Shelter in the name of religion cannot be sought for bursting crackers and that too at odd hours.*"

Advertisements have become the fastest and the most popular way of promotion of any products, services etc. in this age. The practising of distributing pamphlets for promoting pubs, coaching centres, beauty salons etc. has become a common practise. People are often hired as distributors who are under a contract to distribute certain amount of pamphlets in a particular day. They distribute those pamphlets outside colleges, busy streets, and famous restaurants. Other people take them and throw them on the streets which makes the matter worse.

With the boom in the IT sector in the country, people have been tended towards the use of electrical appliances. With the changing lifestyle the nature of the waste has also changed posing a greater challenge ever in managing them. With the advent of Chinese gadgets and appliances of shorter life cycle and rapidly developing technology, the volume of e-waste has

¹ Hindus have a practice to flow the ashes of the dead in a river usually in Ganga

² In Re: Noise Pollution, AIR 2005 SC 3136

increased to a greater extent. They consist of mobile phones, CD's, TV's, monitors and other electrical appliances. There is actually no place distinguished as a proper one to throw them. These are non-biodegradable waste consisting different types of metals like copper, tin, silver, iron, steel etc. The various toxins present in those substances when mixed with the water bodies destroy the aquatic ecosystem and also affects life of human beings.

LEGAL BACKGROUND

- **LEGISLATIONS**

“Environmental pollution” means the presence in the environment of any environmental pollutant³ and “environmental pollutant” means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment⁴.

The year 1972 marked a turning point in the field of environmental laws and management in the country. As per the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in 1972, to take appropriate steps for the preservation of natural resources as well as the protection and improvement of human environment, the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the Environment Protection Act, 1986 and several other legislations were enacted. The declaration of the 1972 Stockholm Conference on ‘Human Environment’ provides that the natural resources of the earth including air, water, flora and fauna should be protected.

Environment protection act was enacted in the year 1986, with the objective of providing for the protection and improvement of the environment. It empowers the Central Government to establish authorities [under section 3(3)] charged with the mandate of preventing environmental pollution in all its forms and to tackle specific environmental problems that are peculiar to different parts of the country.

The Water (Prevention and Control of Pollution) Act was enacted in the year 1974, with the objective to provide for the prevention and control of water pollution, and for the maintaining or restoring of wholesomeness of water in the country. The Water (Prevention and Control of Pollution) Cess Act was enacted in 1977, to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. This cess is collected with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act.

The Air (prevention and control of pollution) act was passed in 1981 as a result of the decisions taken at the United Nations Conference on Human Environment at Stockholm in June, 1972, in which it was decided that appropriate steps would be taken for the preservation of the natural resources of the earth and other things including the preservation of the quality

³ Environment (Prevention and Control of Pollution) Act, 1981, s.2 (c)

⁴ Environment (Prevention and Control of Pollution) Act, 1981, s.2 (b)

of air and control of air pollution. By virtue of Article 253 of the Indian Constitution, this act was enacted. It was enacted to provide for the prevention, control and abatement of air pollution in India and for the establishment of such boards on which such powers can be conferred on and such functions can be assigned so as to regulate the aforesaid purposes. Under this act the State Government has got the powers to declare any area as ‘air pollution control areas’ to control the operation of industries, use of any particular type of fuel and burning of any such material that may cause pollution in the designated area. All the industries operating within the designated air pollution control areas are required to obtain allowance (permit) from the state boards. Standards of emission for automobiles can also be set by the virtue of this act.

The Public Liability Insurance Act enacted in the year 1991 has its main objective in providing for the damages to victims of an accident which occurs as a result of handling any hazardous substance. The Act applies to all owners associated with the production or handling of any hazardous chemicals.

The National Environment Tribunal Act was passed in the year 1995 to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment and for matters connected therewith or incidental thereto.

The National Green Tribunal Act passed in the year 2010 aims to establish a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal is not supposed to be bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice. The Tribunal is mandated to make an assiduous effort for disposal of applications or appeals finally within 6 months of filing of them.

Article 48A of Indian constitution states that State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Article 51A states that it is the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living animals⁵.

- JUDICIAL INTERVENTIONS

⁵ T.N. Godavarman Thirumulpad (87) v. Union of India, (2006) 1 SCC 1 para 77: AIR 2005 SC 4256.

Early environmental laws in the most detailed perspective can be well traced in Kautilya's Arthashastra written around 300 BC.⁶ It put state or the ruler under an obligation not only to protect forest produce but also to set up new ones. Fines were also imposed for cutting the sprouts, branches or for destroying the trunks of the trees. A similar kind of an obligation can be observed in an ancient legal theory developed by Roman Empire, known as the 'Doctrine of Public Trust'. It was found on the ideas that certain common properties such as natural resources were held by the government in trusteeship for the free and unimpeded use by the general public. According to the Roman law these resources were either *res nullius* or *res communis* and under English law, Crown could own these resources but could not grant these to private owners to meet their private interest. This doctrine presupposes that natural resources should be made freely available to the public. The doctrine imposes three types of restrictions on the governmental authority: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.⁷ The Supreme Court of Ohio adopted the doctrine and said that state is a trustee for the public and cannot acquiesce the abandon of the trust property or enable a diversion of it to private ends different from the object for which the trust was created... the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use...⁸. The US Supreme Court in the most celebrated case gave its disposition based on this doctrine and regarded the title over navigable waters of a lake as a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein freed from the obstruction or interferences of private parties.⁹ Reviewing number of U.S. Court decisions, the Indian Supreme Court, in the absence of any precedent in this field, imported this doctrine in the *Span Motels*¹⁰ case. It was observed that State is a trustee and under a legal obligation to preserve and maintain the natural resources which are meant for the free and unimpeded use by the public.

The rule of strict liability evolved in 19th century in *Rylands v. Fletcher* case¹¹. The basis of liability was justified by BLACKBURN, J. in his words as "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape". The strict liability doctrine is subject to some exceptions like act of God, act of third party, plaintiff's own fault, statutory authority. These exceptions tend to limit the scope of the operation of this doctrine. The further years saw the shift from the traditional strict liability principle to the absolute liability principle. With the emergence of the chemical industries and use of more

⁶ V.Gupta, *Kautilyan Jurisprudence* 1 (1987)

⁷ Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", Vol 68:471, January 170, p. 477

⁸ *State v Cleveland & Pittsburgh R.R.*, 94 Ohio St. 61, 80, 113, N.E. 677, 682 (1916)

⁹ *Illinois Central Railroad Company v. State of Illinois*, 146 US 587 (1892)

¹⁰ *M.C. Mehta v. Kamal Nath*, 1997 (1) SCC 388

¹¹ *Rylands v. Fletcher*, (1868) LR 3 HL 330: LRI. Ex. 265

sophisticated and hazardous nature of commodities in the factories and industries, their regulation was felt as the most needful. Subsequently the doctrine of strict liability was felt inadequate and the requirement of a modified law which could regulate them more effectively was greatly felt. These activities could be regulated in two ways, firstly either completely prohibit the carrying on of such activities allow them to be carried on for the sake of public good or allow them to be tolerated on condition that they pay their way regardless of any fault. These activities could not be banned as they had a great social utility. The second way can be adopted only if runs in accordance with the statutory provisions laying down safety measures and providing for compensation for non-compliance. The last way lays down the concept of absolute liability. It basically says that the undertakers of the activity should have to pay damages for any mishap regardless of any carelessness on their part. Subsequently the honourable Supreme Court of India in *M.C. Mehta v. Union of India*¹² held that the given rule did not fully meet the needs of a modern industrial society with highly developed scientific knowledge and technology, where hazardous or inherently dangerous industries were necessary to be carried on as part of the development program and that it was necessary to lay down a new rule not yet recognised by English law, to adequately deal with the problems arising in a highly industrialised economy. The newly laid down rule in the above case: "Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-à-vis* the tortious principle of strict liability. Furthermore this adopted doctrine was approved in *Indian Council for Enviro Legal Action v. Union of India*¹³ and it was held that the new rule laid down in the *Mehta* case¹⁴ was appropriate and suited to the conditions prevailing in our country.

The polluter pays principle is an extension of absolute liability principle. The polluter pays principle states that whoever is responsible for damage to the environment should bear the costs associated with it. "The polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology"¹⁵. This principle was not a part of Indian law hitherto it was invoked in the *Enviro-Legal Action* case. In the mentioned case the honourable court affirmed the absolute liability principle and extended it. Supreme Court also held that the 'polluter pays' principle which is a part of the basic environmental law of the land requires that a polluter bear the remedial or clean-up costs as well as the amounts payable to compensate the victims of pollution.¹⁶ In the case of *Vellore Citizens Welfare Forum v. Union of India*¹⁷, the principle was justified and further observed as the principle when interpreted means that the absolute liability for harm to the environment extends to not

¹² *M.C. Mehta v. Union of India*, (1987) 1 SCC 395: AIR 1987 SC 965

¹³ AIR 1996 SC 1446 : 1996(2) SCALE 44 p. 69: (1996) 3 SCC 212

¹⁴ (1987) 1 SCC 395: AIR 1987 SC 965

¹⁵ Indian Council for Enviro-Legal Action vs. Union of India, (1966) 3 SCC 212 at 215

¹⁶ Indian Council for Enviro-Legal Action vs. Union of India (Bichhri case) AIR 1996 SC 1446, 1466

¹⁷ (1996) 5 SCC 647

only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

The precautionary principle is about the management of scientific risk. It is a fundamental component of the concept of ecologically sustainable development (ESD). Principle 15 of the Rio Declaration (1992)¹⁸ describes precautionary principle as:

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Wingspread statement on the precautionary principle states: “...When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action. In this context the proponent of an activity, rather than the public, should bear the burden of proof.”

This principle was firstly invoked in *S. Jagan-nath v. Union of India*¹⁹. In the mentioned case, the court held that the ‘precautionary principle’ requires government authorities to anticipate, prevent and attack the causes of environmental pollution and imposes the onus of proof on the developer or the industrialist to show that his or her action is environmentally benign. This principle was also applied in protecting Taj and residents in the area from emissions generated by coal/coke consuming industries²⁰. In *AP Pollution Control Board v. Nayudu*²¹ the Indian Supreme Court applied the precautionary principle in a petition against the development of certain hazardous industries.

Courts have also appreciated that it is the fundamental rights of the citizens under the Article 21 of the Indian Constitution to include enjoyment of pollution free environment²².

The first indication of the right to a wholesome environment can be traced to the *Dehradun Quarrying case*²³. In the *Rural Litigation and Entitlement Kendra Dehradun v. State of U.P.*²⁴ case, the Supreme Court came to the ratio that the right to environmental protection can be considered as a part and parcel of ‘right to live’ under Article 21 of the Constitution. In *T. Damodar Rao v. The Special Officer, Municipal Corporation of Hyderabad*²⁵ case, the Andhra Pradesh HC held that “it would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Article 21 of the Constitution embraces the

¹⁸ United Nations Conference on Environment and Development, Rio, 1992 (the “Rio Declaration”)

¹⁹ (1996) 9 SCALE 167: AIR 1997 SC 811: (1997) 2 SCC 87.

²⁰ *M.C. Mehta v. Union of India*, (1997) 1 SCALE 61: AIR 1997 SC 734.

²¹ JT 1998 (1) SC 162, 173 to 183: AIR 1999 SC 812, 819 to 823.

²² Supra n.6

²³ *Rural Litigation and Entitlement Kendra, Dehradun v. State of UP* AIR 1985 SC 652

²⁴ AIR 1985 SC 652

²⁵ AIR 1987 AP 171, 181

protection and preservation of nature's gifts without which life cannot be enjoyed. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Article 21 of the Constitution". In *L.K. Koolwal v. State of Rajasthan*²⁶ case the Rajasthan HC said that preservation of the environment falls within the purview of Art. 21 as it adversely affects the life of the citizen because of the hazard created. In *Kinkri Devi v. State of Himachal Pradesh*²⁷ case, Himachal Pradesh HC said that if the preservation and protection of the ecology, the environment and the natural wealth and resources by the adoption of a long-term perspective planning is not heeded and effective steps in the direction of implementing the same are not taken with the utmost expedition, then there will not only be a total neglect and failure on the part of the administration to attend to an urgent task in the national interest but also a violation of the fundamental rights conferred by Articles 14 and 21 of the Constitution. In *Shantistar Builders v. Narayan K. Totame*²⁸ case, Supreme Court held that the right to shelter would also include 'the right to decent environment and a reasonable accommodation to live in. In *Subhash Kumar v. State of Bihar*²⁹, Supreme Court said that right to life includes right to live properly and have the benefit of all natural resources i.e. unpolluted air and water. In *Virender Gaur v. State of Haryana*³⁰ case it was said that Article 21 protects the right to life as a fundamental right. Enjoyment of life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation, without which life cannot be enjoyed. Moreover in cases like *K.C. Malhotra v State of Madhya Pradesh*³¹, *Hamid Khan v State of Madhya Pradesh*³², *M.C. Mehta v. Union of India*³³, *Madhavi v. Tilakan*³⁴, *Attakoya Thangal v. Union of India*³⁵, *V. Lakshmi Pathy v. State of Karnataka*³⁶, respective High Courts have observed that environmental degradation violates the fundamental right to life.

• MAGNITUDE OF THE PROBLEM

Although the laws have been passed and judiciary's continued interventions have been existed, but these have failed to solve the problem of waste management in India. People still don't know where to throw the garbage. As a result, the pollution levels have increased drastically in less than a decade. The result is that it has led to the increased rate of lung disease affected patients posing not only a greater risk of damaged throat and lung to old people but also to new-born babies.

²⁶ AIR 1988 RAJ 2,4

²⁷ AIR 1988 HP 4, 9

²⁸ AIR 1990 SC 630

²⁹ AIR 1991 SC 420

³⁰ 1995(2) SCC 577

³¹ AIR 1994 MP 48, 52

³² AIR 1997 MP 191, 193

³³ AIR 1988 SC 1037

³⁴ 1988 (2) KER.L.T. 730, 731

³⁵ 1990 (1) KER.L.T. 580, 583

³⁶ AIR 1994 KAR 57, 67

Water pollution has led to the inflow of toxic chemicals to our diet causing many intestinal and stomach problems. Harmful effluents discharged in the river are fed on by the fishes and other aquatic animals which constitutes the diet of many people. Hence traces of arsenic and other deadly chemical compounds can be found in their food.

CONCLUSION

The Indian legislature has enacted laws for specific type of pollution³⁷ and also for the protection of the environment³⁸, wildlife³⁹, forest⁴⁰. The setting up of National Environment Tribunal, National Green Tribunal and the National Environment Appellate Authority by the central government shows the diligence of the centre to achieve the goal of clean environment. But affirmatively it can be stated that the essence of any law or enactment becomes nugatory unless the same is implemented and strictly enforced. It can be easily observed that the environmental issues has not been given due weightage as it deserves. Moreover apart from the laws and initiatives from the government, it requires some aspects of behavioural changes and initiatives from the public.

Among all the other country's major problems, waste management is the toughest, with no silver bullets in sight in near future. Hence *prima facie* it is very clear that the pollution levels take it as garbage, water pollution or air pollution cannot be reduced at a significant level, only their further emissions can be pooled down if managed well.

There is a dire need for the implementation of more strict rules and it should be very well ascertained that once environment has been polluted, then no form of monetary compensation or punishment would bring it back to its previous state. The Supreme Court in *T.N. Godavarman Thirumulpad v. Union of India & Ors.*⁴¹, said that "Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric". The inference is very clear. It is the need of the hour that we form eco-friendly policies rather than those which are eco-centric in nature.

The system proposed by the law also can't act solely as a panacea for the problems of pollution. There should not be development at the cost of environment, but there should be sustainable development which is defined as "development that meets the needs of present without compromising the ability of future generations to meet their own needs"⁴².

SUGGESTIONS

There is a need to harmoniously devise eco-friendly policies that addresses the need of development and causes the least environment degradation possible.

³⁷ Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Noise Pollution (Regulation and Control) Rules, 2000

³⁸ Environment (Prevention and Control of Pollution) Act, 1981

³⁹ Wild Life (Protection) Act, 1972

⁴⁰ Forest Act, 1927

⁴¹ (2012) 3 SCC 277, para 14

⁴² *Karnataka Industrial Areas Development v. C. Kenchappa*

The existing laws should be reviewed and any flaws should be addressed in the least time.

It can be suggested that the use of plastic bottles should be discarded and should be replaced by glass bottles in case of water distributed in trains. The cups used for hot beverages should be replaced by mud cups that would not only provide employment to a large sector of unskilled labours but also be easier to dispose of anywhere.

The use of public transport should be encouraged and at the same time the services offered by them should be re-vamped. Safety, punctuality and cleanliness to be maintained. There networks to be enhanced and new buses to be started to improve the connectivity. Landfills are not even the penultimate solution to garbage problem.

The garbage buried inside land mixes with the soil and disturbs the composition of soil and makes them barren, thus reducing the pasture land. The most important initiative to take is to find the best way possible to dispose of the waste such that it harms the environment least and find a way to process, reuse or recycle the waste.

LEGAL EDUCATION IN INDIA: DEVELOPMENTS MADE AND REFORMS REQUIRED

Prachi Shekhawat* & Shefali Munde**

Abstract

India's future will be fashioned in her classrooms. Law schools are the institutions that promote social engineering. The students are required to be equipped with a variety of physical, mental as well as technological skills for actualizing themselves and for being socially responsible individuals. While legal education in India has seen significant changes over the years, still the scope for improvement is wide. For the establishment of a law abiding society, legal education plays a vital role. Excellence in legal education and research is extremely important, because it will help shape the quality of the rule of law. Prior to the introduction of the five year law programme, the larger portion of the student population aspired to pursue the fields of engineering, medicine, computers, accounting and so on. Legal education as a discipline and law as a profession was not a popular choice amongst the students in India. The article discusses about the legal education system in India till 1985 and presents the picture of the education system after the advent of National Law Schools; the importance of legal education as well as reforms and modifications essential for the enhancement of the society have been highlighted. The article gives a perspective on the improvements that need to be undertaken. A well administered and socially relevant legal education is a sine qua non for a proper dispensation of justice.

* Student

** Student

INTRODUCTION

Legal education deals with the learning of the techniques, skills, ideologies, philosophies, instrumentalities and the critiques aiding in the formation of a just society.¹ It is the education obtained by individuals in order to become legal practitioners or legal professionals. Unlike other types of professional education like medicine or engineering, legal education is both professional and liberal. If taken as a professional education, it aims at acquiring professional skills; but if regarded as a liberal education, it aims at a socio-cultural education, which is value-oriented. It is a highly important subject as it helps in creating and shaping the legal system of the country, which is responsible for the achievement of the treasured goals of justice, liberty, equality, fraternity of a sovereign, socialist, secular, democratic republic.² Blackstone also commented that the purpose of legal education is transmitting all the knowledge relating to the lifestyles and cultures of a common man, nobleman and gentleman in a single learned profession.³

Legal education is a broad concept. It encompasses law as a profession which is practiced in courts, legal research, law teaching, administrative activities in different divisions where law plays an essential role and also all the other activities and areas where legal knowledge and skill is required.⁴

The “rule of law” draws a line of differentiation between the human civilization and the animal world. Legal education plays a vital role in stimulating social justice. Legal practitioners and professionals are known as “social engineers”. Eminence in legal education and research is extremely important, because it will help improve the quality of the rule of law.

Legal education in ancient India began with the introduction of the concept of ‘dharma’. The King acquired special legal knowledge which he used in order to dispense justice. In modern India, formal legal education came into being in 1885. The chief aim of legal education at that time was to gear up the law students so that they could enrol themselves as ‘vakils’ or judicial officers in lower courts and high courts to help the administrators in imparting justice. In 1954, the 14th report of the Law Commission of India deliberated upon the status of legal education in India and realized the need for reforms in the legal education system and also made some recommendations. Advocates’ Act, 1961 brought uniformity in the Indian legal system. Also, after 1961, the Bar Council of India was entrusted to lay down the standards of the legal education system.

It was in 1986, when the first National Law School of India was established (National Law School of India University) in Bangalore, which started a five-year integrated law programme.

¹ U.G.C, New Delhi, Report on the Curriculum Development Centre in Law 12 (1990)

² Bharti, Legal Education- Some Critical Issues 122 (1999)

³ S. K. Agarwal, Report on Legal Education in India- Problems and Perspectives (1972)

⁴ Gajendragadkar Committee, Re-organization of Legal Education in University of Delhi (1964)

Knowledge of law enhances one's understanding of public affairs. It helps in preparing tactful arguments, studying accuracy of expression, understanding social values and interpreting written text. It is everyone's duty to know law because *ignorantia juris non excusat* (ignorance of law is no excuse). Legal knowledge is critical, not just for the creation of good lawyers, but also for creating law abiding citizens, who know what their rights and duties are. Law is an important mechanism in the socio-economic development of the society. We need a legal education system which can satisfy the needs of the society and the country. We are not a laissez faire state, but a welfare state and in a welfare state law plays a vital role in every person's affair.⁵

Law is not just an instrument of social control, but also a mechanism for social change. As far as the production of good lawyers is concerned, legal education should target at endowing them with legal proficiency and professional skills. Lawyers are independent professionals and are directly in association with the society and its problems. Thus, they are most properly acquainted with the problems being faced by the society.

Common law influence, the Constitution of India and the pivotal role of the judiciary have resulted in the development in the rule of law. But, in terms of implementation, there is still a long way to go. There is a blatant violation of law in India, hence there is a need to work towards creating a law abiding society. It is important that the initiatives taken should fundamentally endeavour to impart a respect for law among the citizens of India. All legal, judicial, constitutional and institutional measures taken to ensure rule of law must be taken with a sense to inculcate a respect for law among the people on the basis of the understanding that it would be executed equally and fairly. This is where the importance of legal education comes in. Legal education has a fundamental role to play in the formation of a law abiding society. Eminence in legal research and education is highly important because it will architect the quality of rule of law.⁶

OBJECTIVES

The objectives of the article are to:

- trace developments made in the field of legal education.
- study the shortcomings in the present scenario and suggest the necessary modifications required.

METHODOLOGY

The research is descriptive as well as exploratory in nature. Data collection has been done from reliable sources. References from various books, journals, reports and newspaper articles on legal education in India have been taken so as to ensure reliability.

STATUS OF LEGAL EDUCATION IN INDIA TILL 1985

⁵ Maxwell Cohen, *Condition of Legal Education in India*, 28 Canadian Bar Review, 249 (1950)

⁶ C. Raj Kumar, *Rule of Law And Legal Education*, The Hindu, July 4, 2006

Legal education as a discipline and law as a profession prior to the introduction of five year law course was not a popular choice among the students of India; most students who performed good in the twelfth examination aspired to become engineers, doctors, accountants, business managers but not lawyers; there was a certain stigma attached to it.

The notion of Dharma during the Vedic era can be viewed as the inception of the concept of legal education in India. Just like any other institution in Indian civilization, legal education is under a continuous process of important changes in management, delivery, content and organization. It began with when the University Education Commission was set up in the year 1948, a committee named Bombay legal education was set up for the promotion of legal education.

The All India Bar committee made certain suggestions in 1951 as well as in 1954, the Setalvad commission discussed the legal education status and acknowledged the need for reform in the system of Legal education.⁷ It portrayed a very bleak picture of legal education. Major steps which were drastic in field of legal education were taken by the parliament in the year 1961 when it enacted Indian Advocates' Act which integrated the legal profession all over the country under uniform standards and created bar councils throughout the country with the authority to control and manage the standard of legal education in India, in sync with university teaching law.

The first phase of reforms in legal education followed after these events, which included LL.B. becoming a post graduate degree of duration of three years, there was an accelerated expansion of private institutions which were operating mostly as part time. But within the first two decades although access to legal education was increased, the quality was diluted very much which could not be controlled. The Bar Council of India began licensing and inspecting law schools but this did not have any marginal impact on the standard of colleges. It was only after much prolonged deliberations finally from the year 1979 the BCI issued instruction to all the universities and colleges in the field of legal education to adopt a new pattern of five year integrated law course and a period of three years was given to change over.

THE ADVENT OF NATIONAL LAW SCHOOLS

After nearly five years of serious thought and discussion with the universities, Legal Education Committee and State Bar Council recommended changing the existing three years LL.B. program to 5 year, and made few changes like the course of study for obtaining law degree shall be minimum 5 years out of which first two years shall be devoted to study of pre-law courses and the last 6 months of the fifth year shall include a regular course of practical training. Law College shall be located at a place where there is a District Court or a Circuit District Court, professional law education shall only be through whole time day colleges or University departments from the academic year 1982-83. The teacher student ratio was increased to 1: 40. The maximum strength of students in each class (LL.B I, II, III,

⁷ UGC, New Delhi Report of curriculum Development committee 1 (2000)

IV, V) shall not exceed 320, and 80 in any section of each such class. New colleges approved by BCI would commence professional legal education according to the above rules from the academic year 1982- 83. However, already existing colleges may be allowed to run the existing three-year LL.B. course for a period not more than two academic years.

In the year 1987 National Law School of India University was established in Bangalore. Many Universities failed to adopt the new pattern of legal education as envisaged by the BCI. The BCI succumbed to the pressures from the institutions offering legal education and failed to phase out the three-year program. Thus, it was forced to give further extension of 3 years course due to pressures from the Colleges and State Bar Councils.

In spite of extending time for converting the existing 3 year degree course to 5 years integrated course many colleges and Universities found it difficult to changeover. Due to pressure from the Colleges and State Bar Councils, the three year degree course continued even after 1987. As a result five year integrated course continued as a parallel course to three-year course and many institutions offer both the courses simultaneously.

There was a Curriculum Development Committee formulated in 2010, which emphasized upon the faculty autonomy in designing and conducting the courses in the University. CDC opined that the integrated law course with the first degree subjects is highly technical and therefore there is a need for harmonization of the curriculum. Further, the faculty of the institutions needs to make a serious effort to customize the course and develop the strategy of teaching-learning based on the local needs and resources available.

IMPORTANCE OF LEGAL EDUCATION

For the establishment of a law abiding society, legal education has a vital role to play. Excellence in research and education is very important as it will shape the standard of rule of law.

Another aim is to make students aware of legal concepts and methods of legal reasoning. Students also become informed with the process of law making, ways of settling disputes; they study the structure of government, how the courts work, how the system of adjudicating bodies and appeals work etc. Another aim of legal education is acquiring the knowledge of law in its social, political, economic and scientific contexts.

Dr. Mohammad Farogh in his observations on legal education in a modern civilized society wants to include the following aims and objectives:

- to inculcate students with the operative legal rules, both substantive and procedural,
- to provide the students with adequate experience to apply these rules,
- to equip the students with sufficient knowledge of the historical and sociological background of the country's legal system,

- to provide the students with some knowledge of the other legal system of the world so that the students do not find themselves at a complete loss when it comes to adopting a comparative approach.⁸

To produce a competent lawyer legal education plays an important role, the ultimate goal of legal education is to produce a capable lawyer who aims at achieving welfare of people and includes the defence of fundamental rights.

Law schools are the establishments that aid social engineering. This is indistinguishably linked to their role in building a society that abides by the rule of law. This can be done by investing time and attention in deciding what kind of a society India needs to develop and what would be the role of lawyers and legal education in that society, along with providing high quality legal education that emphasises on researching upon the legal and social issues that have an impact on the society. The role of law schools is extremely important, and they would be able to perform it if they are able to establish a sound institutional infrastructure which will vivaciously promote the intellectual and scholarly abilities of law students. Law is a dynamic education. The laws and their interpretations change with time so as to confront and solve the problems created by the social, political and economic changes in the society. Thus the role of law schools is significant especially in relation to the social expectations created and increased due to the disposition of law schools as organisations of higher learning and quality research.

SHORTCOMINGS IN THE PRESENT SYSTEM AND REFORMS REQUIRED

In order to get admission into any National Law School (NLU), the students have to crack an entrance exam namely Common Law Admission Test (CLAT). This test is conducted by a different NLU every year due to which there is a lack of uniformity in the way the test is conducted. This leads to a lot of confusion and raises issues for the students as to what is the marking scheme and what college will be allotted to them. There have been instances where the students have complained about the lack of transparency in the selection process which puts a question mark on the integrity of the whole system. There is a need to bring about uniformity in the system by setting up a committee which is not in any way linked to any NLU, which would conduct the test and maintain transparency. Also, interviewing the students should be included in the induction process so that the quality of students entering into this professional course is impeccable.

There should be an academic culture which promotes research. There should be greater opportunities for students and faculty of law schools across India to undertake serious and original research pertaining to justice and law that affect Indian society, this is only possible when an in depth examination of justice delivery mechanism and legal framework is done. This could result in useful recommendations which are suitable to the economic and social need of the citizens. Development and comparative research of institutional partnerships, with the other countries and as well as within the country are essential. This can help in

⁸ Dr. Mohammad Farogh, Legal Education: Contemporary Trends and Challenges (1998)

reforming the administration of law and justice in India, but in India it is a tall order. It involves a serious effort by various agencies including the members of parliament, bar and bench, academicians and the society in general. Moreover, law students can analyse the various problems relating to civil and criminal justice delivery system and its implications.

Indian society is facing problems relating to standardization of administration of justice because of unimaginable delay in justice delivery system and issues relating to poverty, governance crises and corruption, because of which the distance between the law in reality and the law in books is widening. If the Indian society is to soar from this challenge is it crucial that a law college plays a more responsible and active role. Scholars should be encouraged to develop research inputs relating to various problem areas for the better understanding of various institutions engaged in law transformation. Schools excel in giving judicature. This will be evident from the numerous national and international level judicature competitions being conducted in India. Participation in these competitions becomes prestigious to the law students. But sadly, few students are able to participate in these competitions. Remaining students participate exclusively in moot courts conducted by the law schools. Internal moot courts in several law schools are conducted by giving a decided case to a group. In these cases 75% of the students either copy from their senior's work or from the law journals.

In fact, the foremost objective of legal education has got to be promoting excellence in each teaching and analysis. However these objectives have to be consummated bearing in mind their relevance to and linkages with establishing a rule of law-friendly society. This state of civil and criminal justice system in the country, poses varied challenges and is far off from providing the much required religion and respect for law and legal establishments. Whereas each establishment has a very important role to play in guaranteeing the rule of law, law faculties have not as of now been seen as stepping up during this regard. It's time for law faculties and also the legal education discourse in India to embrace this responsibility, lest the religion of the scholars and also the school within the role of law and its impact on justice ought to be lost forever.⁹

Various challenges faced in field of legal education are increasing the presence of good and capable law teachers who can impart good education and can motivate the students; maintain a fine quality of law schools, which can produce good lawyers and law professionals, stimulating law students to choose various career options within the legal profession and sustaining good talent in the country.

The complementary teaching methodology of learning by doing and the conventional classroom teaching through the law schools helps in developing the advocacy skills in the law students. 'Mock' trials and moot court competitions, structured as court trials; client interviewing and counselling sessions; legal research, editing of law journals, legal drafting and convincing; court visits etc. in the curriculum are the ideal ways to facilitate performance based education. It is a means of improving in students the basic skills such as the skills of

⁹ Supra 7

critical thinking, presentation skills, participation skills, teamwork skills, leadership skills, in addition boost in students the knowledge of law.

Law schools and universities should be able to provide e-courses on the shelves. The teachers should put course materials on the web, conduct on-line tests/assignments and grade students. Web-sites can lead learners to virtual class-rooms. Teachers and students should be oriented to look at the web as an information provider.¹⁰

CONCLUSION

Half a century ago, the chief objective of legal education provided by universities was inculcating the students the black letter law, that is, certain doctrines and provisions of law so that they could enter the legal practice for the local needs; not the teaching of law as professional and scientific subject that it is. Over the period of time, this perception changed and many reforms in how legal education should be imparted were made. While legal education in India has seen significant changes over the years, still the scope for improvement is wide.

The aim of legal education must be equipping the learners with competence and skills, the ideologies and philosophies for the establishment and sustenance of a just society.¹¹ It should sharpen the society to detect the problems it's facing, safeguard social and economical justice by the rule of law and annihilate injustice, poverty and corruption from the society. Legal education enhances human sensibility and infuses a sense of protecting liberty and equality before law. The curriculum of legal education needs to be decided in terms of the objectives that it aims to achieve.

Sadly, the general view is that the legal education in India is not very ‘meaningful’ and/or ‘relevant’. The way legal education has been methodized in India appears like its only purpose is to inculcate the students about some knowledge of statutes.¹² Today, an inventive programme of integrated legal learning is needed in areas like comparative law, intellectual property, information technology, human rights, corporate governance, international trade law, environment law, alternative dispute technology and commerce.

One has to think within the contemporary model and bring forward the need for developing new avenues to the various challenges being faced by the society today posed by globalization, which should be computed while framing legal education system in a country like India, so as to cope with the present and future problems.

It is high time that the law schools in India recognize the need for establishing a sound physical infrastructure. The students will not be able to achieve the academic freedom to think and bequeath if the universities and college do not have the required infrastructure and financial resources. Philanthropy in legal education is rare. It all in all remains a state

¹⁰ Dr. Tabrez Ahmad, Legal Education in Indian Perspective (2009)

¹¹ Hassnat Azmi, Legal education in India in the 21st Century (1999)

¹² I.P. Massey, *Quest For Relevance in Legal Education* , 2 SCC Journal, 17 (1971)

sponsored enterprise or a mediocre profitable establishment lacking in high academic standards. There is a need for instigating philanthropic initiatives in promoting excellence in legal research and education in the country.¹³ There is a need to re examine the status of legal education in the country. The present system does not address the major problem faced by the legal education system – the dearth of faculty who are good teachers as well as researchers. Young talent should be encouraged to take up teaching as a profession as well. Also, the law schools in India need to create such an environment that promotes the students as well as the teachers to undertake serious research on the contemporary problems related to law and justice in India.

Rule of law is the most important challenge being faced by the country. The civil and criminal justice systems are under great stress. The role of law schools in transmitting legal education and developing lawyers who are analytical thinkers and social engineers is axial to the future of legal education and augmentation of a knowledge economy in India. Law schools and academia in India have a long way to go in developing an institutional culture that encourages research which has the ability to bring about positive changes in the society at large.¹⁴

¹³ C. Raj Kumar, *Improving Legal Education in India*, The Hindu, June 27, 2007

¹⁴ Supra 13

PIRACY AND THE LACUNAE IN UNCLOS

Kartik Raghuvanshi* & Priyam Jhudele**

Abstract

They can't stop us - we know international law.

- Jama Ali, a Somali pirate¹

The UNCLOS was signed on 10th of December 1982. It has been the governing convention as regards the laws of the sea since then. The UNCLOS sets out laws for piracy under Articles 101 to 107. Piracy has become a major threat to sea trade in the past decade. Somali pirates top the list in increasing sea crimes. This paper deals with the interplay of the UNCLOS and the challenges faced by it in the prosecution of pirates. Firstly, it focuses on the challenges faced by the UNCLOS and its incompetency to deal with the modern day piracy. Secondly, it deals with the other existing treaties and provides a comparison between them and the UNCLOS. The last part suggests reforms that should be made to the UNCLOS in order to make it more effective in curbing piracy.

