KIIT Journal of Law and Society

2012 **Volume - 2** **Number - 1**

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EDITORIAL NOTE

The prescience of KIIT Journal of Law and Society is engrossed with the impact of legal change on Indian society and understanding law in the backdrop of a set of shared or at least accepted rules governing social interaction and the way it is organized or discernible in our society as a social institution. Lawrence Friedman and Jack Ladinsky (1967) in the context of social effects of law adopt a definition of social change as 'any non-repetitive alteration in the established modes of behavior in society'. Changes in economic well being, technology or basic attitudes of members of society are understood as autonomous, continuous and probably ubiquitous. Certainly the affairs of law reforms, legislations and growing regulatory legal regime in India in regulation of social control and economic management are our focusing point. With that end in view, the present volume of the journal takes ardent endeavor to identify how far law or particular legislations shape our society and eventually result in bringing about the desired social change.

Writers in this volume have preferred more or less broader concept of law and social change and the operation of various dimensions of law on citizens. Social change may be incremental, comprehensive or revolutionary in magnitude and its scope can be understood in terms of various stages and levels (Grossman and Grossman, eds, 1971). It may alter patterns of individual behavior(for example, job-contentment in Police services or community rehabilitation of prisoners) ; or it may modify patterns of group norms or relations of groups to each other These transformations also depend on such matters as technological progress (e.g. application of medical technology); natural environment and resources (e.g. space law and space policy or IPR over genetic resources), extent of development of political organization and consciousness (eg. Panchayati raj and sharing of resources or political funding in India,); the degree and extent of interaction with other societies (e.g. plight of Indian women divorced overseas, comparative advertising and trademark infringement). Other issues of socio-legal change included in the writings are: the interpretation and application of legal doctrine (e.g. institutional integrity and the integrity of Indian Administrative Justice), the institutionalization of adjudicative processes (e.g. power to grant pardon) or law and inclusive development (estrangement of tribal from land and forest).

We hope the issues addressed in this Journal will reflect generally the contemporary state of affairs on interaction between law and people in India whose lives are affected by the impact of legislation and law reform. Our efforts will become successful if it provides an open platform for a constructive and critical dialogue between the students, academic spectrum and other targeted readers such legal professionals, politicians and administrators.

Prof. (Dr.) Nirmal Kanti Chakrabarti

ARTICLES

'Institutional Integrity' and the Integrity of Indian Administrative Justice

Prof. (Dr.) V. D. Sebastian*

ABSTRACT

In the case for Centre of PIL and another v. Union of India and Another[1], the Supreme Court of India has introduced the concept of 'integrity institution' in the judicial review of public appointments. A three Judge bench of the Supreme Court[2] invalidated the appointment of P.J Thomas as the Chief Vigilance Commissioner of India on the ground that the post of Chief vigilance Commissioner is an integrity institution considering the role it has to play in presiding over the vigilance and anti-corruption activities. The failure of the statutory Committee (under the Central Vigilance Commission Act 2003)[3] to consider, at the time of making its recommendation for appointment, that a criminal case was pending against P.J Thomas, made its recommendation non est in law, resulting in the quashing of the appointment. This case raises certain important questions regarding the judicial review of administrative action in India. It is proposed to examine is briefly.

FACTS IN A NUT SHELL

P.J Thomas, an IAS officer of Kerala Cadre was secretary, Dept of Food and Civil Supplies of Kerala Government in 1991. There were allegations of Corruption, in the import of palmolein by the Kerela Government, against the Minister (the late) K. Karunakaran and some others including P.J Thomas. Two writ petitions in the Kerela High Court, seeking orders to start Criminal proceedings were dismissed.[4] However, after the State election in 1996, the left lead government came to power. This government started proceeding under

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[1](2011) 4 SCC 1.

[2]S.H Kapadia, C.J and K.S.P Radhakrishanan and Swantatra Kumar J.J

[3]Central Vigilance Commission Act, 2003.(45 of 2003).

