

GLOBALIZATION AND LAW

By

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Introduction

The approach of legal profession, which is an important component of legal system, to social change with the help of legal instrument has been found to be not enthusiastic, but only formalistic¹ while judiciary has not consistently favoured the cause of social change, legal draftsmen have been legalistic formalistic even in drafting most vital legal instrument like the Constitution. About the contribution of Law Commission to the cause of legal/social reform, there are two different views. *M.P. Jain* and *V.D. Kulshrestha* have referred to them as instruments of reforms and recorded their contribution as substantial². Looking to the requirement of participatory affair in the process of law reform for social change as inspired from the constitutional preamble law commission has observed, "Laws affect people and it is the people whom we must consult in the law reform process".³ According to it people for consultation included not only law man but also consumers, beneficiaries and victims of the administration of law and justice. The public opinion built by legal academicians is also not substantial and continuous. In the context of lack of dynamism and capacity to meet the challenges of the society it is also possible to infer in the words of *J.S. Gandhi*, "the lacuna lies not merely in the appropriate social orientations, but also and

more fundamentally in its structure and composition which precludes it from retaining their functional autonomy⁴. As he further observed, "it is better to leave in a state of clear despair than to have an unreal hope there is no point in celebrating the promise of law when all evidences are to the contrary. It will only be raising the structure of self-deception to the status of demi-god. Indian legal system is federal with features of co-operative federalism and strong center. The division of powers between two levels of Government has created multiple jurisdictions, some times over lapping and sometimes problematic. In the matter of health, employment, education and gender justice. Regarding the positive rights like right to food, education, lively hood, shelter and social justice programmes of reservations and other affirmative actions. The measures are taken by two levels of Government. The overlapping between the two or lack of coordination in their actions or differential quantum of efforts by them gives rise to loop sided situation. For example, since the protection of the interests of scheduled casts and scheduled tribes is a subject falling into the domain of both the levels of Governments, the question of competence to reform has arisen in constitutional litigations. Strong bias in favour of center has reduced the role of State Governments as useful entities. In the sphere of agrarian and economic reforms, for getting constitutional protection to those legislations, cooperative federalism has been put into action, and Parliament has positively responded to the need even resorting to

1. *K.L. Sharma*, "Legal Profession and Society: A Study of Lawyers and their Clients" in *Indra Deva* at pp.131,141-42.

2. (*M.P. Jain*, *Outlines of Indian Legal History* (5th Edn., Wadhwa & Co., Nagpur 1999) at pp. 570-71; *V.D. Kulshrestha*, *Landmarks in Indian Legal and Constitutional History* (8th Edn.,) at p.277.

3. 114 the Report of law commission (1986) pp.5.

4. *J.S. Gandhi*, "Law as an Instrument of Change in India" in *Indra Deva* (Ed., *Sociology of law* (Oxford University Press, New Delhi 2005 at pp.106).

constitutional amendment. The National Rural Employment Guarantee Act, 2005, Forest Dwellers Rights Act, 2006 and other legislations have relied on co-operative federalism for effective implementation.

The operation of central State financial relations have also decisive say in the matter of balanced development of various parts of India. From the angle of human rights, environment of welfare, the question does federalism matters at all. Has posed some serious issues when one critically looks to the consequence of judgments that deny the reformative role to the States as in *E.V. Chinnaiah*⁵. In some, legal systems responsibility for translating the constitutional goals and the ideals into action is one that is pleased on the shoulders of its various components through a integrated frame work. While the maxim “power divided is power controlled” is true in its potentiality to put forward mutual checks and balances between various organs and levels of governance, the possibility in action or obstruction due to lack of coordination amidst various power holders lurks beneath the crowded public experience, and calls for integrated approach and constitutional complementarily.

Globalization and its Impact on Law:

Globalization, the last but the most important factor in the trio of New Economic Policy, is a process by which the interconnectivity of the world is more intensified by increased economic social, political and cultural contacts⁶. The Human Development Report 2001 defines it as the free movement of goods, service people and information across national boundaries. It denotes acceleration of the interconnections in the global economy and the related

phenomenon of the rise of both institutional financial markets and global corporations⁷. It takes the whole world as a single market as a result of which individual nations, labour and communities loose their bargaining power and suffer erosion of identities, while they reap the advantage of globalized market because of availability of products and services at lower prices. Transnational character of the internet has contributed towards transforming economic, political and cultural processes. Global understanding of the problem of the environmental pollution has evolved international norms relating to environmental security. The cultural dimension of globalisation consists in reduced importance of non-international languages, market orientation in cultural products and exchange of great and little tradition⁸. The threat to language survival and to the identity of linguistic community is to be tackled by meticulous efforts of localizing the globalization development by translation, by application of information technology and by extensive knowledge dissemination that would equip the people to participate effectively in the global village. While sustained economic growth and development of the world economy is the aspiration behind globalization, as the Copenhagen Declaration has stated:

“At the same time, the rapid processes of change and adjustment have been accompanied by intensified poverty, unemployment and social disintegration. Threats to human well-being, such as environmental risks, have also been globalised. Further more, global transformations of the world economy are profoundly changing the parameters of social development in all countries. The challenge is how to manage these processes and threats so as to enhance

5. *E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 SCC 394 = AIR 2005 SC 162

6. *Tony Schirato & Jenn Webb*, Understanding Globalization (Sage Publications, 2003) at p.21.