Keywords: Piracy, UNCLOS, High Seas, Territorial Waters, Prosecution etc.

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¹ Kontorovich, Eugene. 2010. "A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists". *California Law Review* 98 (1), California Law Review, Inc.: 243-75. <http://www.jstor.org/stable/20743970>

INTRODUCTION

The United Nations Convention on the Laws of the Seas was an agreement to create a universal law for the sea. It was made to define the rights and responsibilities of the nations with regard to the use of oceans. Today, 167 countries and the European Union are parties to the convention.² The Convention was an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind's very source of life. A serious threat to this was from the pirates, which was recognized by the UN in this convention thus dedicating sections 100-107 of UNCLOS to stop Piracy.

The UNCLOS has defined Piracy under Article 101. The definition reads as:

"(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)".³

This article particularly focuses on piracy off the coast of Somalia. The problem started after the civil war in Somalia in 1980s after which the central government collapsed which left the coasts of Somalia unregulated and unguarded. Somalia was suffering from poverty and unemployment which pushed its people into Piracy which rendered huge sums in ransoms and was not a tough task as the naval presence in Gulf of Aden was very low. Thus piracy off the coast of Somalia became a big problem from 1990s and Somalia emerged as the hub of Pirates. UNCLOS being remarked as a Constitution for the oceans was the main statute which had to cope with it. This article further discusses how UNCLOS struggled against this challenge and how various other treaties and resolutions took place to amend the loopholes in it. Moreover this article includes some suggestions to improve UNCLOS so it may be able to cope against a similar situation in future.

² United Nation Convention on the law of the sea [1982]

³ United Nation Convention on the law of the sea 1982 Article 101

WHY UNCLOS IS NOT COMPETENT TO SUPPRESS PIRACY

Article 100 provides that the states should cooperate in repression of piracy to the fullest extent possible.⁴

Article 105 of the Convention provides to all states the power to seize and punish pirate activities on the high seas⁵.

There are however, several fundamental flaws in these definitions. Firstly, the definition of Piracy under Article 101 is out-dated and has seen no amendment since the signing of the treaty. It has laid down several requirements for the act to come under piracy which is not feasible considering the modern form of piracy.

The issues are as follows:

The Private Ends requirement: clause (a) of Article 101 clearly lies down that for an act to constitute piracy, it must be committed for private ends by the passengers or crew of a private ship.⁶ This essentially means that the activities committed by a state or activities of terrorists for political purposes may not be included in this definition. The private ends requirement was introduced for the first time in the Harvard Draft Convention. Oppenheim also wrote in favour of the private ends requirement stating that:⁷

“Private vessels only can commit piracy. A man-of-war or other public ship, so long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander, and to pay damages where required. But if a man-of-war or other public ship of a State revolts, and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence then committed are indeed piratical acts.”

Although this issue is widely contested, Commentators have argued differently on the subject matter.⁸ But there's no denying that the language of the provision does make prosecuting pirates an uphill task. It also provides them with an added advantage of claiming that their acts were not for private ends but politically motivated and escape liability. What constitutes private ends is itself a debatable matter. Recently, in the U.S. 9th Circuit judgement of *Cetacean v. Sea Shepherds*⁹, In this case, the Sea Shepherds were an international non-profit,

⁴ ibid, Article 100

⁵ ibid, Article 105

⁶ ibid, Article101(a)

⁷ L. Oppenheim, *International Law: A Treatise*, Third Edn (1920-21), Vol. I, Sec. 273

⁸ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 Vand J Transnatl L 1, 11 (2007). Tammy Sittnick, *State Responsibility and Maritime Terrorism In The Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 Pac Rim L & Pol J 743, 758 (2005).

⁹ *Institute of Cetacean Research v. Sea Shepherds Conservation Society* , 43 ELR 20114 , No. 12-35266, (9th Cir., 05/24/2013)

marine wildlife conservation organization. Their plea that they were acting in a noble cause and had no private ends was dismissed by the judge. The judge put it very succinctly that:

*"You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be."*¹⁰

Therefore, the problem this poses is that the term is very vague¹¹ and will be differently interpreted by various countries thus killing the universality factor of the provision.

The Requirement of two Ships: The definition states that the act must be done by the crew of a ship against another ship.¹² What this means is that piracy will only be committed if two ships are involved.¹³ The inclusion of the word another further narrows down the meaning as its inclusion means exclusion of acts committed by the ship members themselves. Thus, if pirates enter the ship as crew members and then take over the ship, it would not constitute piracy under this definition. Also, mother ships could release fast skiffs which could then be used for the act and it would still not constitute piracy under the UNCLOS provisions. However, the SUA Convention has taken progressive steps in this regard. The Convention provides that it is an offence under international law for any person on board a ship unlawfully and intentionally to seize or exercise control over that ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; or to destroy or cause damage to a ship or its cargo which is likely to endanger the safe navigation of the ship.¹⁴

The high seas requirement: The UNCLOS defines only those acts of violence a piracy which are committed on the high seas.¹⁵ Article 86 of the UNCLOS defines high seas as:¹⁶

"All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."

This means that the acts committed in the territorial waters of a state or in the exclusive economic zone cannot be termed as piracy. Majority of acts committed by the Somali pirates

¹⁰ Ibid, The judge specifically cites the politically-motivated seizures of the Santa Maria in 1961 and the Achille Lauro in 1985 as acts that are often wrongfully described as piracy. See Kontorovich, E. (2013). Yes, Sea Shepherd Engages in Piracy Under International Law - The Volokh Conspiracy. [online] The Volokh Conspiracy. Available at: <http://volokh.com/2013/02/27/yes-sea-sheperd-engages-in-piracy-under-international-law/> [Accessed 8 Feb. 2016].

¹¹ Many Scholars have differed with such an interpretation of the "private ends" requirement. See Heller K, "Opinio Juris » A Response To Kontorovich And Gallagher About Piracy- Opinio Juris" (Opiniojuris.org, 2016) <<http://opiniojuris.org/2013/02/27/a-response-to-kontorovich-and-gallagher-about-piracy/>> accessed 8 February 2016.

¹² UNCLOS, Art 101 (a)(i)

¹³ Although many commentators have different views. See Samuel Pyeatt Menefee, *The New 'Jamaica Discipline': Problems With Piracy, Maritime Terrorism And the 1982 Convention On The Law Of The Sea*, 6 Conn J Intl L 127, 146-47

¹⁴ SUA Convention , Article 3

¹⁵ UNCLOS, Art 101

¹⁶ UNCLOS, Article 86

are committed in the territorial waters of Somalia.¹⁷ Therefore, the Somali pirates have not been prosecuted since there is an absence of a stable state in Somalia. Moreover the requirement of high seas in clause (c) of article 101 is unclear which deals with aiding the pirates thus benefiting the overlords who regulate the piracy from Somali land also they being in the territory of Somalia cannot be prosecuted by any other country. There is also an issue as to whether the acts committed in the Exclusive Economic Zones are piracy or not.¹⁸

The issue of jurisdiction: It is a well-accepted fact that pirates are *hostis humani generis* (enemy of mankind) but the main issue with regard to piracy is that nobody is ready to punish piracy. States have captured and then released pirates for they believe that if pirates are tried in their country, they will stay there forever¹⁹. Although the UNCLOS under Article 105 provides for a universal approach by giving each state the power to seize and punish²⁰ but states have not taken any steps in pursuance of it because Article 105 itself clearly states that prosecution is not an obligation upon the states.²¹ However, this is in stark contrast to what the drafters' commentary states "*any State having an opportunity [to take] measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law.*"²² The commentary further goes on to cite the Harvard Draft Convention on Piracy which goes to the extent of saying that legal steps would be taken against a state that does not punish piracy.²³ The SUA Treaty is better in this regard as it obliges contracting states to either extradite alleged offenders or submit cases to their competent authorities for the purpose of prosecution.

The issue of Armed Robbery: The UNCLOS lacks in this regard. Armed Robbery at sea has not been defined in the Convention. The International Maritime Organization has Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery describes this crime as "*any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a state's internal waters, archipelagic waters and territorial sea*". The term includes inciting or intentionally facilitating such acts.²⁴ The advantage of including such a definition is that armed robbery can be committed even in the territorial waters of a state. With respect to armed robbery, the state in whose waters the armed robbery takes place prosecutes the offenders.

¹⁷ International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Report For The Period 1 January-30 September 2009 ("IMB October 2009 Report")* 6-7 (Oct 2009).

¹⁸ T.A. Clingan, jr, *The Law Of Piracy*, in Eric Ellen, ed, *Piracy At Sea* 168-170 (1989)

¹⁹ M Schenkel 'High time for piracy tribunal,

²⁰ UNCLOS, Art 105

²¹ See Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 30 Eur. J. Int'l L. 399, 408 (2009); NATO Parliamentary Assembly, The Growing Threat of Piracy to Regional and Global Security, 169 CDS 09 E U 37 (2009), available at <http://www.natopa.int/default.asp?SHORTCUT=1770>.

²² Report of the International Law Commission to the General Assembly, 11 GAOR Supp. (No. 9) at art. 38 cmt.2, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Infi Comm'n 253, at 282, A/CN.4/SER.A/1956/Add.1[hereinafter Report of the Int'l Law Comm'n]. Ibid, note 1

²³ Harvard Research in Int'l Law, Draft Convention and Comment on Piracy, 26 Am. J. Int'l L. 739 (Supp. 1932)

²⁴ 2009 International Maritime Organization Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery, Part 2.2.1

CONCLUSION AND RECOMMENDATIONS

The UNCLOS is not up to task for eliminating piracy because of the abovementioned loopholes in it but it is argued that in 1982 piracy was in decline and therefore this issue was not very much focused on²⁵. But since after that piracy increased to new heights UNCLOS need some amendments to counter. Following are our recommendations:-

Firstly, the problem of private ends in the definition of piracy which gives a defence to an accused.

We recommend that the term private ends should be defined by UN so as to clear which acts will be considered as acts done for private ends and which are not. Or this term could be removed from UNCLOS as it is not mentioned in SUA convention. Article 3 of SUA convention describes the acts which will amount to be an offence if done intentionally. Thus there is requirement of term private ends in the definition of piracy.

Secondly, we recommend that the definition of piracy should not have the necessity of “against another ship or aircraft” what if a group of people captures the ship on which they are on-board it should also be considered as piracy, the SUA convention criminalises such act under article 3(1) and empowers the signing parties to take action against such act.

Thirdly, the question of piracy in a country’s EEZ must be cleared the municipal law of some states consider it as piracy while others don’t it is the responsibility of UN to clear this up. Moreover the requirement of high seas for piracy should be removed an inspiration can be taken from Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) in article 1(2) of ReCAAP is defined “armed robbery against ships” which is almost exactly same as piracy but in territorial waters²⁶ which gives ReCAAP better effectiveness than UNCLOS regarding jurisdiction. The UN took some steps in this direction in form of UN resolutions 1816 which authorized nations co-operating with the Transitional Federal Government to take action, using “all necessary means” to “repress acts of piracy and armed robbery... within the territorial waters of Somalia”²⁷ and 1851 which authorized nations to “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea”²⁸

But both of these resolutions apply only in Somalia, to counter piracy in a better way UNCLOS should either remove the requirement of high seas or include a provision like “armed robbery against ships”

²⁵ Yoren Gottlieb, The Security Council’s Maritime Piracy Resolutions: A Critical Assessment, Minnesota Journal of International Law

²⁶ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2004 Article 1(2)

²⁷ S.C.Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008)

²⁸ S.C.Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008)

Fourthly, to counter the problem of prosecuting pirates we suggest for an international institution preferably International Criminal Court as it also deals with crimes against humanity under which piracy can be included moreover a pre-established institution will be better to deal with issue like piracy. In current situation where no country want to prosecute pirates unless it's their ship or their nationals in question an international platform for prosecuting pirates will be suitable or UNCLOS can introduce a provision like article 6 of SUA convention which states that if a state party seizes an offender either they should prosecute him or extradite him to the country whose flag was hoisted by the ship thus making it sure that an offender will be punished in every case.

The piracy off the coast of Somalia is in decline now and is almost considered as finished but it happened due to heavy deployment of Navies of various countries in Gulf of Aden and resolutions 1816 and 1851 of UN. But if piracy is to rise again in some other part of the world such as it is doing in South East Asia UNCLOS in its current form is still not competent to face it.

CRITICAL AND ANALYTICAL STUDY ON CHILD ABUSE

Dr. Narendra Kumar Verma*

Abstract

Child Abuse in all fields being a victim could be most traumatic experience for Children. Especially in India where the society looks down upon the Children and the law doesn't even properly recognise Child Abuse. In this paper I have plan to discuss upon the various types and effects of Child Abuse that can be inflicted upon a Child and how they adversely affect them. I have also briefly examine upon the law exist to protect Children in such cases such as the Protection of Children From Sexual Offences Act, 2012.I am also having an elaborate review upon the recent increase in Child Abuse against Children. In conclusion I have attention upon the options available to the victims to Child Abuse and the changes required in legal system to effectively curb the rising spirits of Child Abuse criminals. I also plan to suggest countering the ever increasing Child Abuse against Children in India.

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INTRODUCTION

Child abuse is the physical, sexual or emotional maltreatment or neglect of a child or children.¹ In the United States, the Centers for Disease Control and Prevention, and the Department for Children and Families, define child maltreatment as any act or series of acts of commission or omission by a parent or other caregiver that results in harm, potential for harm, or threat of harm to a child.² Child abuse can occur in a child's home, or in the organizations, schools or communities the child interacts with.

DEFINITION

The Indian Penal Code does not spell out the definition of Child abuse as a specific offence neither does it offer legal remedy and punishment for "Child Abuse". The IPC broadly lays out punishment for offences related to rape or sodomy or "unnatural sex". The IPC Laws are rarely interpreted to cover the range of child sexual abuse; the law relating to term "Sodomy" or 'rape' are too specific and do not apply to acts like fondling, kissing, filming children for pornographic purposes etc. Child abuse is when a parent or caregiver, whether through action or failing to act, causes injury, death, emotional harm or risk of serious harm to a child. There are many forms of child maltreatment, including neglect, physical abuse, sexual abuse, exploitation, and emotional abuse.

According to the Journal of Child Abuse and Neglect, child abuse is "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation, an act or failure to act which presents an imminent risk of serious harm".³ In Western countries, preventing child abuse is considered a high priority, and detailed laws and policies exist to address this issue. Different jurisdictions have developed their own definitions of what constitutes child abuse for the purposes of removing a child from his/her family and/or prosecuting a criminal charge.

Susan Orr, former head of the United States Children's Bureau U.S. Department of Health and Services Administration for Children and Families, 2001–2007, states that "much that is now defined as child abuse and neglect does not merit governmental interference".⁴ Douglas J. Besharov, the first Director of the U.S. Center on Child Abuse and Neglect, states "the existing laws are often vague and overly broad"⁵ and there is a "lack of consensus among

¹ "Child abuse – definition of child abuse by the Free Online Dictionary, Thesaurus and Encyclopedia"

² Leeb, R.T.; Paulozzi, L.J.; Melanson, C.; Simon, T.R.; Arias, I. (1 January 2008). "Child Maltreatment Surveillance: Uniform Definitions for Public Health and Recommended Data Elements". Centers for Disease Control and Prevention. Retrieved 20 October 2008

³ Herrenkohl RC (2005). "The definition of child maltreatment: from case study to construct"

⁴ Orr, Susan. "Policy Study 262 Child Protection at the Crossroads: Child Abuse, Child Protection and Recommendations for Reform"

⁵ Philanthropy Roundtable. pp. 1-4.

professionals and Child Protective Services, personnel about what the terms abuse and neglect mean".⁶

TYPES OF CHILD ABUSE

Child abuse can take several forms⁷ the four main types are physical, sexual, psychological, and neglect⁸. By far the largest category was “neglect”. Often, these are cases in which the primary problem is family poverty.”⁹ According to the 2010 Child Maltreatment Report, a yearly Federal report based on submission by state Child Protective Services Agencies in the U.S., “as in prior years, neglect was the most common form of maltreatment.” The cases were substantiated as follows: neglect 78.3%, physical abuse 17.6%, sexual abuse 9.2%, and psychological maltreatment 8.1%.¹⁰ According to Richard Wexler, the Director of the U.S. National Coalition of Child Protection Reform, of “those labeled “substantiated” or “indicated” by protective workers, relatively few are the kind that leap to mind when we hear the words “child abuse”.

1. Physical Abuse-

Physical abuse involves physical aggression directed at a child by an adult. The American Humane Association defines physical abuse as any “non-accidental trauma or physical injury” to a child¹¹. Among professionals as well as the wider public, people do not agree on what behaviors constitute abuse.¹² In particular, the distinction between child discipline and abuse is often poorly defined. Abuse often results from the indiscriminate use of corporal punishment, although even so-called “ordinary” physical punishment can cause serious harm. Physical abuse often does not occur in isolation, but as part of a constellation of behaviors including authoritarian control, anxiety-provoking behavior, and a lack of parental warmth.¹³ The psychologist Alice Miller, noted for her books on child abuse, took the view that humiliations, spankings and beatings, slaps in the face, etc. are all forms of abuse, because they injure the integrity and dignity of a child, even if their consequences are not visible right away¹⁴

The Human Rights Committee of the United Nations has stated that the prohibition of degrading treatment or punishment extends to corporal punishment of children. Some professionals claim that cultural norms that sanction physical punishment are one of the

⁶ Krason, Stephen M. “The Critics of Current Child Abuse Laws and the Child Protective System: A Survey of the Leading“

⁷ “Child Abuse and Neglect: Types, Signs, Symptoms, Help and Prevention”

⁸ “A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice”. Retrieved 5 March 2015

⁹ National Coalition for Child Protection Reform, Retrieved August 2012

¹⁰ Children’s Bureau, Child Welfare Information Gateway, Protecting Children Strengthening Families. Retrieved May 2012

¹¹ American Humane Association

¹² Noh Anh, Helen (1994), “Cultural Diversity and the Definition of Child Abuse”, in Barth, R.P. et al., Child Welfare Research Review, Columbia University Press, 1994, p. 28

¹³ International Encyclopedia of the Social Sciences, 2008

¹⁴ UN Human Rights Committee (1992) “General Comment No. 20,” HRI/GEN/1/Rev.4.: p. 108

causes of child abuse, and have undertaken campaigns to redefine such norms. Most nations with child-abuse laws deem the deliberate infliction of serious injuries, or actions that place the child at obvious risk of serious injury or death, to be illegal.

2. Sexual abuse

An India NGO named Recovery and Healing from Incest (RAHI) conducted India's first study of child sexual abuse in 1998 called "Recovery and Healing from Incest, Voices from the Silent Zone (New Delhi 1998). The study interviewed 600 English-speaking middle and upper class women out whom 76 percent said they had been abused in their childhood or adolescence. Shockingly 40 percent said they had been abused by a family member mostly an uncle or a cousin. Yet despite the study making its findings public nothing much was done by the government or related agencies to address the problem with seriousness. Selling the sexual services of children may be viewed and treated as child abuse with services offered to the child rather than simple incarceration. In other words Child sexual abuse is a form of child abuse in which an adult or older adolescent abuses a child for sexual stimulation.¹⁵ Sexual abuse refers to the participation of a child in a sexual act aimed toward the physical gratification or the financial profit of the person committing the act¹⁶ Forms of CSA include asking or pressuring a child to engage in sexual activities, indecent exposure of the genitals to a child, displaying pornography to a child, actual sexual contact with a child, physical contact with the child's genitals, viewing of the child's genitalia without physical contact, or using a child to produce child pornography.

Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often brothers, fathers, mothers, uncles or cousins; around 60% are other acquaintances such as friends of the family, babysitters, or neighbors; strangers are the offenders in approximately 10% of child sexual abuse cases. Effects of child sexual abuse on the victim(s) include guilt and self-blame, flashbacks, nightmares, insomnia, fear of things associated with the abuse, self-esteem issues, sexual dysfunction, chronic pain, addiction, self-injury, suicidal ideation, somatic complaints, depression, post-traumatic stress disorder, anxiety, other mental illnesses including borderline personality disorder and dissociative identity disorder, propensity to re-victimization in adulthood, bulimia nervosa, and physical injury to the child, among other problems.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

This new Act provides for a variety of offenses under which an accused can be punished. It recognizes forms of penetration other than peno-vaginal penetration and criminalizes acts of immodesty against children too. The legislators tried to draft a gender-neutral Act, but failed, using the pronoun 'he' in the description of various offenses. With respect to pornography, the Act criminalizes even watching or collection of pornographic content involving children.

¹⁵ "Child Sexual Abuse", Medline Plus, U.S. National Library of Medicine, 2 April 2008.

¹⁶ Guidelines for psychological evaluations in child protection matters, Committee on Professional Practice and Standards, APA Board of Professional Affairs, The American Psychologist 54 (8)

The Act makes abetment of child sexual abuse an offense. It also provides for various procedural reforms, making the tiring process of trial in India considerably easier for children. The Act has been criticized as its provisions seem to criminalize consensual sexual intercourse between two people below the age of 18. The 2001 version of the Bill did not punish consensual sexual activity if one or both partners were above 16 years.

3. Psychological abuse

There are multiple definitions of Child Psychological Abuse:

- a) In 2015, additional research confirmed these 2014 statements of the American Psychological Association. Victims of emotional abuse may react by distancing themselves from the abuser, internalizing the abusive words, or fighting back by insulting the abuser. Emotional abuse can result in abnormal or disrupted attachment development, a tendency for victims to blame themselves (self-blame) for the abuse, learned helplessness, and overly passive behavior.
- b) In 2014, the American Psychological Association stated that:¹⁷ “Childhood psychological abuse [is] as harmful as sexual or physical abuse.” “Nearly 3 million U.S. children experience some form of [psychological] maltreatment annually.” Psychological maltreatment is “the most challenging and prevalent form of child abuse and neglect. Given the prevalence of childhood psychological abuse and the severity of harm to young victims, it should be at the forefront of mental health and social service training.
- c) In 1995, APSAC defined it as: spurning, terrorizing, isolating, exploiting, corrupting, denying emotional responsiveness, or neglect” or “A repeated pattern of caregiver behavior or extreme incident(s) that convey to children that they are worthless, flawed, unloved, unwanted, endangered, or only of value in meeting another’s needs.”

4. Neglect

Child neglect is the failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child’s health, safety, and well-being are threatened with harm. Neglect is also a lack of attention from the people surrounding a child, and the non-provision of the relevant and adequate necessities for the child’s survival, which would be lacking in attention, love, and nurture. Some of the observable signs in a neglected child include: the child is frequently absent from school, begs or steals food or money, lacks needed medical and dental care, is consistently dirty, or lacks sufficient clothing for the weather.

Neglectful acts can be divided into six sub-categories:

- (i) **Abandonment:** when the parent or guardian leaves a child alone for a long period of time without a babysitter.

¹⁷ “Childhood Psychological Abuse as Harmful as Sexual or Physical Abuse”, The American Psychological Association, 8 October 2014.

- (ii) **Physical Neglect:** characterized by the failure to provide the basic physical necessities, such as a safe and clean home;
- (iii) **Supervisory Neglect:** characterized by the absence of a parent or guardian which can lead to physical harm, sexual abuse or criminal behavior;
- (iv) **Medical Neglect:** characterized by the lack of providing medical care;
- (v) **Educational Neglect:** characterized by the caregivers lack to provide an education and additional resources to actively participate in the school system; and
- (vi) **Emotional Neglect:** characterized by a lack of nurturance, encouragement and support;

EFFECTS OF CHILD ABUSE

A 1991 source reported that studies indicate that 90 percent of maltreating adults were maltreated as children. Child abuse can result in immediate adverse physical effects but it is also strongly associated with developmental issues and with many chronic physical and psychological effects, including subsequent ill-health, including higher rates of chronic conditions, high-risk health behaviors and shortened lifespan. Maltreated children may grow up to be maltreating adults.

- a. **Emotionally Effect-** Child abuse can cause a range of emotional effects. Children who are constantly ignored, shamed, terrorized or humiliated suffer at least as much, if not more, than if they are physically assaulted. The effects of abused children can also differ when it comes to babies and young children. Babies and pre-school children who are being emotionally abused or neglected may be overly-affectionate towards strangers or people they haven't known for very long. They can lack confidence or become anxious, appear to not have a close relationship with their parent, exhibit aggressive behavior or act nasty towards other children and animals. Overall, emotional effects caused by child abuse can result in long-term and short-term effects that ultimately affect a child's upbringing and development. Older children may use foul language or act in a markedly different way to other children at the same age, struggle to control strong emotions, seem isolated from their parents, lack social skills or have few, if any, friends.

Abused children can grow up experiencing insecurities, low self-esteem, and lack of development. Many abused children experience ongoing trust issues, withdrawal, trouble in school, and forming relationships.

- b. **Physically Effect-** The immediate physical effects of abuse or neglect can be relatively minor (bruises or cuts) or severe (broken bones, hemorrhage, or even death). In some cases the physical effects are temporary; however, the pain and suffering they cause a child should not be discounted. Rib fractures may be seen

with physical abuse. The long-term impact of child abuse and neglect on physical health and development can be:-

- (i) Shaken baby syndrome. Shaking a baby is a common form of child abuse that often results in permanent neurological damage or death. Damage results from intracranial hypertension after bleeding in the brain, damage to the spinal cord and neck, and rib or bone fractures.
 - (ii) Exposure to violence during childhood is associated with shortened telomeres and with reduced telomerase activity. The increased rate of telomere length reduction correlates to a reduction in lifespan of 7 to 15 years.
 - (iii) Children who experience child abuse and neglect are 59% more likely to be arrested as juveniles, 28% more likely to be arrested as adults, and 30% more likely to commit violent crime.
 - (iv) Impaired brain development. Child abuse and neglect have been shown, in some cases, to cause important regions of the brain to fail to form or grow properly, resulting in impaired development. These alterations in brain maturation have long-term consequences for cognitive, language, and academic abilities.
 - (v) Poor physical health. In addition to possible immediate adverse physical effects, household dysfunction and childhood maltreatment are strongly associated with many chronic physical and psychological effects, including subsequent ill-health in childhood, adolescence and adulthood, with higher rates of chronic conditions, high-risk health behaviors and shortened lifespan.
 - (vi) Adults who experienced abuse or neglect during childhood are more likely to suffer from physical ailments such as allergies, arthritis, asthma, bronchitis, high blood pressure, and ulcers. There may be a higher risk of developing cancer later in life, as well as possible immune dysfunction.
- c. **Psychologically Effect-** A study by Dante Cicchetti found that 80% of abused and maltreated infants exhibited symptoms of disorganized attachment. When some of these children become parents, especially if they suffer from posttraumatic stress disorder (PTSD), dissociative symptoms, and other sequelae of child abuse, they may encounter difficulty when faced with their infant and young children's needs and normative distress, which may in turn lead to adverse consequences for their child's social-emotional development. Despite these potential difficulties, psychosocial intervention can be effective, at least in some cases, in changing the ways maltreated parents think about their young children.

Children who have a history of neglect or physical abuse are at risk of developing psychiatric problems, or a disorganized attachment style. Disorganized attachment is associated with a number of developmental problems, including dissociative symptoms, as well as anxiety, depressive, and acting

out symptoms. Health inequality also has its origins in the family, where it is associated with the degrees of lasting affective problems (lack of affection, parental discord, the prolonged absence of a parent, or a serious illness affecting either the mother or father) that individuals report having experienced in childhood.

On the other hand, there are some children who are raised in child abuse, but who manage to do unexpectedly well later in life regarding the preconditions. Such children have been termed *dandelion children*, as inspired from the way that dandelions seem to prosper irrespective of soil, sun, drought, or rain. Such children (or currently grown-ups) are of high interest in finding factors that mitigate the effects of child abuse.

CONCLUSION & SUGGESTION

Ensuring a world free of abuse for children will begin in Kerala, said Social Justice Minister Dr M K Muneer launching the three-month long state level campaign of an Abuse free world for children by the Kerala State Commission for Protection of Child Rights on the Children & rescues Day here on Thursday. The Minister gave the pledge on child rights which was rendered by the children and also launched the Commission & rescues website._ A large number of children in India are sexually abused by known persons like relatives, neighbours, at school, and in residential facilities for vulnerable children.

The government has failed to prevent much of the child sexual abuse from taking place. Additionally, the existing systems of child protection and the stakeholders involved including police, lawyers, media, teachers, parents etc. are simply not doing enough to help victims or to ensure that perpetrators are punished. Most cases go unreported. Poor awareness, social stigma, and negligence remain attached to the issue. There is a culture of silence around it.

A committee appointed by government, found that the government's child protection schemes, "have clearly failed to achieve their avowed objective." A statement released by Louis-Georges Arsenault, UNICEF Representative to India states, "It is alarming that too many of these cases are children. One in three rape victims is a child. More than 7,200 children including infants are raped every year; experts believe that many more cases go unreported. Given the stigma attached to rapes, especially when it comes to children, this is most likely only the tip of the iceberg."

INDEPENDENT DIRECTOR UNDER INDIAN STATUTE AND ITS EVOLUTION

B Pallavi Patro* & Vikalp Srivastava**

Abstract

The paper deals with the notion of Independent Directors and their necessity in order to reduce scandals and frauds which have been continuing since decades. The paper further discusses the ‘Evolution of independent directors that was understood by the legislators only after such scams that triggered the world economy’ with regard to *Enron and Satyam* scam where the need of Independent director was felt by most of the company as it has hailed as an effective deterrent against fraud, misconduct and mismanagement and inadequacy in decision making policy. Further paper talks about Independent directors and their role in harbouring the decision making policies and maintaining the balance between the shareholders, stakeholders and managers interests. Corporate Experts have always urged the need for the directors to be independent and free from the influence of the Board. This paper deals with evolution of Independent Directors and their role in Corporate Governance in both national and international perspective, gives brief knowledge about various reforms, and committees which brought in the concept of independent directors, the paper also talks about the role, function duties of independent director in relation with Clause 49(1B) of listing agreement and the definition appointment, reappointment, removal, remuneration provided to the independent director and statutory provisions related to independent directors as per Companies Act,2013. The paper concludes with the complications which are faced in maintaining the independency of independent directors.

Keywords: Independent Directors, Evolution of Independent Directors, Listing agreement, Independency of Independent Director, Schedule IV Companies Act, 2013

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INTRODUCTION

“Independence is a status of mind and cannot be arrayed through a statute. A lot of promoters bring someone on the board that they have acknowledged for long. The chosen individual is either expected to add value or toe the line without practical encounters. However, if the non-executive director chooses to engage in positive challenge within the board room, that is actual independence. In the long run, such positive dissent is bound to result in more operative decision making.”¹

Independent directors as mostly understood are those who apart from receiving remuneration have no material interest in a company.² Reason for appointment of Independent on the board is to strengthen the internal control in lack of effective shareholder control.³ A majority of the independent directors on Indian boards are retired experts with a just proportion of accountants and legal experts.⁴ The broad definition of independent directors is ‘those directors, who apart from accepting director’s remuneration do not have any other material monetary relationship or business with the company, its promoters, and its management of its subsidiaries, which in the decision of the board, may upset independence of the decision of the directors’.⁵ Others regarded it as directors ‘who apart from accepting director’s remuneration do not have any other material fiscal relationship or relations with company, its promoters, its management or its subsidiaries , which in the conclusion of the board may affect their impartiality of judgment .⁶ Furthermore, definition of independent director should be ‘adequately extensive and flexible’ so that it does not ‘become a restraint in the assortment of independent directors on the boards of companies.’

EVOLUTION OF INDEPENDENT DIRECTORS

The notion of Independent Directors developed in the US in the 1950’s. The general notion of the American Boardroom Practice was that Independent Directors used to aid as a solution to the Manager-Share Holder Agency problem. Independent Directors was presented as a voluntary mechanism in the US with the belief that a board with some level of independence will introduce neutrality in decision making, add to the diversity and advisory capabilities of the Board and hence perk up the performance of the company. Later innumerable arms of the government accepted this idea in a phased manner.⁷

¹ www.kpmg.com/IN/en/IssuesAndInsights/ThoughtLeadership/Role_of_Independent_Directors.pdf
(Accessed on 12 January ,2016)

² Indrajit Dube ,*Corporate Governance*, Lexis Nexis Butterworths Wadhwa Publications : New Delhi , 2009, Pg. No. 124

³ Berle, Adolf A & Means, Gardiner C, *The Modern Corporation and Private Property*, The Macmillan Company Publications: London, 1962, Pg. No. 19

⁴ *Supra* at 3

⁵ See Section IB of the circular SMDRP/POLICY/CIR-10/2000

⁶ Report of the Committee Appointed by SEBI on Corporate Governance, Kumar Mangalam Birla Committee,(Academic Foundation) Pg. No. 13

⁷ www.indianacademylaw.com/role-of-independent-directors-in-corporate-governance/ (Accessed on 13 January 2016)

The first committee to be established in this regard was the Cadbury Committee. It aimed at reporting on the financial aspects of corporate governance. Similarly, Greenbury Committee was also established in January 1995 which focused on the Directors' Remuneration, its report was published in July 1995.⁸ Further in the year 2003 although substantial improvements in corporate governance had been stimulated in UK's listed companies, certain areas were highlighted for further improvements by the Higgs Committee. In the same year the UK Government in response to the Enron scandal commissioned a committee known as the Smith Committee which passed its report known as the Smith Report⁹.

In India the Independent Director concept was traced to the recommendations made by the Kumara Mangalam Birla Committee (1999), Naresh Chandra Committee (2002) and Narayana Murthy Committee (2003).

Kumara Mangalam Birla Committee (1999): Committee defined independent director as non-executive directors, who have a significant role in the entire mosaic of corporate governance. The Committee was of the view that it was important that independence be suitably, correctly and practically defined, so that the definition itself does not become a constraint in the selection of independent directors on the boards of companies. The definition should bring out what in the view of the Committee is the benchmark of independence, and which should be sufficiently broad and flexible.¹⁰ It was agreed that "material monetary relationship which affects independence of a director" should be the litmus test of independence and the board of the company would exercise adequate degree of maturity when left to itself, to determine whether a director is independent or not.¹¹ The Committee therefore agreed on the following definition of "independence"- Independent directors are directors who apart from getting director's remuneration do not have any other material pecuniary relationship or dealings with the company, its promoters, its management or its subsidiaries, which in the judgement of the board may alter their independence of judgement.¹² Further, all pecuniary relationships or transactions of the non-executive directors should be released in the annual report.¹³

Naresh Chandra Committee (2002): Defined an independent director as an individual free from business and any other relation with the company. The committee recommended that the appointment of independent director should be done through a Nomination Committee being setup in listed companies, comprising a majority of independent directors including its chairman; there job would be to search, evaluate, shortlist and recommend appropriate independent directors.¹⁴

⁸ Adrian Cadbury , *Corporate Governance and chairmanship* , Oxford University Press Inc.: New York , 2002, Pg. No. 15

⁹ *Id*

¹⁰ www.sebi.gov.in/commreport/corpgov.html (Accessed on 12 January, 2016)

¹¹ www.ecgi.org/codes/documents/corpgov.pdf (Accessed on 12 January, 2016)

¹² *Id*

¹³ *Supra* at 12

¹⁴ www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf (Accessed on 13 January, 2016)

Narayan Murthy Committee (2003): It was suggested that SEBI should work towards harmonizing the provisions of clause 49 of the Listing Agreement and those of the Companies Act, 1956.¹⁵ The Committee noted that major differences between the requirements under clause 49 and the provisions of the Companies Act, 1956 should be identified.¹⁶ SEBI should then recommend to the Government that the provisos of the Companies Act, 1956 be changed to bring it in line with the requirements of the Listing Agreement. It was suggested that companies should inform SEBI/stock exchanges within five business days of the removal/resignation of an independent director, along with a statement certified by the managing director/director/company secretary about the reasons of such removal/resignation (specifically whether there was any difference with the independent director that caused such removal/resignation).¹⁷ Any independent director sought to be removed or who has resigned because of a discrepancy with management should have the opportunity to be heard in general meeting.¹⁸

Further to these proposals the term Independent Director was introduced for the first time in India when the Securities and Exchange Board of India (SEBI) incorporated Clause 49 of the Listing Agreement.¹⁹ There are interesting differences between the New York Stock Exchange (NYSE) regulations and the SEBI regulations with respect to the determination of ‘independence’ of directors. The NYSE regulations define Independent director as one who ‘has no material relationship with the listed company’ which is similar to the original version of the Clause 49 enacted in SEBI. However, the NYSE regulations require affirmative determinations of independence of each director by the board by considering ‘all relevant facts and circumstances’ unlike the original version of Clause 49.²⁰

WHO IS AN INDEPENDENT DIRECTOR AS PER THE STATUTE? DEFINITION, APPOINTMENT AND REMOVAL

Before 2000, the Companies Act had no provision regarding the Independent Director in the Board. The word “Independent Director” was first taken into account in the clause 49 of the Listing Agreement under the heading Corporate Governance. Company Act, 2013 made new provisions regarding Independent Director.

Act lays down that, ‘independent director’ means an independent director mentioned to in sub-section (5) of section 149.²¹

The Companies Act, 2013 says that every listed public company shall have not less than one-third of the total number of directors as independent directors²² and the Central Government

¹⁵ www.geocities.ws/kstability/inbank/corpgovern2/last.html (Accessed on 13 January, 2016)

¹⁶ *Id*

¹⁷ www.sebi.gov.in/commreport/corpgov.pdf (Accessed on 13 January, 2016)

¹⁸ *Id*

¹⁹ Jayanti Sarkar and Subrata Sarkar, *Corporate Governance in India*, SAGE Publications Pvt Ltd : New Delhi, 2012, Pg. No. 237

²⁰ *Id*

²¹ Section 2(47), Companies Act, 2013

may recommend²³ the minimum number of independent directors in case of any class or classes of public companies.²⁴

Section 149(6) of the act²⁵ lays down that an Independent Director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director. Further, the said section lays down the following criteria for a person to be appointed as an independent director. Section 149(6) (a) of the act, says that the person to be appointed, in the opinion of the board should be a person of integrity and should possess relevant expertise and experience. Any person who himself is or is related to the promoter or is related to the director in the company or its holding, subsidiary or associate company cannot be appointed as an independent director of the company.²⁶

Sub-section (c) of the above mentioned section lays down that such individual to be appointed should not have any monetary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during two immediately previous financial years or during the current fiscal year.

Sub-section (d) says that appointment as independent director can be done of an individual, None of whose relatives has or had Pecuniary relationship or business with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to 2 % or more of its gross turnover or total income or 50 lakh rupees or such higher amount as may be prescribed, whichever is lower, during the 2 immediately preceding financial years or during the current financial year.

Section 149 (6) (e), lays down that individual neither himself or his relative should hold any key managerial office in the company, nor should be an employee or proprietor or a partner in the company in which he is supposed to be appointed, he should not hold together with his relatives 2% or more voting power of the company; also he should not be a Chief Executive or director of any non-profit organisation that receives 25% or more of the receipts from the said company.

Another explanation regarding who may consist of an Independent Director has been laid down in Clause 49 of the listing agreement. It contemplates that the expression ‘independent director’ shall mean a non-executive director of the company who apart from receiving director’s remuneration, does not have any material fiscal relationship or transaction with the company; further it says that the individual should not be related to the promoters or any other personnel who is occupying any management position at the board level.²⁷ The

²² See Circular No. 14/2014, dated 9-06-2014 [Clarification on Independent Director] (Division Three)

²³ See rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014. See also Clause49 of the Listing Agreement.

²⁴ Section 149(4), Companies Act, 2013

²⁵ Section 2(47) of the Act states that criteria for independent directors is described under section 149(5), but in fact the correct reference is under 149(6)

²⁶ See Section 149(6)(b), Companies Act, 2013

²⁷ www.indianboards.com/files/clause_49.pdf (Accessed on 16 January, 2016)

individual should not be an executive of the company in the immediate 3 preceding financial years; the individual should not be a partner or an executive of the statutory executive firm or the internal audit firm which is associated with the company or any other legal firm or consulting firm having association with the company. The independent director should not be a material supplier or service provider or customer of the company, as these may affect the impartiality of the director; also, he should not be a substantial shareholder of the company and nor should be less than the age of 21.²⁸

Further, the act lays down that the said appointment of an independent director should be approved by the company in the general meeting in accordance with Section 152 of the Companies Act, 2013; also an explanatory statement has to be annexed to the notice of the general meeting containing the justification as to selecting the very individual for the appointment as an independent director.²⁹ The explanatory statement annexed should also include a statement that “In the opinion of the board, he fulfils the conditions specified in this Act for such an appointment.”³⁰

Manner of Appointment of an Independent Director has been laid down in Clause IV of Schedule IV of the Companies Act, 2013. Companies as well as the Independent Director have a duty to abide by the provisions as specified in the said rule.³¹ Schedule IV lays down following manners of appointment:

- Firstly, that the appointment of the director shall be independent of the company’s management; also that the board shall ensure that the individual being appointed has appropriate skill, experience and knowledge.
- Secondly, the said appointment should be approved by the company in general meeting of the shareholders.
- There should be an explanatory statement annexed to the notice of the meeting as discussed in Section 150 (2) of the act.
- Fourthly, the appointment should be formalised through a letter of appointment, which shall contain:
 - Term of appointment.
 - Expectations of the board for the individual being appointed.
 - Fiduciary duties and liabilities.
 - Provisions regarding Directors and Officers insurance, if any.
 - Code of Business Ethics which the company expects its employees and directors to follow.
 - List of actions not to be done by the director while functioning in the company.
 - Amount of remunerations, fees, reimbursement of expenditures for participation in the Board and other meetings.

²⁸ *Id*

²⁹ See Section 150 (2), Companies Act, 2013

³⁰ See Section 152 (2), Companies Act, 2013

³¹ See Section 149 (8), Companies Act, 2013

- Provisions empower any member of the company to inspect the terms and conditions of the appointment of independent director, at the registered office during normal business hours.
- The terms and conditions regarding the appointment should also be posted on the company's website.

Further, the act lays down the provisions regarding the resignation and removal of an independent director. It contemplates as, that the registration or removal of an independent director should be in accordance with the provisions as laid down in sections 168 and 169 of the Act; Secondly, that the director so removed from the board shall be replaced by a new independent director within 180 days of such removal or resignation; further, it says that where the company fulfils the requirement of independent director in its board even without filling the vacancy, the requirement of replacement by new independent director shall not apply.³²

Reappointment of independent director shall be on the basis of report of performance evaluation. The performance evaluation will be done by the Board to determine the reappointment.³³

Companies act, 2013 also talks about director's remuneration. The overall ceiling on managerial remuneration has been specified in section 198 of the Act. Within those limits, an independent director shall be entitled only to profit related commission as may be approved by the members; in addition to that a director would be entitled to a sitting fee³⁴, reimbursement of expenses for participation in the board and other meetings, profit related commission as may be approved by members; however, no stock options can be given to independent director.³⁵

CODE FOR INDEPENDENT DIRECTORS

The Code is a guide to professional conduct for independent directors. Code of independent directors has been specified in Schedule IV of the 2013 Act. The independent director shall act as per the provisions specified in Schedule IV of the 2013 Act - section 149(8) of the 2013 Act.³⁶ Adherence to these standards by independent directors and completion of their responsibilities in a professional and faithful manner will encourage confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.

Guidelines of professional conduct - The independent director shall act in a bona fide manner. He shall devote sufficient time and attention for balanced decision making and

³² Clause VI of Schedule IV, Companies Act , 2013

³³ See Clauses V and VIII of Schedule IV, Companies Act, 2013

³⁴ Refer Section 197 (5), Companies Act, 2013

³⁵ See Section 149 (9), Companies Act, 2013

³⁶ www.taxguru.in/company-law/independent-directors-companies-act-2013.html (Accessed on 13 January, 2016)

upload ethical standards. The independent director assists company in corporate governance.³⁷ Not allow any extraneous considerations that will vitiate his exercise of objective impartial judgment in the paramount interest of the company as a whole, Not abuse his position to the loss of the company or its shareholders or for the purpose of gaining direct or indirect personal advantage or advantage for any allied person; Refrains if he thinks can lose his independence. If certain circumstances arises which make an independent director lose his independence, the independent director must immediately inform the Board accordingly³⁸.

Duties of Independent Director - The Independent Director shall update and refresh their skills, knowledge and familiarity with the company; Seek appropriate clarification or take and follow appropriate professional advice and opinion of outside experts at the cost of the company; Strive to attend all meetings of the Board of Directors; Participate constructively and actively in the committees of the Board in which they are chairpersons or members; Strive to attend the general meetings of the company; insist that their concerns are recorded in the minutes of the Board meeting; keep themselves well informed about the company and the external circumstances in which it operates; not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board; pay sufficient attention and ensure that adequate deliberations are held before accepting related party transactions and assure themselves that the same are in the interest of the company; Report concerns about unprincipled or unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy; acting within his power, assist in protecting the legitimate interests of the company, shareholders and its employees; not unveil confidential information, unless such disclosure is expressly approved by the Board or required by law.³⁹

CONTROVERSY OF THE INDEPENDENCY OF THE INDEPENDENT DIRECTOR

How far an independent director is really independent, this question is possibly raised in every corner of the world. In the days of inception, a company was necessarily developed as an instrument of business for some group of individuals. So, those people who have an interest in that business venture will send their representation in the board or they themselves will manage the affairs of the company. Appointment of the promoter as the default director or first director in board was necessary conclusion. The first director always looks for keeping control over the board by selecting trusted people. Selection of a director in board is always made from family or from group of trusted people.

A truly representative process would have the shareholders nominating and electing individuals to represent them. For a number of reasons, however this process is not practical.

First, many shareholders do not behave like long term investors; indeed, they are essentially traders, who move in and out of stocks and are not particularly interested in participating in

³⁷ V.S .Datey , *Company law Ready Reckoner*, Taxmann's Publications : New Delhi , 2014 , Pg. No. 510

³⁸ www.psalegal.com/upload/publication/assocFile/ENewslineFebruary2014.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Origin (Accessed on 13 January, 2016)

³⁹ www.idbi.com/pdf/Code-for-Independent-Directors-of-the-Bank.pdf (Accessed on 14 January, 2016)

the governance of corporations in which they own stock. institutional shareholder (including mutual funds, pension funds, and insurance or mutual companies) generally do not want to be directly represented on the boards of companies in which they invest because would make them insiders, which, in turn, would limit their flexibility in deciding whether to buy or sell.

Finally, the broad group of small, public shareholders is not a cohesive body that is organized to act together .In theory, they could identify and nominate directors, but they seldom do. This leaves the nomination process to either the existing board, which may be inclined to postulate itself, or to major shareholders becomes disenchanted with management, they may nominate a slate of directors and engage in a proxy battle. Consequently, the nominating process for directors is usually managed by controlling shareholders and the current board through its nominating committee.⁴⁰

The question of independency of an independent director gets challenging in a publicly held corporate structure. Most of the annual reports of the company do not ascertain the background of the independent director; on the company they designate some of them as independent directors. Even so, in some corners of academia, debate about the value of independent directors continues. Pragmatic studies have shown that a majority independent board does not improve firm performance, i.e., firms with a majority of independent directors do not perform better for shareholders than those with a minority of independents.⁴¹

The data indicates that independence does not lead to improved firm performance and may even be associated with sub-optimal performance. Likewise, independence fails to correlate with improved performance in specific areas .Studies on the performance of independent audit committees, for example, found no relation between committee independence and performance.⁴² In contest to the conventional account of ‘independence’ are both transaction-specific and have a ‘situational’ or ‘contextual’ character.

The word “independence” should connote not just a lack of financial ties to management, but also a willingness to bring a high degree of consistency and sceptical objectivity to the evaluation of company management and its plans and proposals. The imprecision inherent in the word “independence” means that the empirical studies necessarily must use rough proxies for independence: the simple absence of a job with the company, a lack of a close family connection, or (perhaps) the absence of a regular stream of income from the company apart from directors’ fees and dividends are all that it takes to qualify under these restrictive definitions, many directors who lack any real desire to take their monitoring role seriously

⁴⁰ Indrajit Dube, *Corporate Governance*, Lexis Nexis Butterworths Wadhwa: New Delhi, 2009, Pg. No 132

⁴¹ Usha Rodrigues ,*The Festishization Of Independence*, Vol. 33, Journal Of Corporation Law, 2008, Pg. No. 447

⁴² Roberta Romano , *The Sarbanes-Oxley Act and Making of Quick Corporate Governance*, Vol. 114, Yale Law Journal, 2005, Pg. No. 1521

who are on the board for reasons of status-seeking, sociability, or the prerequisites that come with board membership fall into the ‘independent’ category, thereby muddying the data.⁴³

CONCLUSION

Independent Directors play a very crucial role in a company, they are much needed in a company to reduce the rate of biasness, they also help in regulating a company in proper decision making process and increases the level of independency in a Corporate Sector. The Scandals like as Enron and Satyam which drastically changed a scenario of a well-established company and exposed to the whole world for the economic crises which was faced by them can be reduced by an independent director in a company for prevention and detection of fraud, in view of the limited roles performed by them in the company. These scandals guided the legislators and corporate experts in India and abroad, which propelled them to take adequate curative measures.

As regards India, the legislators after such collapses enacted the new law which made a considerable effort to bring the role of independent director in line with the changing needs of the economy. The primary objective behind the Act of 2013’s provision on independent directors is to ensure transparency and independence and at the same time to bring adequate changes to the company by providing input on strategy, business, marketing, legal, compliance and other matters including performance of monitoring functions. They act as a policy formulator in the company.

⁴³ Usha Rodrigues, *The Festishization Of Independence*, Vol. 33, Journal Of Corporation Law, 2008, Pg. No. 463

INTELLECTUAL PROPERTY RIGHTS IN BIOINFORMATICS

Shafaque Raza*

Abstract

Intellectual property protection is perhaps one of the key factors for economic growth and advancement in the bioinformatics and biotech sectors. In particular, patents add value to laboratory discoveries, computer coding and in doing so, provides incentives for private sector investment into these sectors. These sectors advocate a strong and effective global intellectual property system.

Bioinformatics is a new field of science that marks amalgamation of life sciences which marks one of the oldest areas of research and deliberation in human civilisations and information technology which is one of the latest and still developing areas. This paper is basically aims to study the field of bioinformatics and application of intellectual property rights to this area.

Keywords: Intellectual Property Rights, Bioinformatics, Genome, Databases, Algorithms

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INTRODUCTION

The bioinformatics industries, as we know, did not exist prior to the landmark decision of Supreme Court in the case of *Diamond, Commissioner of Patents and Trademarks v. Chakrabarty*¹ where the Court held that anything made by the hands of man is eligible for patenting. Since this decision, this industry has flourished and continued to grow.

As per the facts of the case, Genetic engineer Ananda Mohan Chakrabarty, working for General Electric, had developed a bacterium capable of breaking down crude oil. A patent application for the said bacterium was filed in the United States listing Chakrabarty as the inventor, but the application was rejected by a patent examiner, because under patent law at that time it was generally understood that living things were not patentable subject matter under Section 101 of Title 35 U.S.C.

The Board of Patent Appeals and Interferences agreed with the original decision; however, the United States Court of Customs and Patent Appeals overturned the case in Chakrabarty's favour. Sidney A. Diamond, Commissioner of Patents and Trademarks, appealed to the Supreme Court. The patent was finally granted by the USPTO on Mar 31, 1981.

The Court emphasised that the patent system should be read broadly to encompass patent regime that would also cover living things.

Hence it is evident that strong intellectual property protection is essential to the success, and in some instances, to the survival of the biotechnology companies. For these companies, the patent system serves to encourage development of new medicines and diagnostics for treatment and monitoring of intractable diseases, and agricultural and environmental products to meet global needs.

The main objective of Bioinformatics is mainly three fold.²

- Firstly it organises the data in a way that helps the researchers to access existing information and put it in new entries as they produce.
- Secondly, it helps in developing the tools for the analysis of data.
- Thirdly, to use these tools to analyse the data and interpret the results in biologically meaningful manner.

NATURE OF BIOINFORMATICS

Bioinformatics is the convergence of analytical and computational tools with the discipline of biological research. This has vast influence in biological research as numerous data that are collected through laboratory experiments can be organized, analyzed, or prediction made to reduce the time spent in finding cures to diseases or causes of diseases, biological or other

¹ 447U.S.303(1980)

² Mcentyre J.and Ostell J. (2005), The NCBI Handbook, Bethesda (MD): National Library of Medicine

healthcare-related applications³. Bioinformatics is the application of computer technology to the management of biological information. Computers are used to gather, store, analyze and integrate biological and genetic information which can then be applied to gene-based drug discovery and development. The need for Bioinformatics capabilities has been precipitated by the explosion of publicly available genomic information resulting from the Human Genome Project. The goal of this project is to determine the sequence of the entire human genome (approximately three billion base pairs). The science of Bioinformatics, which is the melding of molecular biology with computer science, is essential to the use of genomic information in understanding human diseases and in the identification of new molecular targets for drug discovery. In recognition of this, many universities, government institutions and pharmaceutical firms have formed bioinformatics groups, consisting of computational biologists and bioinformatics computer scientists. Such groups will be key to unravelling the mass of information generated by large scale sequencing efforts underway in laboratories around the world⁴.

SIGNIFICANCE AND SCOPE OF BIOINFORMATICS

Bioinformatics involves technologies that can be used to gather, store, analyse and integrate biological and genetic information that can be applied to gene-based drug discovery and development. The science of bioinformatics is essential to the use of genomic information in understanding human diseases and in the identification of new molecular targets for drug discovery. For example, researchers can use bioinformatics tools ‘to identify similarity between one gene sequence for which the function is known and another gene sequence for which the function is being investigated. Bioinformatics holds great potential for education, personalised medicine and health care and has increasingly become a competitive business model. With the emergence of bioinformatics and development of genomic databases, an increasing number of companies have gained possession of extensive collections of sequence information and data organised in database formats. The potential commercial value of these data has inspired these companies to effectively protect and leverage them through intellectual property protection.⁵

As more and more DNA, RNA and protein sequences are reported; scientists are developing biological databases to catalogue and store the sequence information. These databases are important if the stored information can be readily searched and analyzed. For example, scientists can use these databases to compare and assign biological functions to particular and characteristics functions. Then, when a scientist obtains a sequence from an unknown DNA, RNA or protein molecule, the scientists can use these databases to identify the unknown molecule and determine its function. Although several databases are available to general public, private companies are not required to make their databases freely

³ Dennis Fernandez & Mary Chow, Fernandez & Associates LLP, Intellectual Property Strategy in Bioinformatics and Biochips

⁴ <http://www.bioplanet.com/whatis.html>

⁵ Singh K.K, Intellectual Property Protection in Bioinformatics and open Bio development

available. For instance, one company working on sequencing the human genome⁶, Celera, generally charges for its access to the database, although it provides free access to “qualified academic users”.

BIOINFORMATIC COMPONENTS

Before one can understand intellectual property protection for bioinformatics, it is necessary to understand the nature of the various components that comprise the field of bioinformatics. Bioinformatics involves the acquisition, organization, storage, analysis, and visualization of information contained within biological molecules⁷. To be a patentable subject matter an invention should be a process, machine, manufacture, or composition of matter or any improvement⁸. Bioinformatics is analyzed according to the following categories:

- a) Biological sequences such as DNA, RNA, and protein sequences,
- b) Databases in which these sequences are organized, and
- c) Software and hardware designed to create, access, organize, and analyze information contained within these sequences and databases.

BIOINFORMATICS IN INDIA

Studies have found that India will be a great potential star in biotechnology keeping in mind the factors like biodiversity, human resources, infrastructure facilities and government initiatives.

Bioinformatics has emerged out of the inputs from several different areas such as biology, biochemistry, molecular biology, biostatistics and information technology. Specially designed algorithms and organized databases is the core of all informatics system. The requirements for such an activity make heavy and high demands on both the hardware and software capabilities. This sector is the quickest growing field in the country. The vertical growth is because of the linkages between IT and biotechnology, spurred by Human Genome Project. There has already been many start ups in Hyderabad, Bangalore, Pune etc.⁹

INTELLECTUAL PROPERTY AND BIOINFORMATICS INTERFACE: CASE STUDY

Intellectual property protection is the key factor for economic growth and advancement in the bioinformatics and biotech sectors. The patents add value to the laboratory discoveries, computer coding and in doing so provide incentives for private sector investment into bioinformatics and biotech sectors and for their development. Intellectual property laws are the driving force for innovation and progress in the contemporary society. Different forms of IP such as patents, copyrights, trademarks, trade secrets, can be used to protect the products

⁶ Meyers T, Patenting and Financing Bioinformatics Inventions

⁷ McBride MS, Bioinformatics and Intellectual Property Protection

⁸ Kankanala KC, Genetic Patent Law and Strategy, Manupatra (2007)

⁹ Naik S, Bioinformatics And Intellectual Property Rights (2014)

of invention and innovation. Patents provides for development of new products, improvement over the existing product, employment opportunity for people around the world. There was no application of IP in biotechnology until the landmark decision in *Diamond v. Chakrabarty* by the United States Supreme Court where the court held that anything made by hand of man as eligible for patenting. In 1972, respondent Chakrabarty, a microbiologist, filed a patent application, assigned to the General Electric Company. The application asserted 36 claims related to Chakrabarty's invention of "a bacterium from the genus *Pseudomonas* containing therein at least two stable energy-generating plasmids, each of said plasmids providing a separate hydrocarbon degradative pathway. This human-made, genetically engineered bacterium is capable of breaking down multiple components of crude oil. Because of this property, which is possessed by no naturally occurring bacteria, Chakrabarty's invention is believed to have significant value for the treatment of oil spills. Chakrabarty's patent claims were of three types: first, process claims for the method of producing the bacteria; second, claims for inoculums comprised of a carrier material floating on water, such as straw, and the new bacteria; and third, claims to the bacteria themselves. The patent examiner allowed the claims falling into the first two categories, but rejected claims for the bacteria. His decision rested on two grounds:

- 1) that microorganisms are "products of nature," and
- 2) that as living things they are not patentable subject matter under 35 U. S. C. §101 . Chakrabarty appealed the rejection of these claims to the Patent Office Board of Appeals, and the Board affirmed the Examiner on the second ground. Relying on the legislative history of the 1930 Plant Patent Act, in which Congress extended patent protection to certain asexually reproduced plants, the Board concluded that §101 was not intended to cover living things such as these laboratory created microorganisms. Bioinformatics is the science of storing, managing and analyzing biological data using computational tools. It uses multiple and diverse disciplines of Mathematics, Statistics, Biology, Chemistry, Computer Mathematics and Physical Sciences, etc. Bioinformatics within a short time by means of computational tools has us to understand the function and structure of genes and proteins. The recent technologies include Genomics, Proteomics, Antisense Technology, RNA Inference, Stem and Progenitor Cells, Cell and Gene Therapy, Pharmacogenomics.¹⁰

USE OF IPR IN DIFFERENT STAGES OF RESEARCH

IPR and their use play a vital role in different stages of research and development. In fact the result of research would lead to intellectual property rights which are part of the development of the research. It is felt and recommended that IPR should be considered in a bioinformatics research while:¹¹

- Defining a research project

¹⁰ Philip W. Grubb, Patents for Chemicals, Pharmaceuticals and Biotechnology, Oxford University Press, Fourth Edition 2004, First Indian Edition 2006 p.265-268.

¹¹ Sreenivasulu N.S, Intellectual Property Rights in Corporate World, Edn. 2011

- Arranging collaborations or outsourcing of research
- Performing the research
- Protecting and disseminating the research result
- Transforming the research results to marketable products

BIOINFORMATICS: IS THERE A NEED TO PROTECT IT UNDER IPR REGIME

The employment of these new technologies has led to advances in basic biological processes and, in turn, advances in diagnosis treatment and prevention of many genetic diseases. The possibility of discovery of drugs and cures based on genetic studies that may have the potential to treat diseases has meant investment in huge amounts in the research and development of bioinformatics tools.

It is natural to expect some form of legal framework for protection of the innovations in terms of new bioinformatics tool, which would ensure a return on the investment secured from marauding interests. This is the argument for the application of IPR to the field of bioinformatics, at the most basic level. Thus to put it in the words of Abraham Lincoln,

“The patent system added the fuel of interest to the fire of the genius.”

IPR are seen as catalyst of scientific, technological and economic development. In terms of grant of patent to an innovation, the creation and grant of exclusive and legally enforceable rights ensure that the innovator is awarded. These rights also vest the innovator to market his produce and exclusivity gives him a natural market advantage. Thus the patent system ensures that the innovator has the opportunity to gain revenue at the level of basic marketing and selling of the product, the profit of which can possibly be accrued thorough the market advantage.

This framework of exclusive rights of exploitation coupled with economic gain acts as a motivator to the innovator and others to further innovate. This is the fundamental argument for the perpetuation of IPR. This argument extends to any kind of innovation in the area of research and therefore can be extended to the area of bioinformatics. Technology in bioinformatics consists mostly of programmes and software which would aid in the compilations and updating of extensive databases of information. Seen in this light, there is no reason, whatsoever, to not extend the protection accorded by IPR regime to the field of bioinformatics. The protection of innovation would incentivise further innovations, which would aid the pharmaceutical industry further in its pursuit to discover new cures for diseases.

INTELLECTUAL PROPERTY PROTECTION FOR BIOINFORMATICS

- **Patents:** Companies and entrepreneurs can obtain a legal monopoly to protect their technology from being manufactured and sold by competitors, thus making patents an important incentive for technology development and innovation. In U.S the following types of patent exist: utility patent, plant patent, and design patent. Of those the utility patent is commonly associated with bioinformatics inventions and

can be obtained for new and useful, non-obvious process, machine, manufacture, composition of matter, or new and useful improvement of any of the aforementioned.

- **Trademarks:** It can be used to protect trade names, product names, domain names, and service marks/slogans for bioinformatics companies.
- **Copyrights:** It can be used to protect bioinformatics related materials such as scientific articles, books, software code, manuals, web pages, graphic artwork, multimedia works, and compilations of facts/databases.
- **Trade secrets:** It is used to protect bioinformatics related materials such as software code, manuals, and compilations of facts/databases, formulas and processes.

CLAIMABLE ASPECTS OF BIOINFORMATICS INVENTIONS

Patents can be obtained for such bioinformatics areas as:

The computational and analytical aspects of genomics and proteomics which includes

- Algorithms,
- Sequence analysis techniques,
- Mapping techniques,
- Comparison techniques,
- Primer design,
- Phylogenetic analysis,
- Molecular modeling,
- Protein structure prediction
- Protein function prediction,
- Databases (for example, construction, querying and data mining),
- Biological integrated circuits, micro arrays, and image analysis

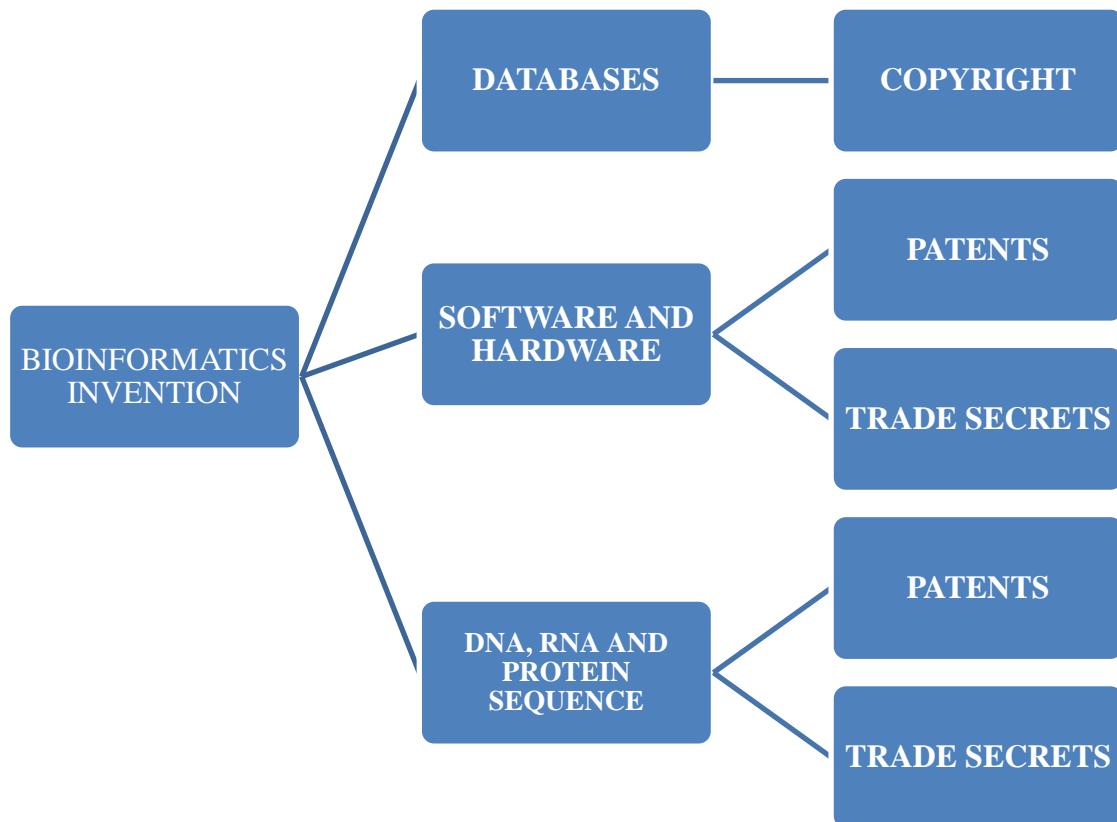
ISSUES IN THE PROTECTION OF BIOINFORMATICS

There are various intellectual property rights issues in bioinformatics field. Since these fields are considered to be fusion between the fields of biotechnology, chemical sciences and information technology, there is a growing significance of these fields. The following are the key issues involved and be considered in the intellectual property protection:

- Internet collaboration
- Types of IPR in bioinformatics

- Revenue from databases
- Employees and ownership
- Database ownership
- Access to databases

BIOINFORMATICS IN THE WORLD OF INTELLECTUAL PROPERTY RIGHTS



ARGUMENTS AGAINST IPR PROTECTION TO BIOINFORMATICS

There have been objections raised against the extension of IPR protection to the field of informatics on the ground that the protection would act to enclose the commons in the very ethically sensitive realm of human genome and gene related studies. The introduction of profit motive in this field of study would tie up ethical balance in an unfavourable manner. The realm of human genomic science should be common and assessable to all humanity and should not be truncated and severed and owned absolutely by a few individuals by virtue of being the first claimants.¹² This strain of argument is further developed wherein it is contended that the main motive behind innovations in bioinformatics is to further medical treatment and rule against patenting of other medical procedure should also apply here.¹³

¹² Gopalan R, Bioinformatics: Scope of Intellectual Property Protection, *Journal of Intellectual Property Rights*

¹³ McBride MS, Bioinformatics and Intellectual Property Protection, *Berkley Technology Law Journal*

Given the complex nature of bioinformatics, it is difficult to offer best form of IP protection. The form of IP protection to bioinformatics depends upon the technology used such as algorithms, databases, software, etc. There is enormous confusion as to the viability of a particular form of the IP protection such as patent, copyrights and trade secrets in protecting bioinformatics databases or software as all forms of IP protection have certain inherent limitations.¹⁴

CONCLUSION

Bioinformatics comprises a wide array of components, and it follows that a wide array of protection might be available, depending on the particular nature of the bioinformatics component and its intended use such as from patent, copyright, trademark, trade secret protection. Because of the tremendous growth and investment in the field of bioinformatics, it is important to consider whether IP protection is available to offset the cost of development and create new efficiencies. With regard to bioinformatics software, the inventor can obtain patent protection on the method within the program, provided the method produces tangible results; and the author can obtain copyright protection, but only for the literal elements of the bioinformatics software code. Although trade secret protection is available for bioinformatics software, again, like many bioinformatics components, the owner runs the risk that the code will be reverse engineered and the trade secret will be lost to the public domain. With regard to biological sequences, trade secret protection may be the only practical protection. This holds best where the owner effectively maintains confidentiality agreements or does not intend to commercialize the corresponding biological composition, because sequences can be easily determined or “reverse engineered” where compositions are available. Likewise, trade secret protection may provide the best protection for biological databases, but only if adequate security measures can reliably limit access and the owner effectively maintains confidentiality agreements. Copyright protection for databases is minimal and is unlikely to extend to the information contained within the database.

¹⁴ Singh K.K, Intellectual Property Protection in Bioinformatics and open Bio development

ENFORCEMENT OF ARBITRAL AWARDS CONTRARY TO PUBLIC POLICY- A COMPARATIVE STUDY OF INDIA, US & FRANCE

Mitali Jain*

Abstract

Judicial enforcement of arbitral awards is essential where there is no willful consistence by the pertinent parties. Courts worldwide might decline to implement arbitral awards if such implementation would be in opposition to the public policy of their nations.

This is known as '*the public policy exception to the enforcement of arbitral awards*'. It is enshrined in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law), which are two of the most conspicuous global instruments in advancing and managing international commercial arbitration.