7. Globalization, Geography and Environmental Security” in *Eleonore Kofman and Gillian Youngs* (Ed.)

8. *Yogendra Singh*, Culture and Change in India (Rawat Publications, 2000) at pp.139-40.

their benefits and mitigate their negative effects upon people”⁹.

Globalization’s most important international institution in the field of trade is the World Trade Organisation whose impact upon society and law has been far reaching. The very formation of WTO was culmination of eight years of Uruguay Round of Multi lateral Trade Negotiation by large number of prominent nations of the world. Article 16 clause 4 of WTO agreement states, “each member shall insure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreement”. Further, sanctions to enforce the Dispute Settlement Body’s decisions supply the binding force to WTO rules to build up a rule-of-law system. Hence, percolation of globalised rules to the local levels of member nations is significantly contemplated.

The wide canvas of laudable objectives that WTO has set, is suitable for holistic treatment of the globalization policy. WTO’s purposive character adds to its legitimacy when we look to its objectives such as raising the standard of living, insuring full employment, increasing the volume of real income and effective demand, expanding the production of trade in goods and services, optimal use of world’s resources in accordance with the objective of sustainable development, seeking protection and preservation of environment and to enhance the means for doing so¹⁰. WTO agreements provide for wide ranging policies: removal of tariff and non-tariff barriers and technical barriers to trade; prohibition of subsidies and dumping; MFN treatment of trade related aspects of intellectual property and trade related investment measures; equal opportunities for trade in services; safe guards through sanitary and phyto sanitary measures;

and gradual withdrawal of subsidies in agricultural sector.

India has a founder member of GATT (1947) and WTO (1995) has a track record of participating in progressive reduction of tariff and opening up of the economy to the operation of market forces. As a leading developing country it has joined hands with the block of developing and least developed countries in recent ministerial conferences to bargain for necessary concessions in the field of IPR, food security, health and agriculture¹¹. A sea change has taken place in the Indian legal regime of IPR in response to TRIPs – Agreement’s insistence. Many of the changes were indispensable in the background of leveling up of the extent of protection to intellectual property rights. In the field of copy right, trade mark, design and new forms of IPR like geographical indications, Integrated circuits Semiconductor chips, the change brought were largely non-controversial, in the matter of plant varieties, breeders ‘and farmers’ rights, formation of legal policy was influenced by public debate, NGO demands and agitations by farmers¹². Regarding patent reforms, since Indian Patent Act, 1970 itself was a progressive measure and conducive to industrial development, it is with great reluctance that Central Government proceeded to bring changes. Some of the changes like extension of product patent protection to inventions in the field of medicine, food and drugs are not-favorable to the national interests but are to be faced by alternative strategies for enhancing the inventions capacity. However, India could retain effective power of compulsory acquisition of patents within the legal framework for promoting public health security, the power of the State to acquire patent on drugs and medicine has been recognized by the Doha Declaration.

9. UN, The Copenhagen Declaration and Programme of Action (Act 5 of 1995).

10. Preamble to WTO Agreement.

11. *Andrew T. Guzman*, “Global Governance and the WTO” (2004) 45 *Harvard International Law Journal* 303.

12. *Vandana Shiva*, *The Enclosures and Recovery of the Commons* at pp. 160-61 India.

That the tricks' impact was far reaching both ideologically and in practical details shows how in modern times law is not entirely product of self-determination. The ideological tilt in favour of commercialization ignoring the implications of human rights perspectives and consideration of knowledge of society came from the basic approach in TRIPs that intellectual property rights are private rights.

Implication of WTO-sponsored globalizations for India is a multi-dimension issue. The strain that the process is likely to cause upon the Constitution's part IV tasks, which the State is expected to handle, has been a cause of wide spread worry. The broad features of market – oriented economy – foreign direct investment, elimination of subsidies, the regulation, delicensing, liberalized physical policies, free competition and flourish of multinational companies – are difficult for absorption into a system primarily oriented to socialistic pattern of society or aiming at a "just social order". Promotion of foreign investment should supplement domestic production. "An equitable distribution of resources between the production and social sectors should be considered; otherwise the poor will be worst hit. *Ranbir Singh* points out the disturbing features of globalization *vis-à-vis* the Indian Constitution such as – ignore capacity of federalism and democratic control, marginalized possession of multilingualism, non application of judicial scrutiny of PIL and transparency rules – and suggests for strengthening these mechanisms to make the basic commitment to people's welfare under the constitution, a reality¹³. The Court's duty as the guardian of the Constitution that proclaims welfare state and the socialist philosophy should not be detracted with the onset of economic reforms. NGOs have tried to fill the gap created by state's

withdrawal from welfare task. With strong and sensitive Panchayati Raj institutions the problems of globalization could be better handled. As Mazaffar Assadi Rights "a multi-stake holder approach involving the State, market and civil society should be adopted for sustainable development and social justice"

Justice *Rajendra Babu* considers that globalization increases the importance of degree and direction of national governance which cannot compromise with poverty, terrorism, child labour, environmental, devastation and ill health¹⁴. He traces the roots globalization and human rights in liberalism, finds no contradiction between the two, and wishes their mutual reinforcement. Use of TRIPs provision for compulsory acquisition of drug patent is one method of making WTO regime human right complaint, has been observed by *A. Jayagovind*. "globalization has no doubt contributed to economic prosperity, but the question is prosperity to whom?. while elitist section have benefited from globalization everywhere, vulnerable sections continue to be in a miserable position. Human rights approach to trade requires us to evaluated the benefits of globalization from global point of view: How mankind has a whole has benefited from this phenomenon". Thus, reforming the existing to humanize the globalization is very much required in order to realize globalization of human rights. In addition to the economic dimension has technological, political, ideological, cultural and environmental dimensions. Viewed from the angle of equity, empowerment, justice and freedom, globalization has deeper sociological implications for individuals, communities and their traditions. In order to ensure social harmony and development with justice, concerted action by civil society and community has been considered as inevitable.

13. *Ranbir Singh*, "Globalization and the Indian Constitutions" (2007) 6 Journal of the National Commission of Human Rights 22.

14. Justice *Rajendra Babu*, "Globalization and Human Rights" (2007) 6 Journal of National Commission of Human Rights 1.

On the whole, the New Economy Policy has been a strong instrument of modernization. Glorifying the position of economic processes and the factor of competition, its operation has been ruthless. The sway of trade competition put agriculture and labour into penury forgetting the human face of the problem. LPG has made entry into all walks of life and all spheres of law. It throws open the mixed bag of opportunities and challenges. As a result, the dynamism, of social transformation with the assistance of law is put into rigorous test.

Globalization of Law and Practices:

The term 'globalization of law' refers to the degree to which the whole world lives under a single set of legal rules. Such a single set of rules might be imposed by an international body, adopted by global consensus, or arrived at by parallel development in all parts of the globe. In today's world of increasing international trade and inter-dependence the need for transnational law has increased many folds. Since more and more countries, open their economy, either partially or completely, there is growing need to recognize and work towards a uniform system of law. This process of globalization is evident in all facets of law.

Globalization of Commercial and Contract Law :

There are various connotations to the term 'Globalization of law'. It may be viewed as a concomitant of the globalization of markets and the business practices of the multi-national corporations that operate in those markets. There has been some movement toward a relatively uniform global contract and commercial law. It is well established that contracts are a kind of private lawmaking system. The two or more contracting parties create a set of rules to govern their relationships, as laid down under the terms of their agreement. In

international trade too, the parties enter in contracts and the contracting parties invariably agree to submit to a non-Governmental arbitration mechanism or the Courts of some particular Nation State, or both, to resolve Contract disputes. They may also chose the governing law of the contract under which any contract dispute between them shall be resolved. In today's world of inter-dependence and international commerce, there is increasing importance of growth of harmonization of international commercial law. Most of the countries have now recognized the need for a uniform, predictable and transparent system of law for encouraging foreign investment and international trade with other countries. As a result of this, the Courts and law of most of the countries recognize and enforce the judgments of the others.

In the global context, because of the economic position of the United States and some of the countries of Europe, these countries substantially influence the process of globalization of law. The obvious reason being that they contribute substantially to foreign investments in other parts of the world and have a strong role to play in international trade. For whatever reasons, it is now possible to argue that American business law has become a kind of global *jus commune* incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of may other nations.

Globalization of Public Law :

Certain global commonalities in law develop from a universal, and apparently growing, popular distrust of Government. The Government has undertaken many welfare activities and also expanded its role to the commercial front. The need to put appropriate checks on the Governmental has also increased. This has paved way for administrative law and now many nations

have accepted the rule of law and used it to check the Government. The world has unanimously recognized that appropriate checks are needed on the Government and there now exist certain fundamental principles that have been recognized as basic to all populations for checking the Government from abuse of power. Today global community has recognized the need of transparency of, and increased public participation in, bureaucratic decision-making it seems obvious that law is an available instrument for achieving greater transparency and participation. Globalization here refers primarily to the industrialized States. Even in India drastic improvements were made in the field of administrative law along with other countries in the world.