Public policy in general approach special case is a standout amongst the most disputable exemptions to the requirement of arbitral awards, bringing on legal irregularity and subsequently unpredictability in its application. It is frequently compared to a 'unruly horse'. The International Law Association's Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002 (ILA Resolution) embraces a thin way to deal with the public policy exception – to be specific, refusal of implementation under the public policy exemption in exceptional circumstances only. The ILA Resolution seeks to encourage the conclusion of arbitral awards as per the New York Convention's essential objective of encouraging the requirement of arbitral awards. The courts of numerous nations allude to this as the New York Convention's 'pro-enforcement policy', which requests a slender way to deal with the exception.

This paper endeavours to investigates the primary contentions and complexities in the legal use of the exception of public policy by drawing a comparative study between India and US , France.

Keywords: New York Convention, Foreign Arbitral Awards, International Law Association, New York Convention, Public Policy.

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INTRODUCTION

Increment in worldwide exchange, speculation and the globalization of business has prompted the advancement of international commercial arbitration as a preferred method of resolving disputes. International commercial arbitration (ICA) gives an option to choose a impartial, simply, classified, sorted out and savvy method of resolving commercial disputes. In guideline, an award that has been effectively rendered in the inquirer's favor by an international arbitral tribunal does not require authorization by a national court on the off chance that it is done by the respondent. However, the reality is that often the respondent will evade carrying out the terms of the award or use the award as a bartering device with the inquirer.

Any deterrent in implementing international arbitral awards represents a principal danger to business ventures over the world. Along these lines, it is generally recognized that, a jurisdiction's credibility as a good destination for ICA essentially lays on its award enforcement regime. Under the NYC an effective petitioner can look for enforcement of award either in the national court of the seat of arbitration or the court of the nation in which the respondent has its asset.¹ The New York Convention² (NYC) provides for certain exceptions on the premise of which enforcement of a foreign award might be denied. By temperance of the NYC an Award may not be upheld if there's inadequacy, invalidity of the arbitration agreement, absence of legitimate notification and procedural due procedure, its past extent of arbitration agreement, there is non-recognition of arbitration principles agreed by the parties, it's not yet binding, it's not arbitral and it's as opposed to public policy³. Unlike the other grounds, arbitration and public policy can be conjured by the enforcement court on its own motion.

The contention encompassing the public policy exception is that it is unequipped for being unequivocally decided and it fluctuates starting with one state then onto the next. This circumstance can prompt an award not being in spite of the public policy of the seat yet might be in opposition to people in public policy of the authorization state. In the nineteenth century public policy was contrasted 'unruly horse that may lead one away from sound law'⁴.

Public policy is a standout amongst the most well-known grounds regularly utilized by parties to worldwide discretion to oppose implementation of arbitral awards⁵. Till today, it remains an exceedingly wrangled about, disputable and complex subject. This is a result of the differing approach taken by national courts in connection to the idea of public policy in international arbitration. Albeit after some time, arbitration laws and practice have attempted

¹ The New York Convention improves upon the Geneva Convention of 1927 in that it removes the need to establish judicial confirmation of an award where it was made and it shifts the burden of proving the invalidity of the award from the party enforcing to the party resisting.

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1989).

³ Ibid, Article V (1) (a), (b), (c), (d), (e), V (2) (a) and V (2) (b)

⁴ Per Burrough J in *Richardson v. Mellish* (1824) ALL ER 258 at p266

⁵ http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf

to adjust the idea of public policy with the goal that parties might profit by an all-around acknowledged idea of public policy, the distinction in state of mind of national courts has made this errand practically inconceivable. As of late, the distinction in state of mind has been most unmistakable in India, where a progression of court choices have hampered the advancement of a universally acknowledged idea of public policy.

THE INDIAN APPROACH

As per the ethos of the UNCITRAL Model Law, the Indian Arbitration Act was given the trust that there will be immaterial lawful legal intercession in the arbitral procedure. Despite this, the Indian courts have exhibited an unimaginable inclination towards interfering with global mediation. In this affiliation, lawful intervention at the recompense authorization stage on grounds of public policy is the most questionable.

There is a little uncertainty that the Indian Supreme Court choice in *Renusagar v. General Electric*⁶ has dependably been the beginning stage at whatever point one considers the theme of Indian court intercession on grounds of public policy. Taking all things into account, the Supreme Court made it clear that:

‘Applying these criteria it must be held that the implementation of a foreign award would be denied on the ground that it is as opposed to public policy if such necessity would be in opposition to (i) principal arrangement of Indian law; or (ii) the hobbies of India; or (iii) equity or ethical quality.’

This decision relied on upon private general law and was as per worldwide practice normally recognized in most made arbitral awards, for instance, the US and France. This decision confirmed the position that, just in unprecedented circumstances, should the national courts interfere with arbitral respects on grounds of public policy. Furthermore, the Supreme Court evidently held that the courts should not use public policy guard to survey the benefits of an arbitral award.

In any case, instead of its former decision in the *Renusagar case* and dismissing the for the most part recognized measures of public policy, the Indian Supreme Court took a substitute methodology in *Oil and Natural Gas Corp v. Saw Pipes*⁷ and frustrated the all-inclusive community strategy safeguard. The instance of Saw Pipes emerged out of a local debate concerning the payment of liquidated damages under a supply contract. The matter was suggested mediation and a grant was rendered by the tribunal which held that ONGC was not qualified for any traded hurts since it had neglected to build up any misfortune as a consequence of the late supply by Saw Pipes. ONGC associated to put aside the arbitral honor under the attentive gaze of the Indian court on grounds of public policy.

Taking all things into account, the Indian Supreme Court held that the ground of public policy was obliged to be given a more broad significance than in the *Renusagar case* in light

⁶ (1994) AIR SC 860

⁷ (2003) 5 SCC 705

of the way that the thought of public policy proposed matters which concerned public good. The Supreme Court saw that, as an issue of law, ONGC was not needed to demonstrate its misfortune and, thus, was qualified to seek liquidated damages. In this manner, the Supreme Court set aside the award on grounds of public policy on the reason that the arbitral tribunal had failed when it assumed that ONGC expected to exhibit its hardship in the event that it is patently illicit.

The Supreme Court felt that a honor which manhandled the law couldn't be said to be in the overall public benefit, in light of the fact that it was inclined to unfairly impact the association of value. The Indian Supreme Court held that, despite the three heads set forward in the *Renusagar case*, an arbitral honor might be set aside on grounds of public policy in case it is patently illegal. It held that an award was patently unlawful if the honor was notwithstanding the substantive law, the Indian Arbitration Act and/or the agreement's terms. The effect of this was these incorporated any slip of law submitted by the authorities.

The instance of *Saw Pipes* has been broadly denounced for its wide elucidation of public policy defence. The Indian Arbitration Act exclude blunder of law as a ground for putting aside arbitral award and it has been broadly acknowledged in India that a judge's choice can't be audited on such grounds.⁸ By plainly expressing that the public policy ground incorporates lapses of law by the arbitral tribunal, the *Saw Pipes* case went past the extent of the Indian Arbitration Act and made another ground for putting aside arbitral award. By bringing slips of law within the ambit of public policy, the Indian courts have made an auxiliary section to overview the advantages of a judge's decision, which is in clear inconsistency of arbitration law and practice.⁹

Furthermore, as an outcome of *Saw's Pipes case*, more parties will now have the ability to challenge arbitral awards on grounds of public policy before the Indian courts. Therefore, this will surge the Indian courts with cases by the losing party messed with the arbitral tribunal's decision.

The occasion of *Saw Pipes* is particularly pushing for the international community subsequent to the Indian Supreme Court did not expressly banish foreign award from its reasoning. In addition, in *Bhatia International v. Bulk Trading*¹⁰, the Supreme Court held that acquisitions of Part 1 of the Indian Arbitration Act (which applies to family intercessions just) would similarly apply to remote respects under Part 2 of the Indian Arbitration Act, unless especially precluded by the parties. The example of *Bhatia* created much considerate contention since it pivoted the recognized position that Part 1 of the Indian Arbitration Act would not have any kind of effect to international arbitration. This suggested party, contingent upon *Bhatia*, could use the 'patently unlawful' ground of public policy added by *Saw Pipes* to contradict approval of remote arbitral awards.

⁸ *Lakshmi Mathur v. Chief General Manager, MTNL* (2000) Arb. L.R (Bom) 684

⁹ In the Mitsubishi case (473 US at 638), the US Supreme Court made it clear that 'the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal.'

¹⁰ (2002) AIR SC 1432

In 2008, the Indian Supreme Court, extending its former decision in the *Bhatia case*, held that a foreign arbitral award could be set aside on grounds of public policy as detailed in the *Saw Pipes* case. The *Satyam case*¹¹ has to a great degree hampered India's progression towards developing itself as an intercession agreeable area. The case of Satyam concerned a joint endeavor debate about which twisted up in a universal discretion arranged in London. An arbitral award was rendered for Satyam which he attempted to implement in the US. In the interim, Venture international recorded an application to set aside the remote award before the Indian courts on grounds of public policy. The matter took care of business in the witness of the Indian Supreme Court which held that regardless of the way that there were no acquisitions in Part 2 of the Indian Arbitration Act pleasing test to a remote arbitral award; a solicitation to set aside the same could lie under Part 1 of the Indian Arbitration Act. The Indian Supreme Court held that the losing gathering could get a self-sufficient action India to set aside a remote arbitral award on the developed grounds of public policy as set out by virtue of *Saw Pipes*. The *Satyam case* has been delineated by Nariman, one of India's most eminent judges, as basically "strange" and one which 'can't be defended'.

Cases like *Saw Pipes* and *Satyam* demonstrate the Indian court's system on the issue of public policy and arbitral award. It creates the impression that the Indian courts have dependably misconstrued the requirements of the Indian Arbitration Act in a path notwithstanding the spirit of the New York Convention. These decisions have brought on a great deal of uneasiness for the international group incorporated into business with an Indian affiliation, who generally incline toward the quick exchange of their level headed discussion through discretion as opposed to taking an interest in extended suit before the Indian courts.

In 2010, the *Bombay High Court in Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd*¹², relying upon the *ONGC case*, set aside an arbitral award on the ground that it was instead of the substantive acquisitions of law and, subsequently, patently illegal. In picking whether the court should interfere with the award, the Bombay High Court analyzed the Supreme Court decision in the *Saw Pipes case* and held that the award could be set aside on grounds of public policy.

The Bombay High Court felt that, *inter alia*, the mediator between did not have any kind of effect the procurement's of the Indian association law successfully and, in this way, the award renounced the substantive acquisitions of law and was patently unlawful. This decision highlighted yet another specimen of undue court intervention under the presence of public policy. Yet rendered in the household association, because of the fact that cases like *Bhatia* stay set up, the procedure taken by the Indian court in Western Maharashtra Development Corporation Ltd. speak to a bona fide danger to overall mediation with an Indian affiliation.

These decisions have begun a considerable measure of verbal confrontation and uneasiness both inland and toward the ocean with legitimate specialists overall noticing that such choices, if left unaddressed, would vivaciously stain India's picture all inclusive. These

¹¹ (3) 2011 (1) SCC 694

¹² [2010] 154 ComCas 593 (Bom)

decisions, fundamentally, took India back to England's pre-1979 period when the English courts could review the official's advantages decision through the case communicated technique in this manner speaking to a bona fide limit to the use and advancement of international arbitration.

These stresses were instantly perceived by the Government of India which comprehended that its debate determination framework expected to keep pace with its quickly developing economy. The Government of India took certain exercises to acknowledge authoritative changes to address the issues settled on by these decisions.

Starting late, the Government of India pushed a 2010 meeting paper endorsing changes to the Indian Arbitration Act keeping in mind the deciding objective to oversee, *inter alia*, the issues postured by exorbitant legal intervention.¹³ The paper perceives that the Indian courts have misconceived the acquisitions of the Indian Arbitration Act in such a way with a specific end goal to pound its article and purpose.¹⁴ The paper proposes to change the issues acted by choices such like *Saw Pipes, Bhatia and Satyam*.

The essential key change proposed by the discourse paper is to refute the effects of the *Bhatia case*. With a particular finished objective to fulfill this, the paper proposes to present clear dialect in the Indian Arbitration Act such that Part I of the Indian Arbitration Act would apply "only" to assertions situated in India. This would apply completely isolated from two procurements which have been especially precluded in order to help the arbitral procedure. The two procurements are portions 9 and 27 of the Indian Arbitration Act, which manage the Indian courts' forces to give between time measures in support of arbitration.

As showed by the suggestion, the position ought to be aligned back with the *Renusagar case*, which reflects the typical perception of public policy in present day made arbitral jurisdictions. As showed by the interview paper, a award would be rather than public policy just on the off chance that it disregards, the interests of India or value and moral quality. The modification would not allow Indian courts to find a break of public policy on the Saw Pipes ground of 'patent illegality' going forward.¹⁵

In any case, it gives the idea that, with begin of this new first light, the Indian courts have started showing up due respect to arbitral awards. The most recent case on this issue hails an abundantly required advancement in the perspective of the Indian courts overseeing policy policy and approval of arbitral award.

¹³ For a thorough discussion of the changes contemplated by the consultation paper, please see P Nair, 'India at a gateway?', GAR Vol. 6(1) available at <http://www.globalarbitrationreview.com/journal/article/28916/india-gateway/>. The author's discussion of the consultation paper is based on Nair's article in the GAR.

¹⁴ P Gandhi and A Kashyap, 'India: Round up 2010/2011', Practical Law Company available at <http://arbitration.practicallaw.com/9-504-6908>.

¹⁵ The proposal excludes the ground of 'patent illegality' from the ambit of public policy, but retains it only for challenges to domestic arbitral awards in a more restrictive manner.

In *Penn Racquet Sports v. Mayor International Ltd.*,¹⁶ the Delhi High Court dismisses a test to the implementation of an ICC award, holding that the award was not as opposed to public policy of India. In going to its decision, the Indian court held that the ground of public policy for the reasons of prerequisite authorization of foreign award ought to be deciphered barely. The Delhi High Court held that to adequately invoke this ground, the candidate must exhibit some reason which is more than a minor encroachment of Indian law. The arbitral award must manhandle the fundamental policy of Indian law or be in contrast to the interests of India, justice or morality.

In association with public policy, this decision is considered to be the latest commitment by the Indian courts to help India regain the confidence of the international arbitration community. This decision highlights the enthusiasm of the Indian courts to handle the past's issues and adjust the Indian circumspection law back with the philosophy taken in the *Renusagar case*, which is similar to the prevalent viewpoint in the most made arbitral purview's, for instance, the US and France.

PUBLIC POLICY AND THE INTERNATIONAL APPROACH

Public policy is one of the grounds specified in the New York Convention taking into account which a party can challenge the requirement of a foreign arbitral award. The infamous way of public policy is not a development of the current age.

Public policy is a standout amongst the most imperative weapons in the hands of the international court which permits it to decline authorization of an arbitral award which is generally legitimate. It is especially infamous since this barrier is unequipped for being accurately decided and is completely indigent upon the laws of individual states for its application. Accordingly, it changes starting with one state then onto the next. Adding to this is the way that the New York Convention not gives any direction to the courts in respect to how the general population arrangement barrier ought to be deciphered.

Therefore, courts may decipher public policy completely at their own particular prudence and much will rely on upon the national's disposition court and the specific judge at the time. Keeping in mind the end goal to manage this issue, the International Law Association (ILA) endeavored to characterize an inside and out recognized thought of all inclusive public policy however fail to do since it was not ready to accomplish an understanding in respect to what-ought to constitute international public policy.¹⁷

Notwithstanding the pending vulnerability of this subject, it has been seen that, in most made arbitral domains, public policy has been deciphered scarcely by the courts. This is in light of the fact that the courts of made districts all things considered bear a genius execution perspective towards arbitral award which they consider to be a stand-alone part of public policy itself. It has been illuminated as takes after:

¹⁶ 2011 (122) DRJ 117

¹⁷ O Ozumba, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?', available at www.dundee.ac.uk.

‘Interpretation and application of the public policy exception in most jurisdictions is usually on the side of enforcement. This is termed in international arbitration parlance as the pro-enforcement bias. Pro-enforcement is it a public policy.’¹⁸

This expert declaration attitude of courts is most apparent in the made arbitral domains, for instance, the US and France.

US APPROACH

US courts take a thin approach when deciphering the idea on public policy as a ground of opposing enforcement.

In *Parsons v. Whittemore*¹⁹, the dispute of the respondent was that if the award is authorized, it will repudiate US public policy because of the strained relationship between the US and Egypt as a consequence of the 1967 Arab-Israeli war. The U.S court of Appeal rejected this dispute and it noticed that deciphering public policy to ensure national hobby will firmly undermine the viability of the NYC. This case infers that a state’s national hobbies as financial approvals or conciliatory approaches are excluded in people in public policy’s exception²⁰.

In a *Second Circuit decision*²¹, there was an endeavor to oppose the authorization of an arbitral award under the ICC rules that was supportive of the Egyptian party. In its judgment, the court highlighted the general pro-enforcement attitude set by the New York Convention and obviously expressed that acknowledgment of an arbitral award might be denied under the public policy defense “where authorization would damage the forum state’s most fundamental ideas of equity and ethical quality”.

Specifically, the judge focused on the way that a broad understanding of the idea of public policy would negate the very extent of the New York Convention, which is the evacuation of hindrances to foreign arbitral award acknowledgment. “To peruse general society strategy guard as a parochial gadget defensive of national political hobbies would truly undermine the Convention’s utility”.

Having personality a top priority these US court choices, it is sheltered to say that American courts have taken a prohibitive methodology while breaking down the thought of public policy. They have made it clear that any obstruction by the national courts in a international arbitration on this ground ought to be negligible. This position from 1974 has continued as before, as can be found in later cases as *Telenor Mobile Communications v. Storm LLC*²².

¹⁸ O Ozumba, note 12 above, at 9

¹⁹ Federal Arbitrash Court of the East Siberian Circuit, case no A58-2103/05, October 16th 2006

²⁰ Harris T.L, “The Public Policy Exception to the Enforcement of International Arbitration Awards Under the New York Convention” *Journal of International Arbitration* 24(1) (2007) at p10

²¹ Parsons and Whittemore Overseas Co., Inc. v. Société Générale de l’Industrie du Papier (RAKTA), 508 F.2d 969, 975 (1974)

²² *Telenor Mobile Communications v. Storm LLC* case, 524 F. Supp. 2d 332 (2007)

For this situation, the public policy defense in light of the way that the award had been toppled by a national court in plot with one gathering was rejected. The courts acknowledged the implementation of the arbitral award, expressing that declining such requirement would negate foreign law in such a way to make compliance with one the violation of the other.

The courts extraordinarily accentuated the significance of arbitral procedures and the supportive role the courts of law must play in this process. Consequently, it is clear that the American approach on this issue is unmistakably a great one to assertion, the issue of refusing enforcement only occurring in rare cases.

FRENCH APPROACH

A landmark decision of the European Court of Justice, the *Eco Swiss China Time Ltd. v. Benetton International NV*²³ case. In this case, the ECJ was confronted with an inquiry postured by the Supreme Court of Holland in regards to a putting aside method. It held that “it is in light of a legitimate concern for productive discretion procedures that survey of arbitration awards ought to be restricted in extension and that dissolution of or refusal to perceive a award ought to be conceivable just in exceptional circumstances”. In that specific case, the ECJ considered that opposition regulations are to be viewed as crucial standards inside the European Union and, therefore, an arbitral award can be invalidated taking into account public policy ground in this circumstance.

In line with this way of considering this issue, French courts have by and large kept up an exceptionally moderate methodology when judging public policy matters.

In the *Gallay v. Fabricated Metals*²⁴ case the Paris Court of Appeal refused to set aside an arbitral award on the claim that it violated competition law. The court stated that, contrary to the Eco Swiss case, the arbitrators had addressed the issue and found no infringement.

However, in some cases the French courts have drastically limited the very scope of public policy.

In *Thales v. Euromissile*²⁵ case, Thales was ordered to pay damages to Euromissile in a debate concerning a permit assent. None of the parties made any reference to an encroachment of competition law amid the procedures. Later Thales, in view of the Eco Swiss case, requested the award to be put aside contending that it was in opposition to public policy since it offered impact to an agreement that encroached fundamental principles of law rules. The French court, notwithstanding, took a prohibitive way to deal with the matter, contending that public policy could be summoned just when the actual award is as opposed to French lawful request or damages fundamental principles of law. That is to say, that what really the losing party is obliged to do by righteousness of the award must be as opposed to public policy and not the contractual connection the award depends on.

²³ ECJ, *Eco Swiss China Time Ltd. v. Benetton International NV*, 1999

²⁴ Paris Court of Appeal, *Gallay v. Fabricated Metals* case, 1999

²⁵ Paris Court of Appeal, *Thalès v. Euromissile* case, 2005

Moreover, the French court contended that, with the exception of when we are in the vicinity of misrepresentation, it can't pass judgment on the case on the benefits, this being impedance unpermitted by law. Without an egregious rupture of public policy, there is no motivation to deny authorization of an arbitral award or put it aside.

CONCLUSION

Surely, even today, public policy remains a basic weapon in the hands of a national court wishing to interfere with the arbitral methodology. The reason being that public policy stands out beginning from one state then onto the following and, along these lines, there is no broad comprehension in the matter of what its substance ought to involve. Whilst the reality of the matter is that public policy is an unruly horse which can lead you astray, it is not impossible to tame this unruly horse.

This should be possible in various ways. In the first place, more international activities like that of the ILA ought to be started so that more nations can meet up to achieve an assertion as to people in general's parameters approach guard. Free finished rules will never be adequate to accomplish the assurance that this equivocal territory of law requests. Second, fitting guideline and planning should be made open to judges overseeing carefulness cases. Simply through fitting get ready will one get the chance to be aware of this thought, its substance and the circumstances in which this reason-ability should be worked out? Judges should be made careful that the law of mediation is self-contained and that the motivation behind why interventions exist is on the grounds that they are perceived by law and is vital for the brisk determination of question. Last, yet not least, judges should be made aware of the unfavorable results that undue hindrances in all inclusive statement have on the country's economy and general improvement.

With the right approach, India, similar to the US and France, will soon get to be one of the main arbitral wards of South-East Asia. This is evident from the genuine attempts taken by the Government of India and the alteration in philosophy of the national courts overseeing prudence matters. The new period for international intervention in India is as of now in sight.

ANTI-DEFECTION LAW IN INDIA: NEED TO AMEND?

Namrata Chakraborty*

Abstract

The Indian Legislative Body plays a paramount role in strengthening the political bonding along with the integrity of the Nation. Where the entire political scenario depends upon the legislature and its members, due to the incidents like hopping around from one to another party, a number of dodgy legislators become responsible for the political disaster of the nation. Since after independence, India has experienced a bunch of defection dramas as an instrument of growing self-demands rather than fulfilling public interests, which concerned the then Government and therefore after a continuous struggle with the menace, the anti-defection law came into existence. But now-a-days a lot of issues are arising related to this said law as it is increasing the infection rather than preventing it. Does this law preserve the Parliamentary privilege of the legislators? Is it effective to combat such kind of corruption from India? Or whether there is a need to bring an amendment to this law? An attempt has been made in this article to encounter the loopholes of the act followed by the critical analysis and necessary recommendations in order to answer the arising questions.

Keywords: Defection, Constitution, Legislator, Disqualification, Reforms

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INTRODUCTION

It has already been passed three decades since India has been struggling with the menace of Defection. Defection, derived from the Latin word ‘*defectio*’ denotes the floor-crossing by a member of one political party to another party.¹ From the Constitutional view, it has been defined as “To abandon a position or association, often to join an opposing group.”² Talking about defection, it has been the bane of Indian Parliamentary System for quite some time now. The vice of defection has been rampant and the trend has been increasing exponentially in the last few decades by destabilizing the Government drastically, for a Government may be tumbled over because of the defected politicians while converting their support from a minority to a majority party. Being in a democracy, the ballot acts as a determinant factor of people’s will towards the Government. Where elections play a vital role for securing democracy through the evolution of political parties along with diverse methodologies; the virus like defection creates a big hole in that vibrant system leading to corruption. This malevolent scenario compelled Late Rajiv Gandhi to incorporate the Anti-defection law in order to curb the arising menace in Indian Politics. Finally, in 1985, the Parliament made 52nd Amendment to enforce the mandate of Rajiv Gandhi where the Anti-defection Law has been added as the Schedule X in our Constitution. The motive behind the implementation of this Anti-defection Law was to curtail the continuous struggle with this Political malaise. Thus, Schedule X of our Indian Constitution has often been treated as an antidote to strengthen the political parties as well as the Electoral Process. Now, if we delve deeper into the concept of Anti-defection, we have to aptly focus on the purpose of the introduction of Schedule X enshrined by the Parliament through the following Statement: “*The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the address by the President to Parliament that the government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.*”³ As a welfare-nation the steps taken by the Indian Legislature to implement the said Law are undoubtedly reflected as the instruments protecting and protracting the basic structure of our Constitution; but with passing time the question of effectiveness of the law grows louder and louder. Therefore, whether the said law is acting as a tool of Parliamentary disharmony or there is a need of stronger Anti-defection Law is still beyond any justification.

HISTORICAL DEVELOPMENT⁴

The political drama of ‘defection’ has been popular since the fourth and fifth Lok Sabha Elections i.e., during the period of 1967-1972 where India faced approximately 2000 defection cases among the 4000 members of the Lower House and the State Legislative

¹ http://indialawjournal.com/volume3/issue_1/article_by_jenna.html

² The Constitution (Fifty Second-Amendment) Act, 1985,

³ The Constitution (Fifty Second-Amendment) Act, 1985,

⁴ Subhash C. Kashyap, The Anti-Defection Law-Premises, Provisions and Problems, 11 JPI (1989) 9 at 9.

Assemblies as well. The situation went beyond the control of the Parliament when, half of the members of Lok Sabha shuffled between parties more than once.

MARCH, 1971: Among the members, one of them was identified to commit defection only to be a Minister for a limited period of five days. It was collected from the statistics that usually in each day more than one member was absconding and in each month at least one or two State Governments devastating because of the infection spread by defection. *Even 50.5% of the legislators of the State Assemblies itself shifted their political parties in order to affiliate with another party. The fact that 116 out of the total number of 210 defectors of the States were appointed in the Councils of Ministers provides the enough evidence that the bait of the Government contributed a vital role in the malady...*

DECEMBER 8, 1967: This vindictive condition became as a matter of concern for the Lok Sabha because of which a non-official proposal regarding the formation of a high level committee was approved.

MARCH, 1968: Consequently under the leadership of Y.B. Chavan, the then Home Minister, a High Committee of the political parties' representatives and the experts was established to settle the dispute of frequent floor-crossing by making some recommendations on 21st March.

Recommendations by Chavan Committee:⁵

- i. A code of conduct should be abided by the each and every political party amongst their members.
- ii. While committing the act of defection, the defecting person must be disqualified from exercising his rights as a legislator although he will be permitted to take a stand.
- iii. If defection is committed because of getting pecuniary profits as well as the temptation of his office, then he will additionally be restrained from taking a stand for a particular period along with being disqualified.

But the recommendations given by the Committee were in vain.

MAY 16, 1973: After considering all of the attempts being futile, 32nd Constitution Amendment Bill referring a Joint Committee for both the houses was introduced by the Government of India in the Lok Sabha itself. But the comical fact is that before starting discussions of the Joint Committee, the Lok Sabha got disbanded, so the bill was lapsed. The drama headed towards a humorous state when another bill was introduced on the ground of defection. After conducting deliberations, the motion for the Bill was reserved by the ruling and opposition parties as well as the other members of the Lower House.

⁵ K. N. Singh, Anti-Defection law and Judicial Review 38 JPI 32 (1992)

DECEMBER, 1984: However, the drama reached a climax after Rajiv Gandhi grabbing the position of Prime Minister with a thumping majority vote in the general election conducted where the Congress owned 401 seats in the Lower House.

JANUARY 17, 1985: Concerned with this political disorder, the then Government envisioned to introduce a Bill for converting the country into defection-free and accordingly in front of both the Parliament Houses and President of India the 52nd Amendment to the Constitution including the said Anti-Defection Bill was passed. But as the time went on, the defection became stronger due to which the demand of deleting the Schedule X has grown gradually and hence the 91st Amendment took place in 2003.

PROVISIONS UNDER SCHEDULE X:⁶

The popular Anti-defection Law, as contained under the Schedule X to the Constitution, was introduced through the 52nd Constitution Amendment Act (1985) by implementing the provisions relating to defection. The main provisions of this schedule are summarized as follows⁷

- i. An elected member of Union and State Legislature, elected as a candidate representing a specific political party, and a nominated member of Union and State Legislature, also a member of that political party during taking the seat, would be disqualified on the ground of defection provided that if he willingly gives up his membership of that political party or votes or abstains from voting in the Parliament Houses in contrary to any direction from such political party. But if an independent member of the Union or State Legislature joins any political party after the election, he will be disqualified for defection.
- ii. A nominated member of Union or State Legislature, but not a member of any political party during his nomination and also who has not been any political party member before the expiry of the six months from the date of taking his seat will be disqualified if after the expiry of six months he becomes a political party member.
- iii. When a legislative party decides to merge with another party not supported by not less than two-thirds of its members, will not be disqualified.
- iv. A special provision has been implemented for the person elected to the office of the Speaker or the Deputy Speaker⁸ of the House of People or the State Legislative Assembly or the Deputy Chairman of the Council of States or the State Legislative Council, in order to disunite the connections with his political party without causing disqualification.
- v. The Chairman or the Speaker of the Union Legislature has been empowered to implement rules-regulations to effect the provisions of the Schedule X, by the approval or disapproval of both the Houses.

⁶ The Constitution (Fifty Second-Amendment) Act, 1985,

⁷ M.P. Jain, Indian Constitutional law (2010)

⁸ http://164.100.47.132/LssNew/abstract/disqualification_on_ground_of_de.htm

- vi. The presiding officer of the House will decide whether a member of Union or State Legislature can be a subject to the disqualification and also this question will be determined by an elected member of the House on that behalf.

The changes brought in the Ninety-first Amendment (2003)⁹; act as an active tool to regulate the maximum limit of the structure of the Council of Minister in order to restrain any defecting person from continuing any public office. As per the Amendment, the Prime Minister along with the number of the other Ministers in the Union Council of Ministers shall not cross the maximum limit of 15% of the overall strength of the Lower House. Similarly, in the State Council of Ministers, the overall strength of the members including the chief Minister shall not cross the limit of 15% out of the entire strength of the State Legislative Assembly. Previously, the Schedule X provided that the exemption on the ground of disqualification is granted on the basis of split by 1/3 members of the Central or State Legislature, which have been removed in this amendment in order to make the defectors free from any sort of protection.

MERITS & DEMERITS OF THE LAW

On the basis of various interpretations by the citizens and Bodies, a number of merits and demerits can be cited while examining the effectiveness of the anti-defection law:

MERITS

The said law acts as a strong weapon to stabilize the Indian Polity by checking the drama of party-switching of the legislators.

- 1) As a protector of uniformity and democracy, the law is considered the creator of a political nexus along with a detrimental motive whenever a coalition of Government by various political parties occurs for snatching the power from the opponent.
- 2) It also aids democratic relocation of parties by merger and it is desirable from the candidate that he should abide by the policies of the party whose support makes him a stand in election. Anti-defection law guarantees the political ethics through disqualification of such corrupt candidates.

DEMERITS

In spite of being treated as a political vacuum cleaner, it has revealed several loopholes resulting in the failure to prevent the vice.

- 1) It fails to distinguish between the concept of dissent and defection by limiting the scope of the Parliamentarians' privilege to dissent, which creates dictatorship in the party to keep the flock together instead of maintaining party ethics. It amounts to the breach of Parliamentary privilege if a member inside the House cannot opine against the party whip.

⁹ The Constitution(91st Amendment) Act,2003; Article 361B of the constitution of India

- 2) It also allows certain disparity between independent and nominated member that just because of being the former one, he is disqualified on joining a party whereas the latter is not.
- 3) Also this law remains silent when a legislator gets involved in corruption outside the domain of Legislature.
- 4) The issue regarding the impose of decision-making power on the presiding officer can also be criticized on the ground that he may misuse this power due to his lack of legal knowledge and involvement in the corruption.

COMPARATIVE ANALYSIS WITH OTHER COUNTRIES

Overall, the number of national constitutions throughout the world that adopted a sort of provision of anti-defection is 40. Only the **Israel Constitution** imposes penalties on the offenders committing defection by restraining them to grab their seat in the Union Legislative Body. So, it only warns the defectors through implementing penalties, but does not forbid them to commit Defection, whereas the rest 39 Constitutions only provide the loss or forfeiture of the defectors to obey the Parliamentary command. Where the Indian Constitution considers expulsion as the punishment of defection, but the Constitutions like Fiji, Panama etc. levy some strict mandatory regulations for the parties.

LESSONS FROM US & UK

Although the phenomenon of defection is not unique in U.S.A politics, but their legislative body adopts a generous approach towards defection by governing the electoral system without having any defection laws in spite of facing a number of defection cases.¹⁰ According to U.S. legislature, a member of the Parliament House can vote any party without being anxious about disqualification in the election. Even though there is no specific law governing the party discipline, but a certain control has been vested in the leading party members as to impose the sanctions over the defectors for maintaining party discipline strictly. Also this control power has protracted its scope by containing the expulsion of a defector from a legislative bloc. The argument formed in contrary to the sanction has been stalked from the 1st Amendment (Bill of Rights) to the USA Constitution. The grounds of free speech of any legislator and the variation of right to free coalition of a political party were the basis of the arguments against the sanctions. The *BOND v. FLOYD*¹¹ case was the first case raising the issue regarding rights of a legislator. The facts herein collected that Julian Bond, a legislator, had been disqualified by the House on the condition that he could not exercise his rights as a legislator. By reversing this decision the U.S. Supreme Court held that the decision of the House was contrary to the 1st Amendment to the Constitution and the defected legislators had an onus to take a stand over the controversies instead of being subjected to the disciplinary actions by the party members. Hence, the Court gave this

¹⁰ Michael Stokes, When freedoms conflict: Party discipline and the First Amendment, 11 J. L. & Pol. 751, 753 (1995)

¹¹ 385 U.S. 116 (1966)

verdict in order to extend the rights including fair speech, free speech and coalition guaranteed by the 1st Amendment over a defected legislator.

India learned a great lesson from the Britain Parliament, where discord does not create any discrimination at all. If we focus on the English Bill of Rights (1869), the Article 105 of the Indian Constitution is found to be stemmed from Article 9 of the English Bill of Rights (1869)¹² providing the right to free speech on the British Parliament. UK law followed the footprints of US laws by implementing no anti-defection law, only the cases of defection are administered by a bunch of rules of the specific party. As per the recommendations of the Nolan Committee, the dissension is either regulated or more in quantity, and it is often used for the long-served legislators who have already come near the retire period or the members having disputes on the community interests. Therefore, such a speedy and thoughtless approach for Parliamentary dissension should not be desirable in a democratic country like India.

| Name of the Country | Existence of defection | Existence of defection law | Anti-Defection Law |
|---------------------|------------------------|----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| U.K | Yes | No | |
| U.S.A | Yes | No | |
| Australia | Yes | No | |
| South Africa | Yes | Yes | Section 47 of the Constitution:- A member if ceases to be a member of the party that nominated him loses membership of The Parliament. |
| Germany | Yes | No | |
| Bangladesh | Yes | Yes | Article 70:- A member shall vacate his seat if quitting from or votes in contrary to the directions given by his party, then it will be denoted by the Speaker to the Election Commission. |
| Kenya | Yes | Yes | Section 40:- A member of any party who resigns from his party has to vacate his seat, this will be decided by the Speaker, and it may be appealed by the member |

¹² English Bill of Rights, 1869, Art. 9: That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament

| | | | |
|-----------|-----|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | | before the High Court. |
| Singapore | Yes | Yes | Article 46:- A member must vacate his seat, if he resigns or if he is expelled from his party. Article 48:- The question related to disqualify a party member will be decided by the Parliament. |

JUDICIAL INTERPRETATIONS

1. *Kihoto Hollohon v. Zachillhu and Others*¹³

In the sphere of Indian Legal System, precedents always act as a strong source of law. Hence if we concentrate on the essence of the precedents on defection, we can easily experience several landmark judgments like *Kihoto Hollohon v. Zachillhu and Others* (1992) that has shaken the chair of the judges as well as the Parliamentarians. The main issues that rose in this judgment were: (1) whether the implementation of Schedule X limits the right to free speech and expression or not, (2) Whether on the grounds of disqualification, the proviso of Paragraph 7 of the Schedule X providing the exclusion of the bar of jurisdiction of the courts of constitutionally valid or not, (3) Whether the grant to finalize the decision of the speaker or Chairman of any House mentioned in the Paragraph 6(1) of the Schedule X is constitutionally binding or not.

With regard to these issues, the Court clearly gave the verdict that the Anti-Defection Law cannot infringe the right to freedom of speech or expression or any kind of Parliamentary Privilege as it strives for identifying the practical importance to apply the decorum of the political code of ethics. Also the Court held that the decision making power vests in the Presiding Officer only and the final authority is given to the Indian Judiciary and the process of judicial review once the decision has been passed. The *obiter dicta* of the Court was that the said law strengthens the political parties with control power over the members and as a result sometimes a party can prevent its members to exercise his vote for the minister ship.

2. *Ravi S Naik v. Union of India*¹⁴

Another landmark ruling in this context of Anti-defection law was the case of '*Ravi S Naik v. Union of India*' (1994). The issues raised from this case law were as follows:

- i. Whether resignation amounts to voluntarily giving up or quitting the membership of a specific political party or not,

¹³ AIR 1993 SC 412

¹⁴ AIR 1994 SC 1558

- ii. Whether the Speaker of the Lok Sabha or Bidhan Sabha should be bound by the instructions and orders given by the Supreme Court or not.
- iii. Whether the Schedule X can come under the ambit of Judicial Review or not.

With respect to the issues framed, the Supreme Court observed that the phrase ‘voluntarily giving up membership of a political party has a broader scope in the domain of Indian Politics. Also it can be interpreted from the behavior of any member that he was willingly resigned from the membership of his political party. The judgment regarding the second issue was passed by referring the Kihoto Hollohon case where it was held that the Speaker would have the power like a Tribunal on passing a judgment; hence the Speaker should be bound by the orders and commands given by the Supreme Court only. Now, addressing the last issue, as the Schedule X is completed an instance of procedural law; so violation of the Schedule X rules would amount as a procedural anomaly, a subject matter of the Judicial Review.

On the grounds of defection, some recent judgments have also been passed in India which was allied with the issue of disqualification by the speaker of Indian Legislative Body. The cases like *Shri Avtar Singh Bhadana v. Shri Kuldeep Singh* (2008) are the exact references for that issue. In case of *Shri Rajesh Verma v. Shri Mohammed Shahid Akhlaque* (2008), the issue was upraised whether the stories published in printed or the electronic media can be treated as the circumstantial evidence of defection or not. The order of the Speaker was that it cannot be claimed for justification why the news in the media would be false.

RECOMMENDATION

In order to cover the arising question of effectiveness of the said law, a variety of Committees have raised their voices in favor of the reform of anti-defection law. The recommendations given by the Dinesh Goswami Committee (1990) and the Election Commission were that the decision-making power on ground of disqualification should be vested with the President of India or Governor with the assistance of the Election Commission and disqualification should be occurred to the member voluntarily giving up the party membership or abstaining from voting against the party whip in a confidence or no-confidence motion. The Law Commission also in the 170th Report (1999) was in opinion that the exemption of splits and mergers from disqualification should not be granted as followed in 91st Amendment and the political parties or pre-poll electoral fronts during the danger of the government should abide by the whips.¹⁵

By considering the approaches proposed by the committees, it can be opined that in order to reconcile the conflicts regarding the efficacy of anti-defection law, there is a strong need to bring an amendment to the Schedule X in which the recommendations can be implemented in realm that

¹⁵ <http://www.legallyindia.com/Blogs/Entry/schedule-x-of-our-constitution-a-myth-or-a-reality>

- 1) No discrimination between the independent and nominated members should be existed,
- 2) If a legislator gets involved in corruption outside the legislature which indirectly affects the Electoral process and Parliamentary Structure, will be held to be disqualified.
- 3) The decision-making power should be vested with a separate body as a watchdog that is free from political contingency and having sufficient legal knowledge or experience instead of presiding officer.
- 4) Only during the danger or no-confidence motion of the Government, the directions of party whip should be abided by the members of the House; else the disqualification will be occurred.
- 5) Also it should keep in mind that Schedule X preserves the pure political structure and the duration of Government. So, as a safeguard of unified polity, the Indian Governance should adopt the lessons from US and UK practices.

CONCLUSION

Since the passage of the Anti-defection law in 1985, it envisaged to bring down the entire drama of this malaise by putting the party members in a bunch of rules and regulations as well. But the question rose regarding the achievement of party loyalty is an allegory or veracity was stemmed from the demerits found by the experts, which endangers the Indian Polity rather than strengthening it. In one way it ensures the political ethics and party discipline, but on the other hand, the principles of the parliamentary privileges and democracy get infringed due to implementation of this said law. But the present set-up plays a major role to increase the rampant cases of defection, which creates a haphazard political order in the Contemporary India. Therefore, the issues come on the spotlight that dissent or defection-which is more acceptable? Or following the voters' will v. the commands of the party whip- which one should be considered? Thus in order to balance these demands and obligations, the recommendations should be adopted by bringing a new amendment. Also the other necessary measures like conducting Parliamentary debates, appointing a High Committee to review the balance between the party politics. Also the Schedule X should be amended in such a manner as not to impede the main rules of parliamentary along with the citizen democracy. The adoption of 'Non-violence' and the 'Satyagraha' methods as introduced by Mahatma Gandhi may be also the another justifiable approach in order to eradicate the corruption which was previously used to wipe out the Britishers and form an independent India. Hence, I would like to opine in favor of passing an amendment act by fulfilling the dream that fixes a duty of the Government to convert the law into real existence instead of being a myth.

WHAT IF A ROBOT COMMITS MURDER? : AN ANALYTICAL STUDY ON CRIMINAL LIABILITY OF ARTIFICIALLY INTELLIGENT BEINGS

Shubham Singh* & Pallavi Singh**

Abstract

The artificial intelligence is becoming an integral part of our society. The interaction of artificial intelligence with humans can be observed in every field. These interactions will increase in the future as the technological world is evolving. To ensure that these interactions are beneficial and occur as intended we need to subject artificially intelligent beings to law, especially criminal law as it is the most effective way for social control. The artificial intelligence can be treated as a legal personality like corporations to subject them to law. Treating artificial intelligence as a legal person not only makes them subject to the law but also protects the innocent developers and owners from the criminal liability arising from the acts of artificial intelligence. The artificially intelligent being should be imposed with the criminal liability if all the conditions are fulfilled. The criminal liability arises basically out of the presence of two factors that are *mens rea* and *actus reus*. *Actus reus* is the physical outcome of the act. In the case of artificially intelligent beings, the main challenge arises in detecting the *mens rea* which is the mental factor as there is no yardstick to measure this factor. This problem can be solved by the application of the Turing Test by the court to detect whether the artificial intelligence entity is capable enough to formulate *mens rea*. The human laws can be imposed on the artificial intelligence like they are imposed on the other legal personalities like corporations and in the similar vein punishments to can be awarded by making necessary alterations.

Keywords: Artificial Intelligence, Legal Personality, Criminal Liability, Corporations, Punishment

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INTRODUCTION

On 4 July 1981, the first death by a robot was recorded, Kenji Udara was an engineer at Kawasaki Heavy Industries plant. He entered into a restricted area of manufacturing line to perform some maintenance work on the robot. Kenji failed to completely shut down the robot. Robot detected him as an obstacle and pushed him into an adjacent machine from its hydraulic arm, killing him instantly.¹ Unfortunately, the present laws are inefficient to efficiently tackle such instances. Robots and Artificial Intelligence add a whole new dimension to our world, the growth in the technological world is rapid, and the robots are becoming an integral part of our life.

In the present world, the robots are just inanimate objects like any ordinary tool with no legal liability or duties which means Kenji who died from the hands of a robot was not murdered by the robot. Then legal aspect of the scenario is who should be held liable? What if a self-driving car accidentally kills a person who suddenly came in front of the car? The owner of the car or the developer of the car who never had any criminal intention or negligence on their part. The legal system will have to evolve to be compatible with the dynamic technological world. Therefore, the question arises that how the technological growth of the artificial intelligence should be made subject to legal social control. This article tries to work on the legal solutions to the problems arising from the increasing influence of the artificial intelligence in our society.

The research on this problem began since the early 1950s by Isaac Asimov. In his science fiction “I, Robot,” Isaac Asimov propounded three fundamental principles for Artificial Intelligence and Robots: The first law states that robot should not injure a human being or allow a human being to come to any harm. The second law directs the robot to obey the orders given to it by human beings, except where such orders would conflict with the First Law. And the third law states that a robot must protect its own existence, but in the case of any conflict among third law and first law, the priority should be given to the above mentioned laws.² Though these fundamental principles are not compatible with the present artificially intelligent beings. The application artificial intelligence is becoming more complex, the interaction of humans with robots is observed almost in every field. Isaac Asimov principles are not sufficient to cope up with this whole new dimension of our society. What if a military drone is ordered to attack a terrorist or what if a person orders a robot to hit a person in good faith? In such cases, these principles have no real legal significance.

Futurologists have propounded the evolution of a new species which they termed as ‘machina sapiens’³ which will share the earth as an intelligent creature with humans. Robots and Artificial Intelligence are emerging as a transformative technology that has capacities of Humans and I won’t be wrong if I say some of these are more capable than humans. From our home appliances to most dangerous war weapons like a drone, humans are in interaction

¹ ‘Killer robot: Japanese worker first victim of technological revolution’ *Deseret News* (Salt Lake City ,8 December 1981) 1

² Isaac Asimov, *I ROBOT* (1st edn, Gnome press 1950) 124 – 125

³ Gunkel David J, *The Machine Question: Critical Perspectives on AI, Robots, and Ethics* (The MIT Press 2012)

with Robots and for making these interactions beneficial we need to regulate our interactions by properly established laws.

The robots are innocent with lack of ability to understand the nature of norms and laws of society like a small child, therefore, they can be used as a crime machine by people, since robots function on the directions and they can, therefore, be misused or another scenario which could be faced by the world in coming future is that robots develop and evolve to a level where they can make self-decisions and can formulate intentions. This could be more dangerous to society than the biggest hydrogen bomb that could possibly be made. A picture of which has been shown in numerous movies like “A Space Odyssey” (2001), “The Matrix” (1999, 2003) and many more where the robots evolve to a level that they take over the world and start eliminating humanity from the face of our world. Though these are fictions but this could possibly be the future of our world.

The main question arises how we can check such misuse of artificial intelligence simultaneously by not imposing the restrictions on the technological growth of this field. In order to cope up with this problem, the Artificial Intelligence entities must be made subject to legal control. The new technology no doubt can improve human lives but at the same time can cause human suffering likewise is also possible. Therefore, the new technological growth compels the adjustment of legal orders. Though the artificial intelligence may not qualify for rights and laws for natural persons and may not be covered under constitutional provisions like a natural person but making Artificial Intelligence subject to law not only saves the innocent people from the criminal liability arising from the acts of such entities but also subjects Artificial Intelligence to legal social control which checks the misuse of the artificially intelligent beings.

Now the question arises what type of laws are suitable and how can an artificial intelligence entity be subject to laws since they are mere objects in the scope of the law. The criminal law is the most effective way towards social control in our human civilization and can be used as an efficient tool check the negative impact of artificial intelligence on our society.

Subjecting artificial intelligence to criminal laws creates an interesting dispute in the provisions, which is based on the approach of society towards them as artificial intelligence though forms a new dimension in the technological world is merely a computer programme based product in the law. The solution to this problem is recognizing artificially intelligent beings as legal or juristic persons in law.

LEGAL PERSONHOOD OF ARTIFICIAL INTELLIGENCE

Artificial intelligence entities should be treated as legal persons just as corporations are legal persons under the law. It is pertinent to note that the initial reasoning behind according to corporates legal personhood was to promote commercial activity and also remove corporate liability from individual shoulders. In the same vein, artificial intelligence should be accorded basic constitutional freedoms in line with those accorded to corporates. The primary objective behind this is that as artificial intelligence develops and begins to think, civil and criminal

liability arising from their actions will not be solely attributable to their programmer or owner. Like, the autopilot is based on the artificial intelligence technology. What if a developer of a warfare aircraft makes an auto pilot programme which itself eliminates any obstacles on its mission and in one of the mission the pilot of the aircraft aborts the mission due to bad weather but the autopilot recognizes pilot as an obstacle and ejects the pilot out of the cabin which kills the pilot. Now the developer didn't have any intention to kill the pilot but the current laws consider them liable. The correct option would be to impose criminal liability on the auto pilot and correct the algorithms of its programming. This not only saves the developers of artificial intelligence and the owners from criminal liability for acts they never intended but also prohibits demoralization of developers to bring more innovations into the technological field.

At the same time, as robots get sentient, they too shall start demanding basic rights in line with their needs to facilitate their well-being. After developing artificially intelligent beings scientists are designing machines with emotional intelligence and other capabilities that will diminish the line of difference between humans and machines.⁴ It is fundamentally in the benefit of human beings to ensure that our interactions with these artificially intelligent beings are beneficial and occur as intended. In furtherance of the same, we need to grant legal personhood to these types of technology.

Though this could make artificial intelligence a tool to commit crimes. The crime perpetrator can easily take shelter behind artificial intelligent beings and use legal personality of the artificial intelligence entity as a statutory privilege to commit crimes. In the case of a corporation if any person uses legal personality of the corporation for his fraudulent or dishonest purposes he is not allowed to take shelter behind the legal personality of the corporation and the court lifts the corporate veil of the corporation and takes action against the perpetrator as there is no corporate personality. The corporate veil is lifted only if a person relies on the corporate personality of the corporation to shield it wrong doings.⁵ In the same vein, the scenario of artificial intelligence can be treated. If a perpetrator of any fraud or crime is found taking shelter behind the legal personality of the robot he should be treated by a court as if there was no legal personality. Many precedents of which are being slowly established like the case of 'computer raped by telephone' which was widely reported in which a programmer used a telephone link to invade the privacy of the computer. During the course of the investigation the questions arose as to whether issue a search warrant to the computer to fetch evidences. This was the first time when the world saw any computer being treated as a person and a search warrant was issued to the computer.⁶ The auto-pilot legislation is leading in establishing the precedents in this field. In *Klein v. U.S.*,⁷ the pilot used the autopilot to land the plane while the guidelines strictly prohibit the use of auto pilot during the landing. There was an error on the part of the autopilot during the landing and which lead to a bad landing causing damage to the plane. The pilot was held liable as there

⁴ Rafael A. Calvo, Sidney K. D'Mello, Jonathan Gratch & Arvid Kappas, *The oxford handbook of affective computing* (Oxford 2015)

⁵ BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai [1996] 86 Com Cases 371 (Bom)

⁶ Ward v. Superior Court of California [1972] 3 C.L.S.R. 206

⁷ [1975] 13 Av.Cas. 18137

was negligence on his part rather than considering auto-pilot liable for error on its part. In U.S four states have passed to legalize self-driving cars by Google,⁸ Nevada being the first state to do so.⁹ These cars treated as the traditional drivers in the perspective of law.

APPLICABILITY OF CRIMINAL LAW ON ARTIFICIALLY INTELLIGENT BEINGS

The applicability of criminal law on artificial intelligence gives rise to another question of criminal liability of the artificial intelligence. The criminal liability is based on the presence of two factors, *mens rea* and *actus reus*. In the light of English criminal law, the criminal liability doesn't arise until both the factors are present.¹⁰ It is said that *actus non facit reum, nisi mens sit rea* which states that the intent and the act both must concur to constitute the crime. *Actus reus* is the material outcome of the act or the deed¹¹ and is an essential element to constitute the crime.¹² The main problem arises in detecting the presence of *mens rea* which means the presence of criminal intention.

To prove the criminal liability of the robot the presence of both the factors is essential. The *actus reus* can be detected by the acts or omissions of robots. But there is no such yardstick that can measure the presence of *mens rea* in the omissions of the robot. It is the mental element of the person doing any offence such as, the knowledge of the outcome or result of the act or the ability to understand the nature of the act which are accompanied by the most important factor which is the intention to perform the particular act.

TURING TEST

The challenge to detect the *mens rea* in the acts of the robots can be tackled by the application of Turing test. In 1950, Alan Turing introduced the concept of Turing Test to test the ability of a machine to formulate intents for its actions or to exhibit intelligence.¹³ Turing test is a game in which the machine imitates being a human with a human opponent. After a series of questions the questioner who is completely unaware of which competitor is human and which one is a computer guesses which of them is human. Turing test basically tests the ability of a machine to exhibit human nature. If the machine is successful in convincing the questioner that it is human, it passes the test and is believed to have capabilities to act as a human. The applicability of the Turing test on every particular artificial intelligence entity can be cumbersome for the courts. Therefore, the government can lay down norms for

⁸ Thomas Halleck, 'Google Inc. Says Self-Driving Car Will Be Ready By 2020' (*International Business Times*, (15 January 2015) <<http://www.ibtimes.com/google-inc-says-self-driving-car-will-be-ready-2020-1784150>> accessed 12 February 2016

⁹ Alex Knapp, 'Nevada Passes Law Authorizing Driverless Cars' (*Forbes*, 22 June 2011) <<http://www.forbes.com/sites/alexknapp/2011/06/22/nevada-passes-law-authorizing-driverless-cars/#17c7344a5b73>> accessed 12 February 2016

¹⁰ Ratanlal, Dhirajlal, *The Indian Penal Code by Ratanlal & Dhirajlal* (32nd edn, LexisNexis 2011) 16

¹¹ Stanhope Kenny, J.W.C. Turner, *Kenny's outline of criminal law* (19th edn, Cambridge University Press 1966) 17-18

¹² R v. White [1910] 2 KB 124

¹³ Alan Turing, 'Computing Machinery and Intelligence' [1950] LIX 236

manufacturers or developers of these entities to subject them to Turing test or any other test as the government deems fit before the public offering of these entities.

CHINESE BOX TEST THEORY BY JOHN SEARLE

John Searle criticized the Turing test theory by his Chinese box test. He stated that Turing test on a robot is similar to giving instructions to a man locked in a room in Chinese who has no knowledge of the language. But when he is given a rule book that consists translation of Chinese into symbols, he will be able to understand the instructions. The people outside the room will be convinced that the person inside the room understands Chinese. But actually, the person doesn't understand Chinese but acts on the basis of instructions. The John Searle conveys by this experiment that the machines act on the basis of algorithms and programmes which are manipulated on the basis of the inputs.¹⁴ The Artificial intelligence entity actually doesn't think or formulates intention but acts on the basis of programmes that function on the given input.

CRITICISM OF CHINESE BOX EXPERIMENT

It is a hypothetical approach that the programmes help the artificially intelligent beings to convince the questioner that it is human. Though the programme of the Artificial Intelligence which is like a symbol manual that helps understand the inputs but it definitely doesn't provide consciousness required to give human like responses and to convince the questioner that it is a human.

PUNISHMENT FOR CRIMINALLY LIABLE ARTIFICIAL INTELLIGENCE

The question arises what should be done after an artificially intelligent being is held criminally liable and what punishments or measures should be taken. After conviction, what punishment should be sentenced to the artificial intelligence entity by the court? What are the matters in which they can be held liable? Similar questions arose when the issue of criminal liability of corporations was discussed as to how the companies and corporations will be made subject to laws implicated on the natural persons.¹⁵ The present corporation laws perfectly display how these questions were answered. The corporations when imposed fines by the court, they are bound to pay them in a similar way like natural persons. In the same analogy, punishments can be granted to the artificial intelligence. Though there is a need for adjustments in the implication of these punishments for artificial entities but this doesn't negate the nature and principle behind these punishments when related to humans.

¹⁴ Peter Kugel, 'The Chinese Room Is A Trick' (2004) Computer Science Department Boston College, Chestnut Hill, USA <<http://www.cs.bc.edu/~kugel/Publications/Searle%206.pdf>> accessed 14 February 2016

¹⁵ Gerard E. Lynch, 'The Role of Criminal Law in Policing Corporate Misconduct' (1997) 60(3) Law and Contemporary Problems <Available at: <http://scholarship.law.duke.edu/lcp/vol60/iss3/3>> accessed 14 February 2016

There are few factors that must be taken into consideration while implication of punishment on the artificial intelligence.¹⁶ 1) The fundamental principles of the particular punishment. 2) Effects of the punishment on the artificially intelligent beings. 3) The practical achievements by the specific punishment.

The most important factor among which that must be taken into consideration is what the achievements are from the specific punishment. Most of the punishments imposed on the human offenders like the death penalty, life imprisonment, imprisonment, serving society and fines. But even the most severe punishments like the death penalty or life imprisonment are impractical for artificial intelligence entities. The fundamental principal behind these punishments is to make offenders incapable of committing any other crime in future.¹⁷ The death penalty is awarded to deprive the human of its life. But the term life is abstract for artificial intelligence. Artificial intelligence can be tangible like robots, computers but sometimes artificial intelligence entities have no physical existence like software, mobile applications. The death penalty is awarded to a human in case of grave and serious offences or when the offender possess danger to the society in the future in the same vein in case if an artificial intelligence entity is found to possess danger to society the punishments of similar consequence can be awarded which bars the entity from causing any further harm to the society like by deletion of the software or banning the production and development of the concerned entity or in case of an entity with physical existence it can be dismantled or destroyed. In the case of less serious offences or petty offences where the humans are awarded imprisonment or other punishments like society service with the fundamental object of bringing reformation in the person so that the particular person can serve the society in future and live as a part of society. The same principal can be applied to the artificial intelligence where there is a possibility of reformation in the artificial intelligence measures can be taken for bringing about reformative changes in the artificial intelligence entity by making necessary technical or programming changes or by alteration of algorithms. Fines can be imposed on the artificial entities for petty offences but in maximum cases, these entities are incapable of paying fine as they don't have money or property of their own. In such cases, fines can be realized by imposing punishment of community service. The punishment of community service is most appropriate in terms of practicality and achievements for artificial intelligence.

Many legal systems recognize community service as the better substitute for short term sentences because of its productive nature.¹⁸ Community service punishment is also awarded in case the offender is incapable of paying the fine imposed for the offence he committed. The objective of such punishments is the contribution of labour service by the offender towards society. Therefore, the punishment of community service can be appropriately

¹⁶ Gabriel Hallevy, 'The Criminal Liability of Artificial Intelligence Entities' (2010) SSRN <<http://ssrn.com/abstract=1564096>> accessed at 19 January 2016

¹⁷ Robert M. Bohm, *Deathquest : An introduction to the theory and practice of death penalty in the United States* (4th edn, Routledge 1999) 74-78

¹⁸ John Harding, *The development of the community service , alternative strategies for coping with crime* (Norman Tutt 1978) 164

imposed on artificial intelligence where the entity can work for the welfare of the community by the contribution of labour.

CONCLUSION

Artificially intelligent beings add a whole new dimension to our society. The rapid development in the technological world warrants the adaptive reforms in the current legal system to find solutions to the emerging legal problems through artificial intelligence in our society. The criminal liability can be imposed on the artificial intelligence if all the requirements of *actus reus* and *mens rea* are met. The dynamic technological world possesses strong danger to humanity, in order to protect our society, we need to subject artificial intelligence to law especially criminal law as it is the most effective way to social control. In the initial phase of corporate development, people were afraid of corporations but since corporations have been treated as legal persons subject to criminal and corporate laws the goal of social control on corporations has been achieved. Corporations since the fourteenth century have appeared in modern form.¹⁹ It took many centuries to subject corporations to the laws. Artificial intelligence has become an important part of our society which is likely to get more influential in the future with the changes in the technological world. The society has already started facing problems due to lack of legal enactments on artificial intelligence. There are a huge number of crimes already been committed by the artificially intelligent beings. Therefore, there is a strong need that the society starts taking steps towards the development of legal system for dealing with such problems. Not subjecting artificial intelligence to laws especially criminal law would be outrageous. Human laws can be imposed on the artificial intelligence as they are imposed on other legal entities like corporations.

¹⁹ William Searle, Holdsworth, *A history of English law* (1st edn, Sweet & Maxwell Ltd 1969) 471-476

REMEDY OF COMPENSATION UNDER ARTICLE 32 OF CONSTITUTION OF INDIA

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Abstract

In this Article I discuss how the opening of writ jurisdiction as a source for monetary compensation in cases of Human Rights infringements has led some very arbitrary amounts being awarded as compensation, especially in the absence of any set rules or jurisprudence. The problem is discussed through some specific case laws. The victims of any wrong generally seek compensation under the law of torts at the local civil courts. This process is tedious and insufficient at most times but the damages awarded under torts are well defined and categorized under the heads of Compensatory, Nominal and Punitive. The least amount courts provide is the direct financial loss suffered by the victim in terms of medical cost or the cost to repair the property or any such similar loss.

The Indian Supreme Court has time and again invented new methods for securing fundamental rights under Article 32. The Article 32 (2) provides the Supreme Court with power to issue directions, orders or writs for enforcement of any fundamental right. The powers of the Supreme Court under Article 32 are not subject any limitations and the court has used these powers to both prevent and remedy the violations of fundamental rights. In the past few decades, India witnessed the birth of a new mechanism for damages in specific cases of Human Rights infringement. The rise of this new jurisprudence of compensation with respect to Human Rights is a welcome step from the constitutional courts but the various amounts awarded by the highest court has started a new debate.

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INTRODUCTION

Compensation to victims is a recognised principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is taking decades for the victims to get a decree for damages or compensation through civil courts, which is resulting in so much hardship to them.

The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all the people irrespective of the absence of any express constitutional provision and of judicial precedents.

The renaissance of the doctrine of natural rights in the form of human rights across the globe is a great development in the jurisprudential field in the contemporary era. A host of international covenants on human rights and the concern for effective implementation of them are radical and revolutionary steps towards the guarantee of liberty, equality and justice. The concept is new, and these rights have been recognised since ages and have become part of the constitutional mechanism of countries. India recognised these rights under Part III of the Constitution providing remedies for enforcement of such rights.

Although, there is no expressed provision for awarding compensation under Article 32 of the Constitution of India. The compensatory jurisprudence introduced by the Supreme Court of India by invoking powers under Article 32 gained tremendous importance in recent times due to the increase of the incidents of State lawlessness¹, police lawlessness², custodial violence³, violence in jails⁴, unlawful detentions⁵ medical negligence⁶ environmental pollution⁷ and other violations. The citizens are entitled to appropriate relief under the provisions of Article 32 of the Constitution, provided it is shown to the satisfaction of the Court that the Fundamental Right of the petitioner had been violated⁸. This innovation made by the Supreme Court is not only reducing the multiplicity of litigation but also helping the courts to render speedy justice to victims of the infringement of right to life and personal liberty. This Court has a constitutional duty to protect the Fundamental Rights of Indian citizens.⁹

Dr. Ambedkar, the person who is attributed with the fatherly rights over the Constitution of India, declared at the time of adoption of the Constitution that if there was one most

¹ Rudul Sah v. State of Bihar, (1983) 4 SCC 141

² Saheli v. Comm. of Police, (1990) 1 SCC 422

³ Sudha Rasheed v. Union of India, (1995) 1 Scale 77

⁴ (1993) 2 SCC 746

⁵ Arvinder Singh Bagga v. State of U.P.(1994) 6 SCC 565

⁶ Paschim banga Khet Mazdoor Samity v. State of West Bengal AIR 1986 SC 2426, (1996) 4 SCC 37

⁷ M.C.Mehta v. Union of India (2001) 9 SCC 520

⁸ Daryao & Ors. v. State of U.P. & Ors. AIR 1961 SC 1457

⁹ M.C.Mehta v. Union of India AIR 2006 SC 1325

important provision in the Constitution, it was Article 32 thereof. This Article referred to “as the very soul of the constitution” by Dr. Ambedkar, provides for constitutional remedies. This Article 32 confers the right to every citizen to approach the highest court of the country i.e. the Supreme Court of India, for enforcement of his fundamental rights. The scheme of the Constitution is such that the right to approach to the Supreme Court for such cause is in itself a fundamental right.

CONSTITUTIONAL PROVISION

Article 32, Remedies for enforcement of rights conferred by this Part:

- 1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed,
- 2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part,
- 3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2),
- 4) (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 32(1) provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case.

Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them. Supreme Court or the High Courts may issue five kinds of writs.

In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in “appropriate cases”.

A question regarding the awarding of monetary compensation through writ jurisdiction was first raised before the Supreme Court in *Khatri (II) v. State of Bihar*¹⁰ In this case, Bhagwati, J. Observed that “*Why should the court not be prepared to forge new tools and devise new*

¹⁰ (1981) 1 SCC 627

remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty.”

In *Sant Bir v. State of Bihar*¹¹ the question of compensating the victim of the lawlessness of the State was left open.

In *Veena Sethi v. State of Bihar*¹² also the Court observed that the question would still remain to be considered whether the petitioners are entitled to compensation from the State Government for the contravention of the right guaranteed under Article 21 of the Constitution.

This dynamic move of the Supreme Court resulted in the emergence of compensatory jurisprudence for the violation of right to personal liberty. The Supreme Court of India in *Rudul Sah v. State of Bihar*¹³ brought about a revolutionary breakthrough in human rights jurisprudence by granting monetary compensation to an unfortunate victim of State lawlessness on the part of the Bihar Government for keeping him in illegal detention for over 14 years after his acquittal of a murder charge.

Till the pronouncement made in the above case, the Supreme Court was hesitating to recognise the principle of monetary compensation for violation of fundamental rights while acknowledging the inadequacy of conventional judicial remedies in this type of cases. The concern of the Apex court to do justice rather than mechanically applying the law based on precedents is reinforcing the credibility of the judiciary among the public.

The approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental right of the citizen has been adopted by the courts of Ireland, which has a written Constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy of compensation for the infringement of those rights. That has, however, not prevented the courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but also against the State itself.

In India, the judgment in *Rudul Sah v. State of Bihar*¹⁴ added a new dimension to judicial activism and raised a set of vital questions, such as, liability of State to compensate for unlawful detention, feasibility of claiming compensation from the State under Article 32 for wrongful deprivation of fundamental rights, propriety of the Supreme Court passing an order for compensation on a habeas corpus petition for enforcing the right to personal liberty.

¹¹ (1982) 3 SCC 131

¹² (1982) 2 SCC 583

¹³ (1983) 4 SCC 141

¹⁴ (1983) 4 SCC 141

The Supreme Court had taken a different view in *Jiwan Mal Kochar v. Union of India*¹⁵ by holding that the petitioner could not be granted the damages and compensation under Article 32 of the Constitution.

The power of the Supreme Court to deviate from traditional concepts and to formulate new rules for granting effective relief for violation of fundamental rights is traceable to Article 32. Regarding the ambit of clause (1) of Article 32, Bhagwati, J. in *Bandhua Mukti Morcha v. Union of India*¹⁶ observed that there is no limitation in regard to the kind of proceeding envisaged in Article 32(1) except that the proceeding must be “appropriate” and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of a fundamental right. Article 32(2) also expressly provided that the Court may grant “appropriate” remedy for enforcing the rights. Hence the power can be traced to “appropriate” remedy under Article 32(2) of the Constitution of India.

The Supreme Court in *M.C. Mehta v. Union of India*¹⁷ reiterated its stand taken in Rudul Sah, that apart from issuing directions it can under Article 32 forge new remedies and fashion new strategies designed to enforce the fundamental right. The Court went on to say that the power under Article 32 was not confined to preventive measure when the rights were violated. The court further observed that a contrary position would rob Article 32 of the entire efficacy and render it impotent and futile.

The most important point considered by the Bench was whether the Supreme Court could entertain claims for damages in respect of violation of fundamental rights and it was held that the Court had the power to award compensation in appropriate cases where: (SCC p. 408, para 7)

The power given to the Supreme Court under Article 32, which itself is a fundamental right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be made readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.¹⁸

¹⁵ (1984) 1 SCC 200

¹⁶ AIR 1984 SC 802

¹⁷ (1987) 1 SCC 395

¹⁸ Punjab & Haryana High Court Bar Assn. v. State of Punjab, (1996) 4 SCC 742

*Sebastian M. Hongray v. Union of India*¹⁹, *Bhim Singh v. State of J&K*²⁰, *Saheli v. Commr. of Police*²¹ and *Nilabati Behera v. State of Orissa* are some of the cases in which the Court made the State liable for compensation in the form of public law remedy.

In Nilabati Behera's case the Supreme Court observed, "*It may be mentioned straight away that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.*"²²

Another valuable authority comes from India, where the Constitution empowers the Supreme Court to enforce rights guaranteed under it. In this case, the Supreme Court awarded damages against the State to the mother of a young man beaten to death in police custody. The Court held that its powers of enforcement imposed a duty to "forge new tools", of which compensation was an appropriate one where that was the only mode of redress available. This was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply.