In the Global context, it is seen that American federal Courts, seconded by Congress, created a new apparatus of administrative law designed to maximize both the participation of interest groups in the bureaucratic policy-making process and the obligation of bureaucracies to make public every bit of their fact gathering, analysis, and policy choice processes. Not only were enormous amounts of new administrative law generated, but there was also a steep increase in the judicial supervision of bureaucracies. The judges now demanded that the bureaucrats fully, completely, and publicly explain what they were doing and do so in such a way that the judge, a person totally devoid of technological training and knowledge, could understand. This concept has rapidly spread all over the globe and is now increasingly recognized in U.K. and India too. In India, we have land mark cases where administrative discretions and quasi-judicial functions have been checked and supervised by the Courts. The principles of natural justice are now acknowledge the world over and Courts around the world are now giving effect to the two maxims of natural justice namely, Audi Alterem Partem and Memo Debit Juris

in Propria Causa. The countries around the world now openly acknowledge these two as pillars of public law. The import of these two maxim implies that no person shall be the judge in his own cause and that every person shall have a right to be heard before a order is passed against him.

Globalization of Protective Law:

The constitutional rights movement is one aspect of a global movement that is based on the distrust of concentrations of power. The individual is seen as needing protection from all the larger forces that threaten to crush him, not simply from the Governmental ones. Law is seen as one instrument for such protection. Thus, in speaking of globalization, we move from the realm of constitutional law to the realm of torts, product standards, consumer protection, and occupational health and safety. Of course, most legal systems around the world have always dealt with personal injury, fraud, and shoddy goods. However, with passage of time the 'caveat emptor' rule was replaced and the laws of consumer protection and investor protection were taken became more stringent. Globalization here refers to a worldwide increase of legal protection against the ill effects of technical, economic, and social devices too complex, distant, or powerful to make individual self-protection possible. The most recent manifestation of this movement is the great outburst of environmental protection law that is partially fueled by a concern with nature itself but tends to achieve its greatest impetus when that concern is coupled with putative injury to individuals from pollutants. India has experienced a tort explosion in the form of landmark cases concerning CNG buses and the reallocation of Taj Mahal. In the securities market there has been a rapid law innovations for better investor protection, such as the ban on insider trading and committee reports on corporate governance.

The globalization is thus clearest and most dramatic in environmental law. As it became increasingly clear that the externalities of environmental degradation crossed national boundaries and that some of them, like ozone depletion, were truly global, parallel developments in national environmental law accelerated, as did efforts at multi-national and/or international environmental protection law.

Conclusion:

We have been looking at the globalization of law along a number of sectors. The global distrust of hierarchical authority and concentrated public and private power generates growth in administrative law, constitutional, and other rights law, and in legal regulation of economic enterprise. The global desire to protect the individual

generates growth in personal injury, consumer protection, environmental law, and even family law. The globalization of markets and business enterprise generates the growth of a worldwide law of business transactions. The global multiplication of exterior business relationships and the growth of arms-length regulatory styles fuel a growing demand for lawyers and their involvement in more and more social, economic, and political relationships. Thus in light of all the above, it may be inferred that there is an increasing need for a global mechanism of legal education, law enforcement and also harmonization of most of the transnational laws. Having stressed on the need for globalization, we need to adopt our domestic structure to be able to keep pace with the movement of globalization both in terms of legislation and in terms of legal education and practice.

WHY AGENCY COURTS PREFERRED OVER JUDICIAL COURTS

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This paper examines the existing redressal mechanisms in the administration of civil justice in the tribal areas and how these systems preferred over Judicial Courts.

Introduction:

The Tribal population of the country is close to 8 per cent of the total population and considered to be 23 per cent of the total indigenous population of the world. The State of Andhra Pradesh is a traditional home for 35 tribal communities, constitute of 6.59 per cent of the total population of the State as per 2001 census reports. The

Tribal sub-plan Area extending over 31,485.34 Sq.kms. in the districts of Srikakulam, Vizayanagaram, Warangal, Visakhapatnam, East and West Godavari, Khammam, Adilabad and Mahaboobnagar Districts constitute the traditional habitat of nearly 31 Tribal groups. The Tribal groups viz., Yerukula, Yanadi and Sugali or Lambada, Nakkala are mainly living in the plain areas, outside the Scheduled Areas. The tribal areas are mainly inhabited by tribes who by fact of their being primitive and innocence, are extremely vulnerable to exploitation by outsiders.