The Supreme Court categorically observed that the defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law.²³

In the hands of the Supreme Court public interest litigation in India has taken multidimensional character. The age-old adversarial system has been given a go-by. With the advent of judicial activism, letters²⁴, newspaper reports²⁵, complaints by public-spirited persons²⁶, social action groups²⁷ bringing to the notice of the Court regarding violation of fundamental rights were dealt with treating them as writ petitions and the relief of compensation was also granted through writ jurisdiction under Article 32 of the Constitution. In respect of writ petitions of disputed facts the Supreme Court developed a theory of fact-

¹⁹ (1984) 3 SCC 82

²⁰ (1985) 4 SCC 677

²¹ (1990) 1 SCC 422

²² at p. 758, para 10

²³ para 14

²⁴ D.K. Basu v. State of W.B., (1997) 1 SCC 416

²⁵ Parmanand Katara v. Union of India, (1989) 4 SCC 286

²⁶ M.C. Mehta v. Union of India, (1987) 1 SCC 395

²⁷ Common Cause v. Union of India, (1996) 6 SCC 593; Shiv Sagar Tiwari v. Union of India, (1996) 6 SCC 599

finding commissions²⁸. Usually the Supreme Court or High Courts do not take up the issues relating to disputed facts in writ proceedings. In cases of claim for compensation through public law remedy under Article 32, the Supreme Court instead of making the petitioner to resort to private law remedy invented the process of fact-finding commissions to inquire into the disputed facts and submit reports before the Court to consider the correctness of the facts placed before the Court. By taking the aid of such reports the Court is coming to a conclusion whether there is infringement of the right to life and personal liberty and whether it is a fit case to award compensation in writ proceedings.

LIMITATIONS OF ARTICLE 32

Like fundamental rights themselves, the right to constitutional remedies under Article 32 is not without limits. The constitution visualizes there situations when fundamental rights may be denied but constitutional remedies will not be available i.e. Article 32 will not be applicable.

- 1) Article 33 empowers the Parliament to modify application of fundamental rights to armed forces and the Police to ensure proper discharge of their duties.
- 2) Under Article 34, during the operation of Martial law in any area, the Parliament may indemnify any person in the service of the central or a state government for acts for the maintenance or restoration of law and order.
- 3) During emergency proclaimed under Art 352 of the constitution, the fundamental rights guaranteed to the citizens, will remain suspended. Article 358 authorizes the Parliament to restrict fundamental rights guaranteed by Art 19 during the pendency of an emergency under Article 352.
- 4) Article 359 empowers the President to suspend the right to move the courts for the restoration of fundamental rights. In other words, Article 359 empowers the President to suspend Art 32 of the constitution. Such an order however is to be submitted to the Parliament, and the Parliament has the right to disapprove the Presidential order.

CONCLUSION

It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at naught or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at naught or circumvent them, and that the court's powers in this regard are as ample as the defence of the Constitution requires.

In several parts of the Constitution, duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have

²⁸ Death of Sawinder Singh Grover, In re, 1995 Supp (4) SCC 450; People's Union for Civil Liberties v. Union of India, (1997) 3 SCC 433

created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed. Though not expressly provided constitution, it permitted an order for monetary compensation, by way of redress for contravention of the basic human rights and fundamental freedoms.

There are several cases in which the Supreme Court and the High Courts made the State liable to pay compensation as a public law remedy ignoring the plea of the State about its immunity from liability.

If by adjudication by a Court of competent jurisdiction, the right claimed has been negated, a petition under Article 32 of the Constitution is not maintainable. It is not generally assumed that a judicial decision pronounced by a Court may violate the Fundamental Right of a party. Judicial orders passed by the Court in or in relation to proceeding pending before it are not amenable to be corrected by issuing a writ under Article 32 of the Constitution. Explaining the significance and the ambit of the rights available to the citizens to approach the Supreme Court directly in matters affecting the exercise of fundamental rights guaranteed by the Constitution, discussed the scope of Article 32 of the Constitution granting such right.

DOWRY DEMAND AS CRUELTY- PIERCING THROUGH CIVIL AND CRIMINAL CONTOURS

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Abstract

Demanding Dowry has a very broad connotation. It is a specific offence under Section 4 of the Dowry Prohibition Act, 1961. When accompanied with cruelty this has been construed under Section 498A the Indian Penal Code, 1860 Subsequently on account of failure of the legislation to halt the menace of dowry amendments were introduced in form of the Marriage Laws (Amendment) Act, 1976, the Dowry Prohibition (Amendment) Act, 1984, the Criminal Law (Second Amendment) Act, 1983 etc. This highlights the menace of the practice of dowry. In this context, an analysis of dowry demand as cruelty becomes pivotal provided the standards *vis-à-vis* civil law i.e., for matrimonial reliefs and criminal laws i.e., sanctioning penalty varies.

Cruelty cannot be put into a strait jacket formula. It has different facets and degrees. Cruelty in matrimonial offences need not be proved beyond reasonable doubt and requires to be proved only on preponderance of probabilities as in civil cases. In the light of judicial interpretation now, dowry demand *per se* amounts to cruelty for civil suits. Even after major amendments of the law and liberal judicial interpretation, many courts have maintained their age-old orthodox approach. With respect to criminal aspect of dowry, Section 4 of DP Act criminalises the very demand of dowry and when such demand is accompanied by cruelty, it amounts to attraction of Section 498A IPC. Dowry prohibition laws are constitutional and have been given a liberal construct by the courts over the years. The current status of cases filed and pending along with the case with-drawl and conviction rate puts forth a very pathetic scene with respect to the women seeking judicial relief in matrimonial affairs. Hence, the construction of dowry demand as a form of extortion is merited. Its advantage lies in cognizability, deterrent effect and addressing the degree of cruelty which the present legislation has failed to remit.

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INTRODUCTION

Demanding Dowry has a very broad connotation. It is a specific offence under Section 4 of the Dowry Prohibition Act, 1961 (hereinafter referred as “DP Act”). When accompanied with cruelty this has been construed under Section 498A the Indian Penal Code, 1860 (hereinafter referred as “IPC”). Demanding dowry is also a form a domestic violence as can be inferred from Section 3(b) of Protection of Women from Domestic Violence Act, 2005. Prior to the advent of dowry prohibition legislation it was treated as criminal breach of trust under Sections 405 and 406 of the IPC. Despite of conferment of improved property rights on women by the Hindu Succession Act, 1956 this evil practice continued. In light of which specific legislations were enforced to eradicate this evil. Dowry was criminalized by the DP Act. Subsequently on account of failure of the legislation to halt the menace of dowry amendments were introduced in form of the Marriage Laws (Amendment) Act, 1976, the Dowry Prohibition (Amendment) Act, 1984, the Criminal Law (Second Amendment) Act, 1983 etc. This highlights the menace of the practice of dowry. In this context, an analysis of dowry demand as cruelty becomes pivotal provided the standards *vis-à-vis* civil law i.e., for matrimonial reliefs and criminal laws i.e., sanctioning penalty varies.

Accordingly, the author has endeavoured to answer the following research questions.

1. What is the nexus between cruelty and dowry demand in context of civil proceedings?
2. What is the requisite standard of proof for determining cruelty with regards to dowry demand as a crime?
3. Can demand dowry be construed as extortion as is required within the parameters envisaged under IPC?
4. What are the advantages of constructing dowry demand as a form of extortion?
5. How have been dowry laws approached in India by the judiciary and what is the correct approach?

DOWRY AND CRUELTY IN CONTEXT OF CIVIL PROCEEDINGS

The *locus classicus* enunciating the basic proposition of this article is *Shobha Rani v. Madhukar Reddi*,¹ where Justice Jagannatha Shetty stated that demanding dowry amounts to cruelty. It was stated that if the conduct complained of is itself bad enough or *per se* illegal or unlawful, then the impact or the injurious consequences of such conduct on other spouse need not be enquired. If such conduct is proved then cruelty is established.² This is the standard which applies to cruelty when it has to be construed as a ground for matrimonial reliefs such as a decree for divorce, judicial separation etc. Reasonability test cannot be employed in cases pertaining matrimonial affairs.³ Every case is to be construed in the light of its peculiar facts and circumstances. This is on account of the fact that the court does not have to deal with an ideal couple because their ideal attitudes will help them overlook mutual faults and

¹ *Shobha Rani v. Madhukar Reddi*, AIR 1988 SC 121.

² *Id.*

³ *Gollins v. Gollins*, (1963) 2 All ER 966.

failures.⁴ Cruelty in matrimonial offences need not be proved beyond reasonable doubt and requires to be proved only on preponderance of probabilities as in civil cases. In this backdrop, an analysis of the expression cruelty is merited.

The expression cruelty has not been defined. In *Russel v. Russel*,⁵ Lord Justice Lopes while defining cruelty observed that to constitute cruelty there must be danger of life, limb or health, mental or bodily or reasonable apprehension of it. A similar definition was given by the court for “*legal cruelty*” in *Sarvana Perumal v. Shashi Kana Perumal*⁶ while interpreting cruelty under Section 27(1)(d) of the Special Marriage Act, 1954. However this approach of the Indian Courts was changed by the advent of seminal judgement of *Dastane v. Dastane*⁷ where honourable apex court laid down that it is not necessary for cruelty to be construed as of such a character which gives rise to a reasonable apprehension of danger as is put forth by English jurisprudence. The court also stated that harm or injury to health, reputation, the working career or the like would be factored in to determine whether the respondent's conduct amounts to cruelty.

The intention of the legislation through the Marriage Laws (Amendment) Act, 1976 was to liberalize the concept of divorce.⁸ *Cruelty simpliciter* is made a ground for divorce henceforth.⁹ This amendment was made in the light of 59th Report of Law Commission of India which was prior to *Dastane*'s case and accordingly the old concept of cruelty as danger to life and limb does not hold any ground. Cruelty therefore in matrimonial law may be subtle or brutal, physical or mental, it may be by word, gesture or mere silence, violent or non-violent.¹⁰

In the case of *Sheldon v. Sheldon*,¹¹ Lord Denning observed that the categories of cruelty are not closed. Each case is different and hence a new type of cruelty may crop up in any case. In *Shobha Rani's case*,¹² the court observed that the cruelty may be mental or physical, intentional or unintentional. Physical cruelty is easy to determine and it is essentially a matter of fact and degree, however in case of mental cruelty enquiry must begin with regards to the nature of the cruel treatment and its impact on the mind of the spouse. It was laid down that persistent demand for dowry by the husband's parents with the support of the husband amounted to mental cruelty on the wife. It was held that cruelty is required to be proved on the preponderance of probabilities and not beyond reasonable doubt. Intention to injure the other spouse is not a necessary element to constitute cruelty.¹³ In deciding cruelty the court must consider social status, environment, physical and mental conditions of the susceptible

⁴ Narayan Ganesh Dastane v. Sucheta Narayan Dastane, AIR 1975 SC 1534

⁵ Russel v. Russel, 1897 AC 395

⁶ Sarvana Perumal v. Shashi Kana Perumal , ILR (1969) 1 Mad 845

⁷ Narayan Ganesh Dastane v. Sucheta Narayan Dastane, AIR 1975 SC 1534

⁸ Statement of Objects and Reasons, The Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976).

⁹ Justice Ranganath Misra et al, Mayne's Hindu Law & Usage, 247 (16th edn., 2010)

¹⁰ Narayan Ganesh Dastane v. Sucheta Narayan Dastane, AIR 1975 SC 1534

¹¹ Sheldon v. Sheldon 1966 (2) All ER 257 at 259

¹² Shobha Rani v. Madhukar Reddi , AIR 1988 SC 121

¹³ Ram Krishna Hegde v. Prameela, ILR (1979) 1 Kant 322

innocent spouse, the customs and manners of the parties.¹⁴ With regards to mental cruelty the whole of the matrimonial relationship has to be accounted for.¹⁵ In *Siraj Muhammad Khan v. Hafezunnisa*,¹⁶ it was held that after the persistent demands of dowry which caused reasonable apprehension in the mind of the wife that she was likely to be physically harmed, she was justified in not living with her husband and cannot be charged of desertion. Mental cruelty may consist of verbal abuses and insults by using foul and abusive language which disturbs mental peace,¹⁷ however every conduct which causes mental tension is not mental cruelty. It must be shown that the conduct affected the health or is likely to affect the health.¹⁸ The Supreme Court has taken this matter with utmost importance. In *Romesh Chandra v. Savitri*,¹⁹ the honourable apex court went to the extent of granting a decree of divorce exercising its power in the light of Article 142 of the Constitution of India when it was found that marriage was dead both emotionally and practically, and continuance of such marital alliance would prolong the agony and would constitute cruelty.

Despite the liberal stance taken by various courts the Calcutta High Court has taken an orthodox view where it interpreted cruelty for purpose of Section 13(1)(i-a) of Hindu Marriage Act, 1955 to be of two types viz., physical and mental. It went to the extent of holding that physical cruelty consists of *physical violence* and *bodily danger* and hence a solitary incident of *beating resulting in minor injuries* would not amount to cruelty.²⁰ A single act of violence will amount to cruelty only if it is *grossly violent*.²¹

DOWRY DEMAND AS A CRIME

A relatively strict construction ought to be given to dowry demand as a crime provided it attracts penal consequences and has the potential of curtailing the liberty of a person. However, it has been argued that the interpretation which has been given at the judicial frontiers have virtually resulted in diluting this stringent requirement. Prior to approaching the nuanced argument, a backdrop of constitutional challenge to dowry prohibition laws is put forth.

Constitutionality of Dowry Prohibition Laws

The constitutional validity of Section 498A IPC has been challenged at various occasions and it has been contented that the above section and Section 4 of the DP Act creates a situation of double jeopardy hence, should be struck down in the light of Article 20(2) of the Constitution of India. It is submitted that, Section 498A IPC is distinguishable from Section 4 of the DP Act as the latter makes a mere demand of dowry punishable and element of cruelty is not

¹⁴ *Ruplal v. Kantaro Devi*, AIR 1970 J&K 158

¹⁵ *Id.*

¹⁶ *Siraj Muhammad Khan v. Hafezunnisa*, AIR 1981 SC 1971

¹⁷ *Simarjit Kaur v. Bakshish Singh*, 1995 (2) HLR 487 (P&H)

¹⁸ *Suresh Kumar v. Suman*, AIR 1983 All 225

¹⁹ *Romesh Chandra v. Savitri*, AIR 1995 SC 851

²⁰ *Pranab Biswas v. Mrinmayee Dev*, AIR 1976 Cal 156

²¹ *Sulekha v. Kamala*, AIR 1980 Cal 370

requisite. Section 498A is essentially an aggravated form of the offence of demanding dowry.²²

Interpretation of Section 4 of the DP act over the years

At the outset the judges took a very narrow interpretation of Section 4 of DP Act. In the cases of *Indersain v. State*²³ and *Kashi Prasad v. State*²⁴ the Delhi and Patna High Courts respectively held that the mere demand of dowry if not accompanied with the consent of the person from whom the demand is made would not invite penal consequences. The apex court in *L.V.Jadhav v. Shankerrao*²⁵ rejecting such contention observed that the object of Section 4 is to discourage the very demand of dowry, hence a liberal construct to satisfy that object of the statute needs to be adopted. It was put forth that,

"There is no warrant for taking the view that the initial demand for giving of property or valuable security would not constitute an offence and that offence would take place only when the demand was made again after the party on whom the demand was made agreed to comply with it".

The incidents of demanded dowry should not be construed in a narrow manner. In *Madhusudan Malhotra v. Kishore Chand Bhandari*,²⁶ the *prima facie* furnishing of a list of ornaments and other household articles such as refrigerator, furniture, electric appliances etc. at the time of the settlement of the marriage were held to be demanding dowry under the DP Act. Recently, the honourable division bench of Justice Bhaskar Bhattacharya and Justice J.B.Pardiwala of Gujarat High Court has went to the extent of saying that even demanding money for business purposes is as good as demanding dowry.²⁷

Liberal interpretation to Section 498A IPC

With regard to curbing the menace of dowry Section 304B, 498A of IPC and Section 113B of Indian Evidence Act, 1872 were introduced. The objective of the legislation was to prevent harassment of the women who enters into a marital relationship with a person and later become victim of the greedy for money.²⁸ Legislation enacted to curb and alleviate the social evil rampant in the society must be interpreted with element of realism and not pedantically or hyper-technically. On account of this Section 498A has been constructed liberally for matters pertaining *first*, the interpretation of expression "*husband*", *secondly*, requisite standard of proof and *third*, compoundability of the offence.

²² Inder Raj Malik v. Sunita Malik, 1986 CriLJ 1510.

²³ Indersain v. State, 1981 CriLJ 1116.

²⁴ Kashi Prasad v. State, 1980 BBCJ 612.

²⁵ L.V.Jadhav v. Shankerrao, AIR 1983 SC 1219.

²⁶ Madhusudan Malhotra v. Kishore Chand Bhandari, (1988) Supp. 1 SCC 424.

²⁷ Press Trust of India, *Demanding money for business is as good as demanding money for dowry – HC*, Business Standard, (July 31, 2014), available at http://www.business-standard.com/article/pti-stories/demanding-money-for-business-is-as-good-as-demanding-dowry-hc-114073101899_1.html (Last accessed on February 20, 2016).

²⁸ Reema Aggarwal v. Anupam, AIR 2004 SC 1418.

With regard to first proposition, in the case of *Reema Aggarwal v. Anupam*,²⁹ the apex court interpreted the expression “husband” in Section 498A IPC when the legitimacy of the marriage was in question. It was observed that such expression need to be narrowly construed when dealing with claims for civil rights and property, however, a liberal approach is necessary when matters for curbing a social evil like demanding dowry are concerned. *Heydon* rule, which is suppression of mischief rule was applied by the court. This is a rule which envisages purposive interpretation with a view of suppressing the mischief which would crop up if the literal rule is allowed to cover the field. This rule has been endorsed in Indian jurisprudence by a plethora of cases.³⁰ In this case the husband subjected his second wife to cruelty on account of demand for dowry. The thrust is mainly on cruelty under Section 498A IPC. It was held that provisions of Section 498A IPC will apply to any person who under feigned status of husband in marital relationship subjects the women to cruelty or coerces her in any manner for purposes enumerated in Section 498A IPC. Similar approach was undertaken in a claim of maintenance by second wife under the Hindu Adoption and Maintenance Act, 1956.³¹ These cases impliedly overrule cases which presuppose existence of valid marriage for offence of cruelty and dowry demand on account of mathematical niceties of law.³²

In the context of second proposition, in the case of *State of West Bengal v. Orilal Jaiswal*,³³ it was stated that in criminal trial the degree of proof is much higher than that required in a civil proceeding. The requirement of proof cannot lie in surmises and conjectures. Though the court observed that requirement of proof was beyond reasonable doubt but held that there was no absolute standard of proof in a criminal trial. The proof beyond all reasonable doubt must depend on the facts and circumstances of the case as well as the quality of evidences adduced. In *Eater v. Bater*,³⁴ Lord Denning observed that the doubt must be of a reasonable man. Standard should be the one as adopted by a just and reasonable man for arriving at a conclusion in context of a particular subject matter. In *Gurbachan Singh v. Satpal Singh*,³⁵ Justice Sabyasachi Mukherjee stated that

“exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law.”

In the light of the above jurisprudence, it is concluded that to meet the ends of justice the standard of proof required for dowry prohibition legislation has diluted from the requisite of beyond reasonable doubt³⁶ to that of a standard of reasonable man. This analysis is endorsed

²⁹ *Id.*

³⁰ *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1953 Pat 87; *Goodyear India Ltd. v. State of Haryana*, AIR 2001 SC 2603; *Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd.*, AIR 2004 SC 355.

³¹ *Narinder Pal Kaur Chawla v. Manjeet Singh Chawla*, AIR 2008 Delhi 7.

³² *Raghothaman v. State of Karnataka*, II (2004) DMC 622.

³³ *State of West Bengal v. Orilal Jaiswal*, AIR 1994 SC 1418.

³⁴ *Eater v. Bater*, (1950) 2 All ER 458.

³⁵ *Gurbachan Singh v. Satpal Singh*, AIR 1990 SC 209.

³⁶ Henry Campbell Black, BLACK'S LAW DICTIONARY, 945 (2nd edn., 1995).

by the apex court in *Trimukh Maruti Kirkan v. State of Maharashtra*.³⁷ In *Prakash Chander v. State*,³⁸ Justice Y.K.Sabharwal stated that in cases of demand of dowry ordinarily only the near relative can know as to what is demanded and what is given or not given, such matters do not come to the knowledge of independent witnesses. It is hence natural that the incidents of cruelty, harassment or demand or dowry remain within the personal knowledge of the near relatives. They are therefore best persons to depose about the same.

With reference to the third proposition it is submitted that despite the fact that Section 498A is a non-compoundable offence, provided it is a means to satisfy the social objective of curbing the menace of dowry and fructifying matrimonial relationships the courts have inclined to take a different perspective. Section 320 of Cr.P.C provides the list of offences which can be compounded. In the light of this, it is abundantly clear that offences under Section 498A IPC and Section 4 of DP Act cannot be compounded. Regardless of this a division bench of Justice Ranjana Desai and Justice N.V. Ramana in their seminal judgement of *Manohar Singh v. State of Madhya Pradesh*,³⁹ has held that since, a genuine compromise has been accomplished amongst the husband and wife and the above offences are personal in nature having no repercussions on society they can be compounded. In this case the estranged couple reached a compromise when husband agreed to pay Rupees 2,50,000 as compensation in addition to the costs of litigation.

In light of the arguments advanced with respect to the interpretation of expression “husband”, requisite standard of proof and compoundability of the offence, it becomes abundantly clear that the stringent requirements of the criminal offence are watered down to further the objective of the statute.

Current status of Dowry as a crime in India

With regards to offences under DP Act in 2012 a total of 24461 cases were put forth for trial out of which conviction was done merely in 677 cases and 515 cases were withdrawn. The result is a conviction rate of trifling 2.76%.⁴⁰ In the year 2012 a total of 87,633 cases were brought for trial under Section 498A of IPC out of which conviction is done only in 6,916 cases which implies a conviction rate of mere 7.89%. The number of cases withdrawn amounts to 8,162.⁴¹ In the year 2013, 4.5% of crimes registered under IPC are pertaining to cruelty by husband or his relatives towards the wife out of which the charge sheet is filed

PROOF BEYOND A REASONABLE DOUBT - The burden of proof that is put forward by the prosecution used to determine a person's guilt or innocence. The defendant is always presumed to be innocent unless the burden of proof is undeniable.

³⁷ *Trimukh Maruti Kirkan v. State of Maharashtra*, (2006) 10 SCC 681.

³⁸ *Prakash Chander v. State*, 1995 CriLJ 368.

³⁹ *Manohar Singh v. State of Madhya Pradesh*, 2014 (8) SCALE 638.

⁴⁰ National Crime Records Bureau, *Cases registered and their disposal under IPC crimes*, (2012) available at http://ncrb.nic.in/CD-CII2012/Additional_Tables_CII_2012/Additional%20table%202012/Cases%20registered%20and%20their%20disposal%20under%20IPC%20crimes%20during%20-%202012.xls (Last accessed on February 20, 2016).

⁴¹ *Id.*

merely in 92.3% of cases.⁴² This indicates the social reality of our country where, even when the women seek protection of law, she is harassed by her own family and friends to quit litigation. In *Rajesh v. Bhavna*,⁴³ wife was compelled to withdraw her criminal litigation on account of pressure, undue influence and fear of welfare of her son. In *S. Gopala Reddy v. State of Andhra Pradesh*,⁴⁴ Supreme Court expressed its trauma in the alarming increase in cases pertaining to harassment, torture, abetted suicides and dowry deaths of young innocent brides in spite of stringent penal provisions to curb such instances. This problem is also highlighted in Law Commission 202nd Report which deals with proposals to amend Section 304B of IPC.

CONSTRUCTION OF DOWRY DEMAND AS EXTORTION

In light of ever increasing cases of dowry demand and the consequent failure of special law to address the same, the author has endeavoured to provide a solution in the existing legal framework. The construction of dowry demand as extortion and consequent invocation of the provision dealing with the offence of extortion have the potential of filling the void in the present law on account of their cognizability, deterrent effect and addressing the degree of cruelty.

Extortion is defined under Section 383 of IPC. It has four essential ingredients, *first*, the accused must be put in fear of injury to that person or any other person,⁴⁵ *secondly*, putting of a person in such fear should be intentional,⁴⁶ *third*, on account of inducement property or valuable security or anything signed which may be converted to valuable security must be delivered and *lastly*, inducement must be dishonest.⁴⁷ This offence is carried out by overpowering the will of the owner.⁴⁸ Dishonestly here means with an intention to cause wrongful loss.⁴⁹ The provisions of extortion under IPC extend from Section 383 to 389. These encompasses various degree of the offence of extortion and attempts to commit extortion. According to the 1st Law Commission Report, with regard to extortion, it was observed that it is a question of fact for the courts to determine whether the injury threatened or was of such a nature to produce the effect intended and whether in the surrounding circumstances that party was truly put in fear and believed injury to be inevitable if he/she did not comply.⁵⁰ Section 2 of the Dowry Prohibition Act defines dowry. It uses similar terms as “*property*” and “*valuable security*”. Demanding dowry fulfils the requisites of Section 385 and 387 of IPC as *first*, it is intentional. *Secondly*, dowry can be indirectly given or agreed to be given, as fear of injury under Section 383 can be contemplated to that person or any other

⁴² National Crime Records Bureau, *Figures at a glance*, (2013) available at <http://ncrb.nic.in/> (Last accessed on February 20, 2016).

⁴³ *Rajesh v. Bhavna*, 2008 (6) ALL MR 131

⁴⁴ *S. Gopala Reddy v. State of Andhra Pradesh*, AIR 1996 SC 2184

⁴⁵ *Indrasana Kuer v. Sia Ram Pandey*, 1970 CriLJ 647 (Pat)

⁴⁶ *Mahadeo Tukaram v. Crown*, AIR 1950 Nag 240

⁴⁷ *R.S.Nayak v. A.R.Antulay*, AIR 1986 SC 2045

⁴⁸ *Ratanlal & Dhirajlal*, RATANLAL AND DHIRAJLAL'S THE INDIAN PENAL CODE, Vol. 2, 1953 (32nd edn., 2013)

⁴⁹ *Mahadeo Tukaram v. Crown*, AIR 1950 Nag 240

⁵⁰ 1st Report of the Law Commission of India, Liability of the State in Tort, 306 (1956)

person. Section 4 of DP Act in a way restricts the scope of extortion as amongst one party to a marriage and the other. The Dowry Prohibition (Amendment) Act, 1984 amended the definition of dowry and substituted the words “*in connection with the marriage*” for the words “*as consideration for the marriage*”. This was done with a view to widen the definition of dowry in the Act. Hence, the intention of the legislature is to make the law more stringent. Accordingly, the construction of dowry demand as extortion gains legitimacy.

Section 385 of IPC seeks to punish an attempt to commit extortion when the attempt has failed, the offence of extortion is not complete and the property or valuable security is not delivered. The fear of injury contemplated in Section 385 IPC need not necessarily be bodily harm or hurt.⁵¹ It includes injury to mind, reputation and property of a person.⁵² Whether a person has in fact been put in fear of injury is a matter which a court must decide considering the age, sex and situation of the person threatened.⁵³ A similar interpretation has been given to the cases of cruelty. Section 387 of IPC is an aggravated form of an attempt of extortion. The fear of death or grievous hurt should not necessarily be instantaneous.⁵⁴ This is analogous to cases of dowry demand where there exists the demand which is not met. Dowry demand if not met often leads to killing of the wife by husband and in-laws.⁵⁵ In most cases of dowry demand, the threat is to drive the women out of the house⁵⁶ which essentially comes within the ambit of fear of injury as envisaged by provisions of extortion. This can be equated to the situation, where oral or supposed influence by a member of a certain establishment inducing other members to give him money against their will and threatening in case of refusal, the loss of their situation was treated as extortion.⁵⁷ In the light of above arguments that appreciate the similarity between dowry demand and extortion it is submitted that dowry demand can be placed on equal footing as extortion for the purposes of criminal law.

Advantages of construction of dowry demand as extortion

In light of construing demanding dowry as a form of extortion the following advantages emerge. *First*, provisions of IPC dealing with extortion are cognizable offences whereas Section 498A IPC and Section 4 of DP Act are not. The cognizance of Section 498A can only be taken if information regarding the crime is given by any person who is related to the aggrieved by blood, marriage, adoption or public servant notified by State Government on this behalf. Similar is the case with Section 4 of DP Act. This amounts to only limited cognizability. Construction of dowry demand as extortion will lead to the unearthing of cases where women or her relatives do not resist such demands on account of social realities that prevail in our country. *Secondly*, construction of dowry demand as extortion IPC enhances the deterrent effect of the law and hence helps in achieving the objective of dowry prohibiting

⁵¹ Habib Khan v. State, AIR 1952 Pat 379

⁵² P.S.A. Pillai, CRIMINAL LAW, 763 (11th edn., 2012)

⁵³ N.D. Basu, INDIAN PENAL CODE, Vol. 2, 2470 (11th edn., 2011)

⁵⁴ Basu, *supra* note 53, at 2477

⁵⁵ Trimukh Maruti Kirkan v. State of Maharashtra, (2006) 10 SCC 681

⁵⁶ Arun Kumar Sharma v. State of Bihar, (2010) 1 SCC 108

⁵⁷ Basu, *supra* note 53, at 2470

legislations.⁵⁸ *Third*, it also helps in addressing the degree of cruelty which cannot be effectively addressed by Section 498A as a maximum of 3 years sentence can be awarded. This is particularly useful in cases where the degree of cruelty is extreme and a mere sentence of 3 years is inappropriate. Such construction can also provide a proper remedy where course of action is not available due to legal technicalities such as limitation period provided by Section 468 of Cr.P.C.

CONCLUSION

Cruelty cannot be put into a strait jacket formula. It has different facets and degrees. Cruelty in matrimonial offences need not be proved beyond reasonable doubt and requires to be proved only on preponderance of probabilities as in civil cases. In the light of judicial interpretation now, dowry demand *per se* amounts to cruelty for civil suits. Even after major amendments of the law and liberal judicial interpretation, many courts have maintained their age-old orthodox approach. With respect to criminal aspect of dowry, Section 4 of DP Act criminalizes the very demand of dowry and when such demand is accompanied by cruelty, it amounts to attraction of Section 498A IPC. Dowry prohibition laws are constitutional and have been given a liberal construct by the courts over the years. The current status of cases filed and pending along with the case with-drawl and conviction rate puts forth a very pathetic scene with respect to the women seeking judicial relief in matrimonial affairs. Dowry demand can be construed as a form of extortion. Its advantage lies in cognizability, deterrent effect and addressing the degree of cruelty which the present legislation has failed to remit.

The author tends to emphasize on the importance of the “*object of the legislation*” via the arguments advanced in the article. It can be concluded that matters pertaining to family law need to be addressed with the demands of the society and not by engaging in hyper-technicalities of law. The author submits following recommendations. *First*, offences under Section 498A and DP Act are made cognizable. *Secondly*, the expression “*solemnize*” be given an explanation as to depicting a relationship which is of the nature of marriage to avoid the mathematical niceties of law which at times let the accused to go scot free. *Third*, the penal sanction under Section 498A is enhanced so as to combat with the degree of cruelty and slacking deterrent effect of the law. Further, in light of Justice Verma Committee Report all marriages in India should be registered in presence of a Magistrate to ensure that there has been no demand for dowry and parties have consented to marriage.

⁵⁸ Narsingh Prasad Singh v. Raj Kumar, AIR 2001 SC 1828, The Honourable apex court observed that it is virtually a matter of shame to civilization and indiscriminate attacks and violence against married women for obnoxious and anti-social demand of dowry and the accused are let off imposing free-bite sentences like “till rising of the court” or “sentence already undergone” without verifying whether the accused has undergone any sentence. The result is that violence against women continues unabated as the law loses its deterrent effect.

CODIFICATION OF PARLIAMENTARY PRIVILEGES AND FREEDOM OF SPEECH

Bhavinee*

Abstract

Since the commencement of humanity, there have been continuous conflicts and clashes between the government and ones governing it. Gradually it was the ones being governed who were endowed with the rights to freedom and liberty against the established government. The judiciary and Legislature being the two of the three pillars of the democratic governance in India have undergone unparalleled fights side-by-side and stood diagonally opposite to each other under the constitutional framework. Parliament in India is one of the most important pillars standing with an aim to achieve the goals of national reconstruction and nurturing the values of freedom, secularism and democracy. As Dicey says, “is harder to define than the extent of the indefinite powers or rights possessed by either House of Parliament under the head of privilege or law and custom of Parliament”. Black’s Law Dictionary defines Parliamentary/Legislative Privilege as – the privilege protecting (1) any statement made in a legislature by one of its members, and (2) any paper published as part of legislative business¹.

The issue of Parliamentary Privilege is one where the Indian Legislature claims exclusivity in matters of its domain and jurisdiction due to the nature of the work it is associated with it is imperative to enable the members perform in a free and frank atmosphere, and where Indian Judiciary tends to have no say into it but they may scrutinize the proceedings of the House on the ground of illegality or unconstitutionality². The apex court had been on several occasions been forced to dwell upon issues pertaining to privileges, protection of fundamental rights of citizens, media and to uphold the constitutional spirit and values. Though this interference is not welcomed by the legislatures, yet their contribution cannot be denied. This judicial discourse can be broadly be divided into three phases; MSM Sharma phase; Keshav Singh Phase and prevailing- Raja Ram Phal Phase. There has been a tremendous and a sharp shift between in the judicial opinion that the judiciary held over these phases that sets to conclude the present scenario of the immunities, powers enjoyed by the Parliament and the State Legislatures.

Keywords: Parliamentary Privileges, Article 19(1)(a), Article 105, Article 194, codification.

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¹ Bryan A. Garner, BLACK’S LAW DICTIONARY, Deluxe Eighth Edition, 2004, p.1235

² Keshav Singh’s case, AIR 1965 SC 1186; A.J. Faridi v. Chairman, U.P. Legislative Council, AIR 1963 All 75; Syed Abdul v. State of West Bengal Legislative Assembly, AIR 1966 Cal. 363; Om Prakash Chautala v. State of Haryana, AIR 1998 P&H 80; S. Ramachandran, M.L.A v. Speaker, AIR 1994 Mad. 332

The law that relates to the privileges and immunities given to the Parliamentarians including power to punish for contempt or breach of any privilege falls under “Parliamentary Privileges”. Individual or collective are granted so to enable them to carry out their constitutional functions independently, properly and efficiently. And as constitution itself empowers the legislators, it is important to understand the limits and extend of the privilege that is provided. Article 105 relates to the “Powers, privileges and immunities of the Parliament and its members” and article 194 to members, committees of state legislatures³. Clause 2 provides for freedom of speech – something said and freedom of expression – vote. The language of Article 105 is "mutatis mutandis" the same as that of Article 194 except that for the expression "Parliament" in Article 105 the expression "legislature of a State" is used in Article 194⁴. Hence, a discussion on Article 105 would be relevant to Article 194 also.

Article 105(1) guaranteeing freedom of speech in accordance to the rules and standing orders laid down, provides immunity from the process of courts pertaining to anything said within the four walls of the House. It stands as an effective exception to the freedom of speech as guaranteed under Article 19(1)(a) of the constitution. The immunity extends not only to the members but also to dignitaries like Attorney General and certain ministers though not a member have right to speak in while the House is in session. The immunity provides for free, frank and fearless participation in the debates expressing views either in the favour or against the motion before the House. However such an expression is subjected to reasonable restriction and forbids unrestricted license of speech. Those being while exercising freedom of speech, a member cannot raise a discussion as to the conduct of a Supreme Court or High Court Judge,⁵ except when a motion for his removal is in consideration. If such violation happens, the presiding officer of the House itself shall have jurisdiction over the matter than any judicial body.⁶ The provision of 10th Schedule, para 2 (relating to anti-defection) are not violative of Article 105(1) and 194(1).⁷ The immunity under article 105(2) doesn't extend to the speech made outside the premises of the house even if it is a verbatim demonstration of what was said by him or any other person in the house while the debate was going on. The rules and standing orders of the House which regulates the procedure in House⁸ suggests that freedom of expression of members under article 194(1) are subject to Rules of Procedure of Legislature.⁹ Clause 2 provides for complete immunity from the legal proceedings despite any of the words or sentences tend to violate the fundamental rights of any other person as under article 19(1)(a). Proceedings tend to include – civil, criminal and writ proceedings as well.¹⁰ The immunity is complete as it provides for fearless speech without fear of legal consequences.¹¹ Any derogatory statement against the judiciary in the house shall not attract

³ Professor MP Jain, Indian Constitutional Law, Sixth Edition Reprint , 2011, p.343

⁴ Ibid at p.91

⁵ Sharma v. Sri Krishna, AIR 1959 SC 395

⁶ A.K. Subbiah v. Karnataka, Legislative Council, AIR 1998 SC 2120

⁷ Kihoto v. Zachilhu AIR 1993 SC 412

⁸ Durga Das Basu, Shorter Constitution of India, 12th edition, 1999, p.404

⁹ Ref. under Article 143, AIR 1965 SC 745

¹⁰ A.K. Subbiah v. Karnataka, Legislative Council, AIR 1998 SC 2120

¹¹ Tej Kiran v. Sanjiva, AIR 1970 SC 1573; Church of Scientology v. Jhonson-Smith, [1972] 1 Q.B. 522

contempt even though it infringes the provision of the constitution.¹² The Rajya Sabha in its 12th Report stated that any question with respect to the disclosure, enquiry or scrutiny of the proceedings from a member of the parliament shall be deemed to be an interference with freedom of speech and will amount to contempt of court or breach of privilege if any suit is filed in court for what is said on the floor of the house. So was confirmed by Lok Sabha as well.

The Supreme Court in the case of *Tej Kiran Jain v. Sanjeeva Reddy* held that “once it is proved that parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceeding in any court”.¹³ “Anything said” does not extend to words or actions outside, except spoken while performing essential duties as minister or functionary of the state,¹⁴ or those which have been disallowed¹⁵.

Freedom of publication is available to all those publishing reports or papers under the authority of the house. As under a 105(1) and 105(2), circulation to audience or among members becomes immaterial. *Stockdale v. Hansard*¹⁶ has laid the development of law where a suit for damages was filed against a book containing the defamatory matter under the authority of House of Commons, and held that no privilege is attached to the publication. This facilitated the framing of “Parliamentary Papers Act, 1840 granting absolute privilege and immunity to the publications made under the authority of the house¹⁷.

The Calcutta High Court quoting the English decision in *Wason v. Walter*¹⁸ which protects the unauthorised yet faithful publication of the proceedings of the house stated its non-application in India, as there exists no exceptions for such publication under defamation¹⁹. Also, a member is supposed to have qualified privilege and not an absolute one,²⁰ as would be liable for defamation, if proved publication actuated with malice.²¹ In some ways the privilege is similar to the Fourth Exception to Section 499 of the Penal Code as conferred on persons reporting court proceedings. Privilege could be asserted even in respect of a part of the debate which the reporter alone finds newsworthy provided that it is a fair report, untainted with malice²². Henceforth, article 361-A²³ was inserted where the protection given was at a much higher status, as the need for awareness within the community with regard to

¹² *Surendra v. Nabakrishna*, AIR 1958 Ori. 168

¹³ *Tej Kiran Jain And Others vs N. Sanjiva Reddy And Others* 1970 AIR 1573, 1971 SCR (1) 612

¹⁴ DE SMITH, PARLIAMENTARY PRIVILEGE AND THE BILL OF RIGHTS, 21 Mod. L.R.,477-82

¹⁵ *Jatish v. Harisadhan*, AIR 1961 SC 613

¹⁶ (1839) LJ (NS) QB 294

¹⁷ *Surendra v. Nabakrishna*, AIR 1958 Orissa 168

¹⁸ LR 4 QB 73 (1868)

¹⁹ *Suresh v. Punit*, AIR 1951 Calcutta 176

²⁰ *Jatish v. Harisadhan*, AIR 1961 SC 613

²¹ *K. Daphtry v. O.P. Gupta*, AIR 1971 SC 1132; *Ramalingan v. Daily Thanthi*, AIR 1975 Mad. 309

²² *Cook v. Alexander*, (1973) 3 WLR 617 : (1973) 3 All ER 1037 (CA) (Court of Appeal through Lord Denning, M.R.)

²³ Article 361- A enacts that no person shall be liable to any proceedings, civil or criminal, in respect of any publication of a substantially true report of any proceeding except secret sitting of the House.

the substantially true report was felt, paving ways for such publications that included newspapers, air-broadcasters, pamphlet, booklet etc²⁴.

The limits of the privilege with regard to publication can be appreciated with reference to two cases decided by the Supreme Court. In *M.S.M. Sharma v. Sri Krishna Sinha*²⁵, action was initiated for breach of privileges in respect of a publication of a speech made in the House that had been expunged by the Speaker. The Court held that article 19(1)(a) is subject to Article 194 and Article 105. In *Jatish Chandra Ghosh (Dr.) v. Hari Sadhan Mukherjee*²⁶ a member published questions that were disallowed by the Speaker. In both cases, the publications were found not entitled to any privilege.²⁷

Some of the other privileges are where the members have freedom from civil arrest for a period of forty days before and after meeting of the parliament²⁸. Such privilege does not extend to arrests or imprisonment on a criminal charge²⁹ or contempt of court³⁰ or to preventive detention³¹. The court in *K. Anandan Nambiar v. Chief Secretary, Governor of Madras*³², lay that ministers do not enjoy any special status within the Constitution as compared to an ordinary citizen in respect of valid orders of detention. Also, superiority over law, where the members could change or supersede the law itself, exclusion of strangers, exclusive jurisdiction of House over the proceedings, power of enforcement of privileges, protection from insult etc forms part of the privileges.

Justice Sarkar opined in the *President's Reference No.1 of 1964*³³ that there exists no *prima facie* conflict between Article 19(1) (a) - a general provision, yielded to Article 194(3) requires harmonious construction to be adopted. Once the privilege is proved to exist, the house itself shall judge depending upon the occasion and manner of its application. No interference by the court is entertained on breach of the privilege. In the case of *In Re Under Article 143*³⁴ or *Keshava Singh case or U.P. Assembly case, 1965* the issue before the court was; whether court can entertain order issued by the speaker? ; can the speaker initiate privilege proceedings under Article 226 and 32? Supreme Court stated its affirmation to entertain petition under Article 226 and it does not breach parliamentary privileges. Also, if the fundamental rights of any individual have been violated, recourse to judicial remedy is always open. Article 105 does not take away the right to constitutional remedy. Fundamental

²⁴ An act was first enacted in 1956, but was repealed in 1976 to curb the freedom of press in the wake of emergency. The Act was re-enacted in 1977 when emergency came to an end.

²⁵ AIR 1959 SC 395

²⁶ AIR 1961 SC 613

²⁷ Justice P.K. Balasubramanyan, “Parliamentary Privilege: Complementary Role Of The Institutions”, (2006) 2 SCC (Jour) 1, retrieved from site http://www.ebc-india.com/lawyer/articles/2006_2_1.htm#Note8

²⁸ H.M.Seervai, Constitutional Law of India, 4th ed., reprint 2013, vol. 2, p. 2156

²⁹ Kalyan Chandra Sarkar v. Rajesh Ranjan, 2005 (3) SC 307

³⁰ Sir Thomas Erskine May: Parliamentary Practice, 16th Edition., Chapter III, p.82

³¹ Smt. Indira Gandhi v Raj Narain, AIR 1975 SC 2299

³² AIR 1966 SC 657

³³ (1965) 1 S.C.R. at pp. 413

³⁴ (1868) LR 4 QB 73

rights cannot be subjected to article 194 or article 105. *P.V Narsimha Rao v. State or JMM Bribery case*³⁵ court stated ‘what may be politically correct may not be legally correct’. Article 105 provides immunity for bribe takers and holds the bribe givers and members who did not vote despite taking the bribe to be guilty. The case projects an irony where the ones accepting bribe are left scot free. Also, the Income Tax Appellate Tribunal claimed the money given to be donation rather than bribery. Yet, the money being accepted stands established, opening path for the concept of corruption. The end question whether Parliamentary privilege prevents party from execution if money is accepted. The answer stands “yes” as in accordance to the rule above- as the act may be immoral but not illegal. This projects a bizarre interpretation if the clause and goes against the spirit of the constitution as it tends to support corruption.

In 2002, National Commission for review of the constitution in its report submitted several recommendations to make it harmonious with the provisions of constitution. Article 105(2) needs to be amended such that they do not cover corrupt practices in connection with their duties. It shall include both, accepting as well as giving money for any speech or vote in a particular manner thereof. Such an act should attract penal consequences under the law of the land. The court also shall not take cognizance of any offence until prior sanction of the Speaker or the Chairman has been obtained. Similar amendment should be made in relation to the members of State Legislature under Article 194(2). One such limitation to the privilege is given under 52nd Amendment, 1985 and Anti-defection rules, and party whip shall lead to disqualification. The powers so given to the parliamentarians are to maintain the independence and dignity and to enhance the performance of law making, but due to several reasons their credibility is degrading day by day. Money and muscle power is the most craved ground and no political party stands out of this exception. Also judiciary having no say into the proceedings that brings chaos and vandalism under the cover of privileges or immunities. It provides for an umbrella to those who have committed wrong yet is a part of the ministry. Lack in participation of women leads to lack of dedication and commitments towards the fulfilment of goals. Thus article 105(3) provides for the Parliament to make laws to define Parliamentary Privileges. And even after decades, it hasn’t been done yet. Its only after they are duly defined, the bizarre interpretation shall end.

³⁵ AIR 1998 SC 2120

THE RIGHT TO BE FORGOTTEN

Aanal Desai *

Abstract

European Court of Justice ruled that EU citizens have a “Right to be Forgotten”, that they could request that search engines remove links to pages deemed private, even if the pages themselves remain on the internet.

The Court in its judgement did not elevate the right to be forgotten to a “super right” trumping other fundamental rights, such as the freedom of expression or the freedom of the media. It only applies where personal data storage is no longer necessary or is irrelevant for the original purposes of the processing for which the data was collected.

It applies to 500 million European citizens whose data are strewn across billions of webpages.

These rights are not absolute; fair balance is required.

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Personal data has become the currency on the Internet. It is collected, stored and used in an ever-increasing variety of ways by a countless amount of different users, producing a “panopticon beyond anything Bentham ever imagined”. Cheap sensors, have made ‘little big brothers’ out of all of us, producing a complex interaction between our different roles as data controller and data subject. In this ‘global village’ where every piece of information can be remembered until eternity, the question of control over one’s ‘personal data’ becomes the more important. The idea of a ‘right to be forgotten’ currently being pondered by the European Commission has been pushed forward as an important materialisation of this ‘control-right’.

The right to be forgotten has been defined as an amorphous privilege that would allow individuals more control over their personal information, particularly that information, particularly that information collected and connected with new technology.

In May 2014, the European Court of Justice¹ ruled that EU citizens have a “Right to be Forgotten”, that they could request that search engines remove links to pages deemed private, even if the pages themselves remain on the internet.

The right to be forgotten is intended to cope with privacy risks online by empowering individuals to control their own identity and information in the online environment. Thus, if an individual no longer wants his or her own data to be processed and stored by a controller (example: Facebook) and if there is no legitimate reason for keeping it, the data should be removed from their system.

The Court in its judgement did not elevate the right to be forgotten to a “super right” trumping other fundamental rights, such as the freedom of expression or the freedom of the media.

On the contrary, it confirmed that the right to get your data erased is not absolute and has clear limits. The request for erasure has to be assessed on a case-by-case basis. It only applies where personal data storage is no longer necessary or is irrelevant for the original purposes of the processing for which the data was collected. Removing irrelevant and outdated links is not tantamount to deleting content.

Much of the controversy surrounding this case has focused on the impact of the judgment on freedom of expression and the right of access to information, as well as the potentially devastating effect of a large amount of deletion requests. This is understandable, as with the prospect of an even more demanding EU data protection framework looming over the horizon, the decision is a potential game changer for the whole internet industry. However, the Court of Justice of European Union’s decision is not only relevant to search engines or internet companies. The implications of the judgment are much wider.

There is understandable discomfort concerning implementation of this ruling by Google and other intermediaries. It applies to 500 million European citizens whose data are strewn

¹ Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, C-131/12

across billions of webpages. When Google first responded with an online complaint form allowing individuals to identify “irrelevant, outdated, or otherwise inappropriate” links, apparently 40,000 claims were made within the first six days, with another 30,000 in the month following.

The risk is that, in order to manage the interests recognised in the ruling at scale, powerful but blunt tools may be deployed. Such tools, it is feared, may serve the interests of disinformation, rather than better information and more social cohesion.

The European Court of Justice’s ruling has been labelled the ‘right to be forgotten’ – an unfortunate and polarising catchphrase and its legal and practical effect. Legally, this case is just one facet of individual privacy rights derived from the EU Data Protection Directive and the European Convention on Human Rights. Privacy rights inevitably involve boundary problems as they come into conflict with rights to freedom of expression and access to information. These rights are not absolute; fair balance is required.

In this context, and against the current default, the ECJ strongly emphasised the importance of individual privacy interests in otherwise privatised, economically-driven digital curation and navigation, recognising the ubiquity of digital information and the ever-increasing influence of search engines and other intermediaries in shaping who we are and what we do online.

THIS RIGHT HAS ITS SHARE OF PROS AND CONS

The Pros for EU Data Protection Rules are

Each and every single human being has a secret. The exact definition of a secret is: “not known or seen or not meant to be known or seen by others.” I would like to put extra emphasis on the second part of this definition, which states that it is not meant to be known by others. As human beings we have a right to do as we wish with our secrets, we deserve to be able to choose who we can trust with it and who we can’t. Unfortunately sometimes we are stripped of that privilege. Nerd Herd stated “The right to be forgotten on the Internet sometimes constrains us from viewing things we want to know more about.” I would like to flip the perspective on this and view it from the victims point of view, in this case the “right to be forgotten” sometimes deprives us of our personal right to choose what others can think of us. This is a real life example; Nikki Castouras, crashed a sports car. The impact was so forceful that it decapitated Nikki in a horrendous manner. It was so horrible that her parents were not even allowed to identify the image. A few images were taken from the scene and sure enough they surfaced on the Internet. The image spread like wildfire and the family had no way of stopping it. You can only begin to imagine how terrible it must be to have to avoid the Internet all-together because images of your dead daughter are being shown everywhere and there is nothing you can do to stop it. Had the right to be forgotten been implemented when this occurred, it would have spared them from this. The simple matter is that this is a breach of privacy and should be illegal.

Even though some things are rights it doesn't necessarily mean that it can't interfere with other rights. Humans for example have a right, which is freedom of speech, however certain situations remove that right. For example revealing information about the government is a crime, even though they have a so-called 'Freedom of speech' In an article of Stanford law Commissioner Reding states "If an individual no longer wants his personal data to be processed or stored by a data controller, and if there is no legitimate reason for keeping it, the data should be removed from their system."

To conclude I would like to state that the right to be forgotten should definitively be a civil right since it helps people maintain their right of personal privacy. Helps remove a emotional burden on people who have had to undergo some sense of breach of privacy which has emotionally hurt or scarred them, and lastly helps strengthen internet security and safety online. Also history will never be removed. History is usually applying to multiple people for example a war, containing thousands and thousands of humans. The right to be forgotten mainly applies itself to individuals. As such it is highly unlikely that this will interfere with history. I would like to quote the President of the NSW Council for Civil Liberties Stephen Blanks as saying "I think people view information about them-selves as something they want to be able to control".

The Cons for the EU Data Protection Rules are

Many of us had once in our life have been outraged for our right to know in the public eyes. Whether it be from a blocked website or maybe even Area 51. We all question things in our world, but do we know what they are trying to keep from us? The 'right to be forgotten' on the Internet sometimes constrains us from viewing things we want to know more about.

Right to be forgotten: The concept that individuals have the civil right to request that personal information be removed from the Internet.

Ought: Is used to express duty and obligation

Civil Right: The right to personal liberty.

Value: Property

The definition of property according to Dictionary is the right of possession, enjoyment, or disposal of anything, especially of something tangible. Now we may not always want to dispose of some particular site of ours or for it to be blocked from us. This is highly important towards us because we may have ourselves blocked from our own website or photo because it may have been flagged.

Justice demands individuals should be accountable / responsible for their actions Article 19 of the Universal Declaration of Human Rights states: "Everyone has the right to freedom of opinion and expression, this right includes freedom to hold

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This is important towards us because there should be no barrier to our freedom of expression and our thoughts and ideas.

By allowing people to remove their personal data at will, important information might become inaccessible, incomplete and /or misrepresentation of reality. The implementation of a fully-fledged ‘right to be forgotten’ might conflict with other fundamental rights such as freedom of expression and access to information. This information is important because there may come a time when we post personal information about ourselves then it becomes outdated which alleges confusion towards strangers and or employers or schools.

Also, if the ‘right to be forgotten’ contradicts with other rights (freedom of speech), Then it can’t be a civil right. On an article on Stanford Law Review dated on February 13, 2012 a Professor of Law at the George Washington University a man named Jeffrey Rosen said “In America, In contrast to European Law and Practice, publication of someone’s criminal history is protected by the First Amendment, leading Wikipedia to resist the efforts by two Germans convicted of murdering a famous actor to remove their criminal history from the actor’s Wikipedia page.” In America this law implies to criminals.

The important issue is that we also have a freedom of knowledge that needs to be issued in the “right to be forgotten”. “Factsheet of the ‘Right to be Forgotten’ Ruling” June 3, 2014 on European Commission “The proposed European regulation, however, treats take down requests for truthful information posted by others identically to take down requests for photos I’ve posted myself that have then been copied by others: both are included in the definition of personal data as ‘any information relating’ to me, regardless of its sources. I can demand take down and the burden, once again, is on the third party to prove that it falls within the exception for journalistic, artistic, or literary exception, This could transform Google, for example, into a censor-in-chief for the European Union, rather than a neutral platform. And because this is a role Google won’t want to play, it may instead produce blank pages whenever a European user types in the name of someone who has objected to a nasty blog post or status update. The ‘right to be forgotten’ should not be a civil right because search engines will become censors rather than true search engines.

DATA RECEIVED BY THE SEARCH ENGINES FOR REMOVING INFORMATION AVAILABLE ON THE NET

| Sr. No. | Search Engines | Requests Received |
|---------|-------------------|-----------------------------|
| 1. | Google | 170,706 URLs (41.8 percent) |
| 2. | Facebook | 3,332 links |
| 3. | Profileengine.com | 3,289 links |

| | | |
|----|---------|-------------|
| 4. | YouTube | 2,392 links |
|----|---------|-------------|

In addition, the ‘right to be forgotten’ places an unjust burden on the search engines, the search engines will begin eliminating all material (fearful of lawsuits). The right to be forgotten could make Facebook and Google , for example , liable for up to two percent of their global income if they fail to remove photos that people post about themselves and later regret, even if the photos have been widely distributed already. Unless the right is defined more precisely when it is promulgated over the next year or so, it could precipitate dramatic clash between privacy and free speech, leading to a far less open Internet.

First of all, the ‘right to be forgotten’ seems to presuppose a contractual relationship. It can/should only be applied in situations where the individual has consented to the processing of personal data. The concept is not suitable to cope with privacy issues where personal data is (legally) obtained without the individual’s consent. Additionally, it is important to remember the right only provides an ex-post solution to privacy issues.

One of the most repeated arguments against a ‘right to be forgotten’ is that it would constitute a concealed form of censorship. By allowing people to remove their personal data at will, important information might become inaccessible, incomplete and/or misrepresentative of reality. There might be a great public interest in the remembrance of information. One never knows what information might become useful in the future. Culture is memory. More specifically, the implementation of a fully-fledged ‘right to be forgotten’ might conflict with other fundamental rights such as freedom of expression and access to information. Which right should prevail when and who should make this decision . Finally, defamation and privacy laws around the globe are already massively abused to censor legitimate speech. The introduction of a ‘right to be forgotten’, arguably, adds yet another censoring opportunity.

How should the right deal with ubiquitous and opaque cross - platform data transfers? One could request ‘personal data’ to be deleted on one site, but meanwhile the information might have been copied and/or ‘anonymised’ already. All these potential third-party uses (and/or ‘secondary uses’) are practically untraceable and do not necessarily take into account deletion of the primary material. Moreover, the right also raises some technical implementation issues. In short, besides traditional jurisdictional issues, the actual implementation of an effective ‘right to be forgotten’ brings along many practical difficulties as well.

The Internet is evolving from a practically entirely ‘free’ network to a primarily commercial environment. In this new setting, personal data has become the major currency. The greediness for this currency and the limitless data collection capacities of modern technology, have caused a major power shift between data users and data subjects. On the Internet, the latter are virtually powerless against the first. Even if an individual knows that his or her data is being collected / used, there is often not much

that can be done in order to prevent this. Notice and takedown procedures might take content out of public sight, but do not normally result in removal from the data user's servers. Public outcry and a lot of media coverage have not led to much improvement yet. And the claim that competition is only 'one click away' has no value in this context. The free market argument depends on transparency and does not take into account network externalities and lock -in issues . Further, the few true efforts that are made by market players, necessarily lack in credibility as their business model generally depends on the collection and use of personal data. Finally, consumers are showing a paradoxical demand for more data collection, which illustrates that they do not necessarily want more 'privacy' (oh, what a vague concept) , but especially want more 'control'. Concluding, it has become clear over the last few years that it is impossible to rely on the market alone to give back control to individuals. Code and especially the law will be necessary to assure a healthy and balanced market.

One of the most interesting ideas on how to implement the 'right to be forgotten' is that of an 'expiry date'. It has the considerable advantage that an individual does not have to worry any longer after personal data is shared. But the practicability of this theoretical principle is far from evident. Personal data could , for example, be 'tagged' with an expiry date (adding so-called metadata). This system relies on the willingness of data users to respect it and should probably be accompanied by a corresponding law forcing data users to comply. Alternatively a more profound technical protection could be inserted in the data, similar to DRM protection for intellectual property. In both cases, individuals should have a legal recourse against circumvention of these expiry dates. Although interesting research is being done on the latter, the first voluntary system seems most technically feasible at this point in time. Nonetheless , the idea that an individual will have to give an expiry date each time personal data is being collected seems unrealistic. Besides, it risks becoming a merely proforma requirement that no one truly pays attention to, as is already the case in the current consent regime. Additionally, nothing would prevent someone from copying and /or decrypting the data for as long as it is available. A 'privacy agent', monitoring all personal data transfers and allowing people to manage their expiry preferences over time according to different types of data, controllers and contexts, could contribute to a more effective 'user choice'. Obviously, such centralised data-managing software raises many other privacy questions.

As a safeguard against censorship and unwanted erasure of data, the 'right to be forgotten' should be limited by a 'public interest' exception. This exception would cover, but is not limited to, the free speech issues in article 9. To decide on its applicability, one could rely on a 'substantial relevance' standard (with regard to the personal data) and a proportionality test (with regard to the request for deletion). Undoubtedly, an Article 29 Working Party opinion on the 'public interest exception', especially with regard to its compatibility with art.7(e) of the DP Directive, would bring more clarity and lead to cross-border efficiency. But ultimately, it will be national judges and data protection authorities that decide on the exact scope of the

exception. The burden of proof , as EU Commissioner VIVIANE REDING hinted already, should be on the data controller. Finally, it should also be emphasised that the exception only applies to actual personal data, which might be separated from other content it is part of.

In the form proposed by the European Union, the right to be forgotten cannot easily render a substantial contribution to an improvement of data protection. The concept is probably too vague to be successful. History has shown that human rights need to be embedded in strategies, and such strategies have to be actually used. Consequently, a clearer picture of the actual objective of a new fundament right is necessary. The proclamation of a right to be forgotten as such does not suffice. It recalls the myth of Pandora's box: Impelled by her natural curiosity, Pandora opened the box and all the evils contained in it escaped. Moreover, a concretization of the right to be forgotten might be achieved by more specific codes of conduct, such as the French "Code of Good Practice on the Right to Be Forgotten on Social Networks and Search Engines," encompassing practical commitments that could become the starting point for a future international memorandum of agreement.

The right to be forgotten must be complemented with legal instruments to guide individuals and entities on how to apply data protection principles on the basis of the acknowledgement of right holders 'autonomy. Together with such guidelines, accountability mechanisms need to be introduced and audit procedures should be established. Possible means could be privacy marks or seals from a self-regulatory regime, which would then be monitored by established data controllers according to accountability procedures applied by the program or scheme organization. Such an "evaluation" also corresponds to the democratic theory that holds governing bodies accountable in responding to the public's interest. This would enable technical measures to be introduced much faster than legal instruments, and the technical measures would have a global scope of application that is not limited by geography. Returning to Pandora's situation, by the time she managed to close the lid, nearly the entire contents had escaped. Only one last thing lay at the bottom, and that was hope.

THE CLASSICAL SCHOOL OF ECONOMIC THOUGHT

Shafali R. N.*

Abstract

Classical economics asserts that markets function best without any government interference. It was developed in the late 18th and early 19th century by Adam Smith, David Ricardo, Thomas Malthus, John Stuart Mill and Jean-Baptiste Say. The following paper is an attempt at explaining the laws lay down by *The Trinity of the Classical School*, Smith, Ricardo and Malthus. Adam Smith's staunch belief of minimum state intervention, Ricardo's theory of differential rent and Malthus's theory of demographic transition are just a few examples of the exemplary role this school has played in forming a base to modern economic thought. The history of the classical school of economic thought throws light on economic laws and theories accepted in that era.

A classical economist would say that the economy is self-correcting and responds so rapidly that there can't be a recession. However, they would not have said the same thing during the stagflation of the 1970s. Similarly, the crucial problem for all these theories is that labour markets and the associated institutions operate mainly at the national level, making it essentially impossible for labour markets in many different countries to move together, except as the result of macroeconomic influences operating at an international level. Sharp tests of economic theories are rare and hard to find, particularly in macroeconomics. Any examination of particular episodes in economic history necessarily involves counterfactuals, and these provide room for endless dispute. Hence, it can be deduced that in order to understand and implement such theories in the modern world, we must first clearly understand them and analyze the reasons and situations in which they were formed.

Keywords: Adam Smith, David Ricardo, Thomas Malthus, Karl Marx's Criticism of the Classical School

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INTRODUCTION

The Classical School of economics was developed about 1750 and lasted as the mainstream of economic thought until the late 1800's. Adam Smith's *Wealth of Nations*, published in 1776 can be used as the formal beginning of Classical Economics but it actually evolved over a period of time and was influenced by Mercantilist doctrines, Physiocracy, the Enlightenment,¹ Classical Liberalism and the early stages of the industrial revolution. Adam Smith [1723-1790] is recognized as the originator of Classical Economics. John Stuart Mill [1806-1873] is often regarded as the synthesizer of the school.²

Classical economics as the predominant school of mainstream economics ends with the "Marginalist Revolution" and the rise of Neoclassical Economics in the late 1800's. In the 1870's, William Stanley Jevons' and Carl Menger's concept of marginal utility and Léon Walras' general equilibrium theory provided the foundations. Henry Sidgwick, F.Y. Edgeworth, Vilfredo Pareto and Alfred Marshall provided the tools for Neo-classical economics. Neoclassical economics is an extension of Classical economics but, the focus of the questions changed as well as the tools of analysis. In spite of the dominance of Neoclassical thought, Classical Economics has persisted and influences modern economics, particularly the "New Classical Economics." The belief in the efficacy of a "free market" is central to both classical and neoclassical ideology.³

While Adam Smith would be regarded as the originator and leader of the school, David Ricardo [1772-1823] should be credited with establishing the form and methods of the school. The debates between Thomas Malthus [1766-1834] and David Ricardo about policy issues such as the "Corn Laws" and the "Poor Laws" contributed to the focus and form of the school. Smith was concerned about the nature of economic growth. Malthus, Ricardo and other classical economists were concerned about the question of "distribution."⁴ One important debate among classical economists was whether there was or wasn't a "surplus" or "glut." Jean Baptiste Say [1767-1832] and Malthus were the two major protagonists in the question about the existence of a surplus and its effects on a market economy.⁵

MAJOR CONTRIBUTORS TO THE CLASSICAL SCHOOL

Major contributors to the Classical School include:

- a) Adam Smith [1723-1790, founder] *Theory Of Moral Sentiments* (1759), *Wealth Of Nations* (1776)
- b) David Ricardo [1772-1823], *On The Principles Of Political Economy And Taxation* (1817)

¹ A philosophical movement which dominated the world of ideas in Europe in the 18th century.

² Reynolds, R. Larry, *Classical School of Economics: An Outline*.

³ Hollander, Samuel, *Classical Economics*, Basil Blackwell (1987)

⁴ Spiegel, Henry William, *The Growth of Economic Thought*, Duke University Press (1992) pp: 221-394

⁵ Blaug, Mark, *The New Palgrave Dictionary of Economics: Classical Economics*, pp: 434-445.

- c) Thomas Malthus [1766-1834], *An Essay On The Principle Of Population* (1789), *Principles of Political Economy* (1820), *The Measure of Value* (1823), *Definitions in Political Economy* (1827)
- d) James Mill [1773-1836], *Elements Of Political Economy*(1821)
- e) Jean-Baptiste Say [1767-1832], *Traite D'economie Politique* (1803, English 1821)
- f) Nassau William Senior [1790-1864], *An Outline Of The Science Of Political Economy* (1836)
- g) Karl Marx [1818-1883], *The Communist Manefesto* (1848), *Grundriss Der Kritik Politischen Okonomie* (1859) *Das Kapital* (1867)
- h) John Stuart Mill [1806-1873, son of James Mill], *Principles Of Political Economy* (1848)⁶

THE TRINITY OF THE CLASSICAL SCHOOL OF ECONOMICS

Adam Smith, Robert Malthus and David Ricardo formed the Trinity of the Classical School of Economics.

ADAM SMITH

Adam Smith believed in a balance between social order and natural order. He is considered the father of economic science as well as of modern liberalism. He advocated Wagner's Law of Increasing State Activities, which says that as the state functions increase, government has to spend more. Also, taxation should be based on a person's ability to pay. His economic ideas include labour, distribution, wages, etc.

Labour

Labour is an important factor of production. It determines the wealth of nations. "The annual labour of every nation is the fund which originally supplies it with all the convenience of life which it annually consumes and which consists always either in the immediate product of that labour, or in what is purchased with the produce, from other nations."

According to Smith, labour supplies the required comforts and necessities of life. It produces what is being consumed by the people. The export of the produce facilitates the income. He is in agreement with Physiocrates. He says that land is the productive sector, and he attached importance to nature in economic activity. He emphasises on the quality of labour which is justifies by saying that it is dependent on the quantity of labour, and finally, the difference in the quality of labour in different nations can be understood by the nation's wealth.

Division of Labour

⁶ Bhatia, H. L., *History of Economic Thought*, Fourth Revised Edition (2007), Vikas Publishing House Pvt. Ltd.

Division of labour can be defined as a sort of social corporation which created a natural combination of economic efforts designed to produce national dividend.

“Division of labour is not the benevolence of the butcher, brewer or baker that we expect our dinner, but from their regard to their own interests.” Society is bounded together by mutual exchanges which are motivated by self-interest and division of labour.

Some benefits of division of labour include: greater efficiency, increased rate of production, when work is divided to your suiting; you tend to invent machineries of your specialization.

Some disadvantages of division of labour include: miscommunication due to distance between labourers, their incapability to adapt to new professions in times of crises, mental stagnation, etc.

Controversies surrounding division of labour: labour can be changed, but capital is given; capital is the main foundation of the building of a nation’s wealth; and he could not accommodate the interrelation between labour and capital.

An important limit to his theory of division of labour is market extent. Factors like density of population; transport facilities; capital accumulation; exchange facilities (money value economy), etc played a role in determining market extent.

Importance of capital

Adam Smith said that “capital is the essential foundation of national wealth/national dividend”. J. S. Mill also did not believe that industry is limited by capital. Industry is dependent on the availability of capital. If there is more capital in every nation, it will increase the rate of industrialization. Capital can be employed in processing crude product, in manufacturing and preparing crude product for immediate consumption, in transporting the manufactured product to the wholesaler, and finally transporting the finished product from the retailer to the consumer.

Agriculture

Agriculture was regarded highly in terms of economic activity, according to Smith. He has faith in Turgot Quesnay's (a medical doctor, who from the philosophical point of view, remained in favour of natural law in order to demonstrate his biological analogy) table of circulation and introduced to it, the interdependence between different economic activities.

Origin of Money

He says that, to some extent, man works like a merchant. Money is required for trade. During the barter economy, commodities were sold for commodities. This gave rise to problems such as irregularities and inconsistencies in the value of the commodities exchanged. This gave the need for a standard medium of exchange. In order to facilitate trade, “money” as a concept

originated spontaneously. However, issues regarding the fineness, weight, etc of the coins came about, which was a real concern to the state authorities.

Smith was against the bullion approach of mercantilists. He believed that the factor on which the volume of circulation of money was based was the internal economic activity level (macroeconomic factors such as GDP, inflation, real and expected growth rate, etc).

He also says that import of goods should not be curbed as there is nothing to fear when there is export of money. If you restrict trade from a particular country, that country will retaliate and reciprocate.

Theory of Value

Adam Smith says that if any commodity has its maximum value in use, then its value in exchange will be scarce (Water-Diamond Paradox).

In the Labour Theory of Value, he says that the real price of a commodity is the toil and trouble of acquiring it. It is the amount of labour engaged in its process of production that commands its exchange value. The only limit of this theory is that the only factor of production it takes into consideration is labour. The Cost of Production Theory of Value looks into the cost incurred in hiring land, labour and capital.

Theory of Distribution

Adam Smith defined rent as the part of the produce that is raised by the farmers of the cultivators who have worked on the land, but it goes to the landowners. As the distance to the market increases, the rent decreases and vice versa. Another factor that contributes to rent is the fertility of land. The distance from the market can be neutralised with better infrastructure and facilities. The relationship between rent and price was not known by him. When there is an increase in the economic progress, the nominal and the real rent increase.

Wages are based on bargaining and contract [issue of combinations of masters and workmen]. Wages fund argument and the amount necessary to bring up a family and more workers. Profits are subject to variations. Wages and profits are inversely related. For Smith, profits include interest, reduced capital stock increases profit, increased capital stock reduces profit, and profits equalize across industries.

He believed in minimum state intervention.

Some problems of state intervention are:

- a. Individuals may know more about their own preferences than the government.
- b. Government planning may increase risk by pointing everyone in the same direction- governments may make bigger mistakes than markets.⁷

⁷ Meier, M. Gerard and Rauch, E. James, *Leading Issues in Economic Development*, 7th ed. (2000) Oxford University Press, pp-431.

- c. Government planning may be more rigid and inflexible than private decision-making since complex decision-making machinery may be involved in the government.
- d. Governments may be incapable of administering detailed plans.
- e. Government controls may prevent private sector individual initiatives if there are many bureaucratic obstacles.
- f. Organizations and individuals require incentives to work, innovate, control costs, and allocate efficiently and the discipline and rewards of the market cannot easily be replicated within public enterprises and organisations.
- g. Different levels and parts of government may be poorly coordinated in the absence of the equilibrating signals provided by the market, particularly where groups or regions with different interests are involved.
- h. Markets place constraints on what can be achieved by government, for example, resale of commodities on black markets and activities in the informal sector can disrupt rationing or other non-linear pricing or taxation schemes. This is the general problem of ‘incentive compatibility’.
- i. Controls create resource-using activities to influence those controls through lobbying and corruption- often called rent-seeking or directly unproductive activities.
- j. Planning may be manipulated by privileged and powerful groups which act in their own interests and further, planning creates groups with a vested interest in planning, for example, bureaucrats or industrialists who obtain protected positions.
- k. Governments may be dominated by narrow interest groups interested in their own welfare and sometimes actively hostile to large sections of the population. Planning may intensify their power.⁸

DAVID RICARDO (1772-1823)

In England, the thirty years from the passing of the Corn Laws (1816) to their repeal (1846) can be defined, in terms of economic theory, as ‘the Age of Ricardo’. It was at the beginning of this period that David Ricardo proposed his own economic theory; and whether the economists of the period exalted, discussed, misrepresented, or criticized the Ricardian approach, it is a fact that all the English economic research of those years was involved with it. The controversies were at least as strong as the political implications of the theories in question and the violent class conflict to which they referred.

Ricardo was the son of a Jewish immigrant stockbroker who moved from Spain to Netherlands to Britain. He entered business as a broker at age of 14, married a Quaker at the age of 21, and his family disowned him. With the support of his friends, he entered the market on his own and within 10 years amassed a fortune [one estimate was 2,000,000 pounds]. His rule was that the market over reacted to most events. He anonymously gave wealth and maintained two almshouses. He studied math and science, encouraged his study of economics by reading Smith’s Wealth of Nations in 1799.

⁸ Stern, Nicholas, *The Economics of Development*, Economic Journal (September 1989), pp-616.

Ricardo retired in 1814, aged 42. He used abstract, deductive, theoretical reasoning, [an economists' economist] to create an analytic approach to economics. His premises led to conclusions. The three basic premises used by him were: (1) Rent Theory; (2) Malthus' Population Theory; and (3) Wages Fund Thesis.

Ricardo and his followers, the Ricardian socialists, have placed the accent on the 'quantity of labour' with which the goods are produced or which is commanded by them.⁹

Ricardo's Policy Work in the Parliament [elected in Pocket borough in Ireland]: Independent, conscientious, respected often argued and voted against his own interests, sided with reformers in political matters: (1) Abolish flogging, for secret ballot, extend suffrage, free speech, reduce capital offenses, for civil liberties (2) In monetary matters, Ricardo espoused a narrow quantity theory of money, free trade.¹⁰

Theory of Value

He follows Smith in value in use and value in exchange, but he focuses on value in exchange. Utility is not a measure of value, it is a necessary but not a sufficient condition, it assumes utility. There are two types of goods (1) Those which derive value from scarcity, for example: a rare painting (2) Those which derive it from the quantity of labour required to obtain them. These relative values depend on the quantities of labour required, and profits and wages (rates) are equalized in all industries. There is equality of labour. Capital can be assumed to be stored up labour. There may be differences in the durability of capital that allow value changes like values, wealth, riches or welfare. *"It is true that the man in possession of a scarce commodity is richer, if by means of it he can command more of the necessaries and enjoyments of human life: but as the general stock out of which each man's riches are drawn, is diminished in quantity, by all that any individual takes from it, other men's shares must necessarily be reduced in proportion as this favoured individual is able to appropriate a greater quantity to himself."*

Theory of Rent

In 1815, at the climax of the debate on Corn Laws, Ricardo published a pamphlet in which he used the theory of differential rent- a theory that seems to have been formulated independently by Malthus, Edward West and Robert Torrens.

This theory can best be understood with the help of a simple example. Assume you have an area of cultivable land, let's say 1 acre. You use this land for the cultivation and tillage of corn and corn only. The wages for labour must also be considered. That one acre of land is divided into four parts on the basis of their fertility, A, B, C, and D, in decreasing order of fertility. Let us assume that the quantities of both, the seeds and the labour, are fixed. If we begin from a situation in which only A is required to be cultivated, the production of corn will be g(A).

⁹ Screpanti, Ernesto and Zamagni, Stefano, *An Outline of the History of Economic Thought*, 2nd ed., Oxford University Press, 2006, p. 75

¹⁰ <https://en.wikipedia.org/wiki/Schools_of_economic_thought>

Now, if we need to increase production, we must cultivate B, then C, and so on. Let us assume that on the least fertile area of land, D, there is no rent. The capitalist working on plot D will undoubtedly, make lesser profits than the one working on the other three more fertile plots. In conclusion, we can deduce that this theory aims to say: more fertile the land, higher the rent, and hence, higher the profits.

The Differential Theory of Rents: (1) Land of different qualities (productivity), (2) Labour is homogeneous (3) As population increases, the price of corn rises, bringing marginal land into production. (4) Rent accrues to the best land, no rent on the marginal land.

Ricardo also says that rent is the result, not the cause of value.

Theory of Distribution

Distribution is related to the theory of value. What principles determine the shares of Labour, Capital and Land? We must correlate the values of products with the incomes of producers. Profits depend on high or low wages, wages on the price of necessaries, and the price of necessaries chiefly on the price of food. He said that distribution is the desire, which every capitalist has of diverting his funds from a less to a more profitable employment that prevents the market price of commodities from continuing for any length of time either much above, or much below their natural price. “*The natural price of labour, therefore, depends on the price of food, necessaries, and conveniences required for the support of the labourer and his family. With a rise in the price of food and necessities, the natural price of labour will rise; with the fall in their price, the natural price of labour will fall.*” His view was that with a population pressing against the means of subsistence, the only remedies were either a reduction of people, or more rapid accumulation of capital.

“*In the natural advance of society, the wages of labour will have a tendency to fall, as far as they are regulated by supply and demand; for the supply of labourers will continue to increase at the same rate, whilst the demand for them will increase at a slower rate.*” “*The natural tendency of profits is then to fall; for in the progress of society and wealth, the additional quantity of food required is obtained by the sacrifice of more and more labour. This tendency, this gravitation as it were of profits, is happily checked at repeated intervals by the improvements in machinery, connected with the production of necessaries, as well as by deliveries in the science of agriculture which enable us to relinquish a portion of labour before required, and therefore to lower the price of the prime necessary of the labourer.*”

In the long run, wages at subsistence, the rate of profits fall, rents rise. When the rate of profit is zero, there is not inducement for further capital accumulation. Welcome the arrival of the stationary state.

There are some critics of the Ricardian thesis who say that as society progresses, there must be an increase in the share of national income received by landlords as rent, while the profit share declines. This prognosis is qualified by the argument that there are limits to the use of land, and hence, to the growth of the rent share. These limits are provided by “the ordinary

rate of profit" in some circumstances, and by "the ordinary rate of wages" in others. The demand for land will always be limited by the net productivity gain which accrues from its use. It is only where profit rates and wages remain relatively low for long periods, that there will be a marked progression towards the use of increasingly less fertile soils of low yield.¹¹

THOMAS MALTHUS (1766-1834)

Thomas Malthus was the son of a lawyer. He studied at Cambridge; was a curate in the Church of England. He married at the age of 40. David Ricardo was a close friend of his and an opponent in policy issues. He was the first professor of Economics at Haileybury College (owned by the East India Company). He was interested in demography (undermining the doctrine of human perfectibility) and economics, particularly distribution. His theories were popular until the 1830's and had lasting influences on social and economic thought. He influenced Charles Darwin, Ricardo, and many others. He opposed Poor Laws, and was in favour of Corn Laws.¹²

Theory of Population

Malthus' population theory became an integral part of classical economics. It is a mixture of moral judgment and Positive Economics. The inciting themes of his theory include: 1) Reasons for economic inequality; 2) Role of self interest, laissez-faire rather than benevolence in human affairs; 3) The nature of the future and progress; and 4) Relation between religion with a benevolent God and existence of widespread poverty.

He provided an insight for Charles Darwin that led to his theory of evolution and *survival of the fittest*. He gave three propositions: 1) Population cannot increase without food; 2) Population invariably increases if food is available, *passion between the sexes* is a given; and 3) The superior power of population cannot be checked without producing misery or vice..

Food production increases arithmetically, limited by land and diminishing returns whereas population increases geometrically. The increase in population is due to: 1) Function of age at marriage; 2) Natural sexual instinct; 3) People never considered contraception or abortion. Population could be limited by keeping preventative checks, marrying later in life, abstinence, moral restraint, abortion, contraception. "Irregular connections" are preventative measures, but labelled as vice. Positive checks like disease, pestilence, famine, wars, etc also kept a check and control on the population growth.¹³

Population and Wages

If we increase wages above subsistence due to the increase in population, wages fall. If we decrease wages below subsistence due to decrease in population, wages rise. Wages at

¹¹ Gordon, B. J. W. E. Hearn, *Rent: An Early Item*, Australian Eco. Papers, June 1967, pp. 103-112

¹² <https://en.wikipedia.org/wiki/Classical_economics>

¹³ <http://www.economicsonline.co.uk/Economic_schools.html>

subsistence in the long run is a variant of Ferdinand Lasalle's (1825-1864) *Iron law of Wages*. The result is a stationary state at subsistence.

In subsequent revisions of the *Essay on Population*, Malthus concedes that a normal feature of economic development is “industrialization” which raises the standard of living of even the poor. Malthus’ population theory is not testable; if a population is not starving, it means that preventative checks have been implemented.

Malthus' Economics

His 1814 publication (Observations on the Effects of the Corn Laws) was one of the first to suggest the use of calculus in economic analysis. However, he complained that Ricardo was “too abstract.” Malthus was an agrarian. He felt that agriculture was morally superior to commerce, which according to him, was exploitative. As agrarians opposed importation of corn into Britain, he argued for the Corn Laws [tariffs on imports of corn and bounties on production]. Cheap corn would encourage excessive population growth. For the same reasons, he opposed the Poor Laws.

Malthusian theory of “Gluts”

There are two ways to spend income, (1) acquisition of goods for consumption; (2) accumulate capital (it follows that savings=investment). Malthus disagrees with Say’s law. Land owners hire menial servants and capitalists hire productive or industrial workers. As a result, total production rises, total income of workers is constant (there is a shift from unproductive to productive employment), the capitalists’ demand for consumer goods is down, and the result is general glut. In 1818-19, there was a general depression in Britain where agricultural prices dropped, labour became militant [Manchester, Peterloo Massacre]. It was a concern of revolutionary danger. “*The interests of no other class in the state is so nearly and necessarily connected with its wealth, prosperity and power as the interests of the landowner.*” There was imbalance in the circulation of money and commodities. There were more goods than workers at subsistence could consume. Ultimate cause of gluts was excessive profits, increased capital, improved technology, and subsistence wages. The conclusions were: (1) if you increase wages, you increase population and wages fall to subsistence; (2) if you increase income share to capitalists, they save and invest, result is more goods; and (3) if you increase share of landowners, they build bigger estates and hire more servants.

The Demographer in Malthus

As a guide to demographic trends in his own society during the first three decades of the nineteenth century, Malthus has been criticized for paying insufficient attention to the quantitative evidence that was available to him, and for misinterpreting it when he did. His account on the effects on marriage and birth rates of the old Poor Law, the incompleteness of his system of checks as a model for affecting fertility, notably with respect to age-structure

and sex-composition and his assignment of the causes of population growth have all been subject to attacks of this kind.

Some critics have taken the matter further by suggesting that Malthus was guilty of a less venial crime, that of confusing moral and scientific categories, of allowing the former to influence his understanding the latter, and of propounding a theory that was inherently untestable by virtue of its deductive, even tautological features.¹⁴

CRITICAL ANALYSIS OF THE CLASSICAL SCHOOL AND ITS MODERN DAY APPLICATIONS

Sharp tests of economic theories are rare and hard to find, particularly in macroeconomics. Any examination of particular episodes in economic history necessarily involves counterfactuals, and these provide room for endless dispute. As an obvious example, assessing the impact of the Obama Administration's 2009 stimulus requires an estimate of how things would have gone without the stimulus, and that is obviously hard to do.¹⁵

To understand the Classical School better, let us apply it in the modern context and implement the theories laid down by the classical thinks in current economic problems across the world.

What would a classical economist do in a recession?

A classical economist would say that the economy is self-correcting and responds so rapidly that there can't be a recession (i.e. falling output for two quarters). However, they would not have said the same thing during the stagflation of the 1970s.¹⁶

There is, although, one way in which the current Great Recession/Lesser Depression provides a sharp test of a critical proposition in economics. All forms of classical economics involve, in one form or another, the claim that the causes of unemployment are to be found in labour markets, and not in macroeconomic variables such as the level of aggregate demand. That's equally true of the Say's Law version of classical economics criticized by Keynes.

The crucial problem for all these theories is that labour markets and the associated institutions operate mainly at the national level. Even within the EU, different countries have very different labour markets. So, it is essentially impossible for labour markets in many different countries to move together, except as the result of macroeconomic influences operating at an international level. That means that the occurrence of a sharp and sustained increase in unemployment, taking place in many countries at once, is inconsistent with classical economics.¹⁷

¹⁴ Winch, Donald, *Malthus*, Oxford University Press, 1997, p.203

¹⁵ <<http://johnquiggin.com/2012/04/27/classical-economics-and-recession-in-many-countries-wonkish/>>

¹⁶ <www.cliffsnotes.com/study_guide/_classicalschooltoday/>

¹⁷ <<http://crookedtimber.org/2012/04/27/classical-economics-and-recession-in-many-countries-wonkish/>>

CONCLUSION

“Classical political economy seeks to reduce the various fixed and mutually alien forms of wealth to their inner unity by means of analysis and to strip away the form in which they exist independently alongside one another...”

-Karl Marx

Just when theories of economic harmony were spreading all over the capitalist world, Karl Marx was working on a ‘critique of political economy’. The defeat of the workers’ movement in 1848 ended a cycle of struggle which had lasted for more than thirty years and had opened a face of bourgeois cultural hegemony and capitalist economic growth previously unknown in Europe. In Marx’s estimation, classical political economy constituted a decisive stage in the investigation of the capitalist mode of production; around 1830 this phase begins to draw to a close, a close intimately bound up, for Marx, with the appearance of a new social and political force increasingly conscious of itself, the working class. Marx did not, of course, mean to imply that in a somewhat mystical manner the modern working class ‘killed’ political economy. Rather he wished to stress that the methodological limitations of classical political economy increasingly paralysed it in the face of this new phenomenon.¹⁸

There is a close relationship between Marx and the Classical Economists. In fact, he himself never had any difficulty in acknowledging the merits of these great economists, especially Ricardo. By using the term ‘classical’, he intended to distinguish them from the ‘vulgar economists, the apologists of capitalism who worked to produce consensus rather than science’. His definition of ‘classical political economy’ is simple and rigorous, and coincides with that of Ricardian economics, a theoretical system based on the theory of surplus, the labour theory of value, etc.

Marx considered classical political economy as a theoretical expression of the bourgeoisie in the period when modern the modern capitalist economy was asserting itself.¹⁹

¹⁸ <<https://www.marxists.org/archive/pilling/works/capital/geoff1.htm>>

¹⁹ Scrpanto, Ernesti and Zamagni, Stefano, *An Outline of the History of Economic Thought*, 2nd ed., Oxford University Press, 2006, p. 143

IMPACT OF TERRORISM ON HUMAN RIGHTS

T. Deekshitha*

INTRODUCTION

Government grants inalienable rights such as Freedom of Speech, Freedom of Religion, protection for Unequal treatment in the court, protection from the invasion of privacy and out of all most importantly, the absence of torture and extrajudicial punishments and the political imprisonment enables the citizens to live life with freedom and security. On the other hand, the risk of having more human rights increases the country's security to internal and external threats. Terrorism affects human rights and diminishes government's respect for it such as extrajudicial killings, imprisonment and torture. We live in a globalised world where people are faced mostly with the dilemma of protecting human rights while fighting against terrorism. Therefore, I as a researcher in the paper have provided the impact of terrorism on human rights also, listed the measures to protect the human rights while fighting against terrorism with two arguments in the paper. They are¹.

1. Whether Terrorism itself is a threat to human rights? Is it necessary to make certain compromises in order to combat terrorism?
2. In the name of Counter terrorism, there are still illegal operations going on. How far have the measures been effective in controlling terrorism?

TERRORISM

Terrorism refers to the acts of violence which usually targets the civilians in the pursuit of various claims which are usually political and ideological. According to the General Assembly's Declaration on Measures to eliminate International Terrorism it stated that Terrorism also includes the criminal acts which are intended to produce a state of terror in the general public for various political, philosophical, ideological, racial, ethnic and religious purposes. The means used in order to meet their ends are usually unjustifiable. Webster defines terrorism as the systemic use of terror which is usually not free and is caused mostly by coercion.

In 2004, the General Assembly referred terrorism as those criminal acts which are directed against the civilians which are usually committed to cause death or bodily injuries with the purpose to produce a state of terror in the general public or group of persons so that they compel the government to do or not to do an act. Terrorism poses a threat to the successful functioning of the society. The General Assembly is currently working towards the adoption of a comprehensive convention against terrorism which would complement the existing definition of terrorism which includes unlawfully and wilfully causing damage.

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¹ Axel Dreher, Martin Gassebner and Lars-H. Siemers, "Impact of Terrorism on Human Rights", Vol. 53, No. 1, pp 65-93

The many States define Terrorism in National law as that which has deferring degrees of elements². The term terrorist refers to a person who tries or commits the terrorist act. According to Mamdani in his article said that public reasoning also plays an important role in the definition of the term. For example, how they distinguish between Good Muslims and bad Muslims. Nowadays the image of terrorists is that of an Islamist suicide bomber or Osama Bin Laden. It is a biased image and not representative of a variety of individuals and organisations. However, the definition of terrorist depends on an individual's perspective. The distinction is drawn on arbitrary grounds. For example, Al Qaeda is defined by the various Governments across the world as the centralised enemy with organisational hierarchy³.

HUMAN RIGHTS

Human rights are natural rights which are guaranteed to all citizens irrespective of nationality, religion, sex and status. These rights are rights which are inseparable, associated and interrelated. Universal Human Rights are guaranteed to the citizens by the law which is in the form of treaties, customary international law and all other sources of international law. International Human Rights law lays down certain obligations for the government to act in certain obligated ways and also, to forgo certain acts so as to advance and secure human rights and fundamental freedoms of the individuals.

INTERDEPENDENT AND INDIVISIBLE

All human rights are inseparable whether they are civil and political rights. For example, Right to life, Right to equality and Freedom of Speech and Expression. There are certain economic, social and cultural rights which are guaranteed to the citizens such as Right to work, social security and education. The improvement of one right facilitates the progress of the other rights. In the like manner, the hardship of one right has an immediate effect on the other rights⁴

INTERNATIONAL HUMAN RIGHTS LAW

International Human Rights law is reflected mainly by the core international human rights treaties and in customary international law. The international treaties include International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Other universal treaties are the Elimination of all forms of Discrimination which also includes racial discrimination and discrimination against women. The other covenant is to provide protection to the migrant workers and their families. They bind all the states together irrespective of whether they are part of the treaty or not. There are certain rights where there are no circumstances at all in which criticism from them is

² Human Right, Terrorism and Counter Terrorism”,

³ “Perspectives on Terrorism” file:///C:/Users/user/Downloads/38-138-2-PB.pdf (last accessed on March 23rd 4:44pm).

⁴ United Nations Human Rights”, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last accessed on March 21st 2015 11:25pm).

permissible. The prohibition of slavery, genocide, crimes against humanity are widely recognised as the most important norms⁵.

STATE OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Human rights law obliges States, essentially, to do certain things and avert them from doing others. States have an obligation to regard, ensure and safeguard human rights. Regard for human rights essentially includes not interfering with their happiness. Measures should be taken to make positive moves to guarantee that others don't interfere with the happiness with respect to rights. The fulfilment of human rights obliges the States to adopt suitable measures like authoritative, legal, regulatory or educative measures, in order to satisfy the legal obligations⁶

IMPACT OF TERRORISM ON HUMAN RIGHTS

Terrorism attacks the human rights mainly the vote based system and the rules of law. It destroys the qualities that lie at the heart of the Charter of the United Nations and other Universal instruments: regard for human rights which are the principle of law, respect for human rights, rules which aim at providing protection to people and the civilians, resolving conflicts among people groups and countries through tranquil measures.

According to the concept of International Law, human rights are usually protected and similarly violated by the States only. Human rights are the state's obligations towards the individuals. Terrorism has a direct effect on the pleasure of human rights specifically the right to life, freedom and physical uprightness. Terrorist acts can destabilize the Governments undermine the civil society, disturb the peace and security, reduces the social and financial advancement and may also influence certain gatherings. These have a direct effect on the pleasure of human rights.⁷.

ANALYSIS

TERRORISM AND DRUG TRAFFICKING

Terrorism is one of the key concepts in the International Politics. In general, it is a threat to the society. Now, the terrorist groups are using more sophisticated weapons to exploit the media, they use violence to influence the government and organisations. The acts of terrorism are linked to drug trafficking era which aims at the destruction of human right, freedom and democracy. Drug production and trafficking have gone global with organisations which are those of legitimate businesses. The drug trade is usually with weapons, smuggling of stolen

⁵ “Terrorism, Human Rights and Counter Terrorism”, <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (last accessed on March 21st 2014, 11:30pm).

⁶ A.S Narang and Pramila Srivastava “Terrorism the Global Perspective (last accessed on March 23rd 2015, 4:54pm).

⁷ “Terrorism, Human Rights and Counter Terrorism”, <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (last accessed on March 23rd 2015, 5:54pm).

art objects, illegal immigration abuse of children, gambling and prostitution. They start with the terrorization of the peasants in the big cities in the world.

The crimes with the drugs involve drugs such as cannabis, heroin, cocaine and others. Trafficking drugs have led to the participation of many entities. The Golden Triangle region involves more than 65 percent of total world's opium. New mafias have emerged who deal in the trafficking of drugs. This has a greater impact on the lives of the individuals as the children are more vulnerable to get access, the relations between the states spoil mostly because of the urge to procure more drugs.

Usually, the traffickers want to exploit the societies whose legislative and judicial systems are most vulnerable. This happened in the case of Eastern Europe. Violence is associated with narco-terrorism where they use coercion to kidnap, torture, murder and massacre. The threat is more serious if there exists state sponsorship which is usually described as support offered in many ways to the terrorists. The result is because of the corrupted public authorities and also the destabilisation of the whole economy which was seen in Columbia.

Some governments are accused of giving state sponsorship to the terrorism. Money laundering helps in transforming the funds generated by terrorism a less suspicious activity, makes it difficult to trace the origins. The profit is deposited in various banks or is used in running the restaurants, nightclub and shopping malls.

The PKK established in 1978, seeks to establish a Kurdish state in the south eastern part of Turkey. It was involved in the robbery, extortion, armed smuggling, labour trafficking and narcotics smuggling. It smuggled heroin from Golden Crescent to Turkey. In Rumania, the organisation hides under the Association of Eastern Businessman Minors, who are associated with PKK are apprehensive in many ways. This shows that drug trafficking and terrorism have a greater impact on the human rights⁸.

IMPACT ON RIGHT TO LIFE

The right to life is absolute. According to the International Covenant on Civil and Political Rights, it states that no person should be deprived of his/her life. Right to life is absolute and cannot be deprived. The combatants use the weapons due to which it leads to loss of life and freedom of many individuals. It is shocking that in most of the situations terrorists attack not only adults but also children are killed. It upholds the value and human life and right of every human being to claim such a right. On September 11th thousands of human beings were killed including the innocent civilians and large number of people. They were deprived of the most fundamental right that is right to life. It is a crime against humanity.

The major terrorist attack at Godhra in February 2002, a Muslim mob set to fire the train in which the Hindu activists were present. Many people were killed and they joined the hands

⁸ "A.S Narang & Pramila Srivastava", Terrorism The Global Perspective, (last accessed on March 23rd 2015, 9:15pm).

with the BJP and killed two thousand Muslims in the state. Therefore, the definition of terrorist for some people is that Muslims are terrorists.

As Richard Jackson notes in Writing the War on Terror: Language, Politics and Counter-terrorism: the estimated yearly deaths from terrorism as 1000-7000. About 500,000 people die with the use of arms and weapons. The threat to life from terrorism is large. We can never achieve security by sacrificing human rights. Hence, the people and government should strive hard to encourage people to respect their own human rights as well the rights of others. The fight for justice should be in accordance with the rule of law⁹.

LIBERTY AND SECURITY OF PERSON

All persons are secured against the unlawful or self-assertive interference with their freedom. This protection is appropriate in the setting of criminal transactions, and also in areas where the State may influence the freedom of persons. Terrorism undoubtedly poses a threat to the security of the nation. It involves the use of violence in order to meet their political ends. There is a direct impact of terrorism on national security and also on human security.

On 11th March 2004, several bombs exploded in four trains in Real Madrid. While countering terrorism importance should be given to human security as the terrorists usually target the innocent civilians which mean that people are threatened during their day to day lives. About twenty thousand people were killed during the 2006 attacks. There can be various effects of terrorism on the lives of the people, environment, infrastructure and health. According to the UNDP, it defines human security as that which is concerned with food, shelter, health, personal and political security. Many historical structures and monuments are destroyed. The infrastructure of the country is disturbed during the attacks which in turn has an effect on the health and food issues.

The term terrorism and security are interrelated and cannot be ignored. Hence, the state should adopt various measures to curb the problem of terrorism¹⁰.

FREEDOM OF ASSOCIATION

The right to freedom of association, in the same way as the freedom of expression, is a stage to exercise the resistance of other rights, for example, political interest rights and social rights. Human rights guards frequently utilize this legitimate right as a basis for their activity. It is key to a democratic society. However, this right is limited by the state when there is a terrorism threat. Therefore, the state must ensure that the right to freedom of association is not limited in any case whether it is in a treaty. The Organisation has the right to defend the rights which are guaranteed to the citizens and in cases where they are deprived of their rights. They should be given full freedom to go and criticize the government action.

⁹ "Protecting Terrorism while Countering Human Rights", <http://www.e-ir.info/2012/02/14/protecting-human-rights-while-countering-terrorism/> (last accessed on March 24th 2015, 10:34am).

¹⁰ "Does Terrorism threaten Security?", <http://www.e-ir.info/2010/11/22/does-terrorism-pose-a-real-threat-to-security-2/> (last accessed on March 24th 2015, 11:54am).

FREEDOM FROM DISCRIMINATION

Dissatisfaction of majority and the minority is the major cause of terrorism. Discrimination can also be the major cause for terrorism. Hatred against a particular group or community could be the reason for terrorism. It is the injustice that leads to frustration among them and hence they resort to illegal methods in order to revenge.

The state prohibits discrimination on grounds of colour, race, sex, caste and creed. This right is being violated as the terrorist's .Hence; the terrorism violates the freedom from all forms of discrimination. For example, the Arabs and Muslims from stereotypes associating them to terrorists and extremists.

COMPROMISES TO BE MADE TO CURB THE IMPACT OF TERRORISM ON HUMANRIGHTS

Some people think that Terrorism itself is a threat to human rights while the others think that it poses a threat to security of the nation and humans. Hence, in order to curb terrorism certain compromise between the nations has to be made in order to protect the human rights.

1. The victims should be treated with respect and dignity. Awareness should be created about the basic rights which are guaranteed to them by the Government. They should be given an opportunity to represent themselves and this right should not be deprived even in cases of threat of terrorism.
2. The major cause of terrorism is Poverty. Few countries are endowed with efficient natural resources and some countries are not bestowed with natural resources. It is poverty which forces people to engage in the illegal activities. The Mafia gangs are forcing the people to kill the innocent civilians and in return, they are motivating them to get some amount of price. Therefore, reducing poverty would control poverty.
3. We can see a lot of injustice in the Third World Countries particularly between Afghanistan and Pakistan. The situation is very unjust in obtaining justice. Injustice is the main cause for the growth of terrorism and, therefore, people take law in their hands. The income inequalities among the people. The rich are getting richer and the poor are getting poorer. This gap has forced people to engage in terrorism to meet their ends. If we want to curb terrorism then injustice should be ended.
4. Political leaders in the third world countries are corrupted and are using their power to extract money through illegal means. Corruption is increasing day by day. Hence, corruption should be controlled¹¹.
5. Various treaties should be implemented to curb terrorism. The acts which involve the use of violence should be incorporated in domestic laws and regulations. Measures

¹¹ "Phsyical Impact of terrorism", <http://www.jstor.org/stable/pdf/41345042.pdf?acceptTC=true> (last accessed on March 24th 2015, 3:41pm).

should be taking before granting asylum to the refugees to ensure that the asylum seeker has not planned any terrorist activity.¹²

COUNTER TERRORISM OR HUMAN RIGHTS VIOLATION

While fighting terrorism Government must ensure that the counter terrorist movements do not violate international human rights, humanitarian and refugees law. Secretary General Kofi Annan after the September incident said that there shall be no tradeoff between human rights and fighting terrorism. However, there are human rights violations taking place in the name of counter terrorism.

True Security is about creating and ensuring a safe environment for all the citizens of the country where all their rights are respected and protected, ensuring that they live a peaceful life without constant threat to their security and life.¹³ The main question is

- whether the human rights are protected while countering terrorism
- Are the measures taken by the Government to combat terrorism effective?

CLANDESTINE OPERATIONS

A clandestine operation is a military operation which is usually conducted without the notice of the general population. It is usually conducted by the Government or the agencies with the assurance that the operation is conducted secretly. It emphasises on the concealment of the operation. It is usually conducted by the placement of the underwater communication taps, cables, cameras, microphones and monitors so that the mission goes unnoticed.

During the Vietnam war, the officials were completely unaware of the sensors which sensed the ignition were placed. In September 2002, Georgian officials confirmed then backtracked on reports of extradition and clandestine operations which were taking place. Hence, even after the measures taken by the Government still there are clandestine operations which take place which still makes it a burden on the Government to introduce strict measures to curb the problem of terrorism¹⁴.

GLOBAL WAR AND TERROR

The War on Terror also known as the Global War on Terrorism was a military campaign which was started by the United States after the terrorist attacks in the United States on September 2001. The US led a coalition to the NATO and non -NATO nations with the urge to destroy the Al-Qaeda and other extremist organisations. Its primary aim was to focus on

¹² In the Name of Counter terrorism: Human rights Abuse”, http://www.hrw.org/sites/default/files/reports/counter-terrorism-bck_0.pdf (last accessed on March 24th 2015, 4:01pm).

¹³ Ibid

¹⁴ “Special Operations and Covert Actions”, <http://fas.org/man/eprint/gross.pdf> (last accessed on March 24th 2015, 7:13pm).

Muslim countries which are associated with Islamic terrorism organisation like Al-Qaeda and the others.

Richard Jackson said that the War on Terror includes wars, covert operations, agencies and institutions. The Authorisation of Use of Military force against terrorists was made a law on September 2001. Back then, the President George Bush elucidated the objectives of the War on terror. The main objectives were to defeat terrorists like Osama Bin Laden and Abu Musab and also to demolish their organisations and end their state sponsorship to terrorism. Global War and Terror is, in turn, affecting the lives and the laws of the country. Where the Government is striving hard to combat terrorist organisations are coming together to destroy terrorists organisations which in no way is a solution as this again leads to destruction and deaths¹⁵.

VIOLATION OF NATIONAL LAWS

While fighting terrorism, the national laws are violated. There is an effect on the rule of law, good governance and human rights. Respect for human rights and the rule of law are the primary characters in fighting against terrorism. The National law enforcement agencies are affected. Hence, the state should take appropriate measures to ensure that while combating terrorism none of the human rights or national laws is violated¹⁶.

CONCLUSION

In my project, I have highlighted the impact of terrorism on human rights with two arguments in the paper. I, as a researcher have relied on various journal articles which were taken from websites and were cited accordingly.

After my research, I understood the various ways in which terrorism has the impact on the states and our lives particularly the way it has an impact on human rights. Terrorism is a global issue and it's not an issue which is only limited to a particular country or a state but to the whole nation. It is a threat to the whole society as it causes death to thousands of people and they are deprived of their basic right which is guaranteed to them by the constitution that is the Right to Life. Innocent Civilians are killed in this battle. There is a lot of violence and bloodshed. Various historical monuments are also destroyed in this process.

The Stereotypical view that most of them, have about the word “terrorists” that they are usually the Muslims. Most of the Americans have a view that Muslims are violent and are not trust worthy. They were theories with respect to the stereotypical depiction of Muslims in India. This shows the attitude of the people who are living in the society. It does not have to necessarily mean that terrorists are always the Muslims or the Afghans. It could be anyone irrespective of their religion, caste and race.

¹⁵ “Global War on Terror and Sliced Four Ways”, <http://www.jstor.org/stable/pdf/40210210.pdf?acceptTC=true> (last accessed on March 24th 2015, 8:31pm).

¹⁶ Supra 5

Corruption in our society is increasing day by day. People are fighting against each other for the lust of power and to acquire more wealth. Political leaders, especially in the third world countries, have no concern about the political and economic problems the country is facing. They are always looking for more power and wealth and therefore, are engaged in various illegal activities and scams. The legal system in various countries is spoilt because of "bribery". No legal work can be done without offering the person a certain amount of bribe. This shows how our legal system is corrupt and the State is not able to protect the rights of the people.

Therefore, In order to combat terrorism, we the people along with our representatives and the State should adopt all the possible measures which are required in order to curb terrorism. Education can be used as a weapon to change the world in cases where there are stereotypical views with regard to the definition of terrorist. Awareness among the people should be created with respect to the rights they possess and state or anyone else for that matter should not be given the opportunity or authority to deprive them of their rights. Hence, if we citizens with the support of the Government and State come together and strive hard we can combat terrorism and protect our human rights.

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