[4]Supra note 1, at Para 4 to 23.

the Criminal law by filing an FIR against K. Karunakaran and others (which came to include P.J Thomas also) and sought permission from the Government of India, Dept. of Personal and Training (DoPT) to prosecute P.J Thomas on the basis of the cases pending before Kerela Courts, as he was an officer belonging to the All India Serivces. Karunakaran tried unsuccessfully before the High court and the Supreme Court to quash the sanction to prosecute and the FIR filed in that connection. In a Note, the DoPT suggested that departmental penalty proceedings should be started against PJ Thomas and there was no evidence to sustain a prosecution. DoPT made a reference to the Central Vigilance Commission (CVC) which also advised that major penalty proceeding should be started. In 2001 the Congress-led UDF won the elections and formed the government which took the stand that there was no material to prosecute PJ Thomas and wrote to the Government of India (GoI) that the state Government wanted to withdraw the request for the sanction to prosecution.

In 2006, the left-fed LDF government came to power in Kerala. This government reversed the stand of the previous government. It wrote to the Government of India that it wanted to continue the prosecution. An attempt by K. Karunakaran to stop the renewed moves at prosecution did not meet with success in the High Court and in the Supreme Court.

The question came up whether the pendency of the case would stand in the way of PJ Thomas being considered for higher appointments. On a reference to the Cetral Vigilance Commission (CVC) the opinion was given that the case was reconsidered and no case had been made out against PJ Thomas to warrant a prosecution. He acted in accordance with the cabinet decision and no case had been made out that he derived any profit from the transaction of import of palmolein. After the above vigilance clearance, PJ Thomas was appointed the Chief Secretary to the Kerala government and then deputed to the central government. While holding the post of Telecom Secretary, he was considered along with others for being appointed as the Vigilance Commissioner. He was appointed as the Vigilance Commissioner by the President of India, according to terms of Central Vigilance Commission Act, 2003, on the majority recommendation of a Committee (the Prime Minister and the Home Minister supported but the leader of opposition in Lok Sabha dissented). The PIL was filed to challenge the appointment.

THE DECISION

The Court referred to the familiar principle in Administrative Law that judicial review of administrative action is confined to legality and not to merits.[5] The court proceeded to consider the legality. It said that the chief vigilance commission is an integrity institution.

The CVC has to preside over the anti-corruption operations of the government. Criminal charges are pending against P.J Thomas. There are controversial noting in the government file regarding the action to be taken against him. Though Vigilance clearance was given for his higher appointment, why the Vigilance Commissioner changed his earlier stand is not clear from the files. The recommending committee considered only the CVC clearance without considering the integrity factor. The recommending committee failed to consider the fact that the criminal case was pending. The committee failed to appreciate the fact that CVC is an integrity institution. Selection of P.J Thomas was done without all relevant papers before it. So the Committee failed in its statutory duty to make a recommendation according to law. Hence, its recommendation is legally invalid (*non est* in law) necessitating the quashing of the appointment.

A CRITIQUE

While the judicial activism shown in admitting into the administrative law governing appointments, the principle of integrity institution is a welcome extension, the question whether the court has adhered to the professed dichotomy between merit and legality raises some doubts.

The High Power Recommending Committee which recommends the appointment under the Vigilance Commission Act is not given any statutory guidance as to what it should consider before the recommendation. In this case, the committee seems to have relied on the vigilance clearance given to P.J Thomas. The adverse noting in the files was between 2000 and 2004 and the vigilance clearance was given in 2007. Will the earlier adverse noting at the lower level be still relevant after the decision of 2007? If such a stand is taken, then the initial noting will have relevance even after the decision of the higher authority and there can be no finality in the decision making.

[5]Supra note 1, at para 24 and at para 63

The Distinction between merits and legality

Though the Court says that the review is concerned with legality and not merits,[6] it is doubtful if the distinction has been maintained. What elements have been taken into account in deciding 'legality' is not made clear. What has been done seems to be that in view of the allegation pending against P.J Thomas and in view of the fact that the post of Vigilance Commission is an integrity institution, the High power Committee should not have recommended the appointment. Its recommendation is held to be illegal. Is this not a decision on merits? A thin cloak of legality has been made on the basis that the adverse notes were not placed before the Committee and the Committee did not apply its mind.

It has to be noted that the President of India (as advised by the Council of Ministers) is not bound by the recommendation of the recommending committee. The proviso of section 4 of the Vigilance Commission Act only says that the appointment shall be made after obtaining the recommendation of the Committee. The recommendation is not binding on the President (and the Council of Ministers) so the discretion of the President (and the council of Ministers) is not legally controlled by the recommending Committee. Therefore the recommendation of the Committee, (which the Court has found to be *non est* in law) doesn't seems to be a strong factor in deciding the legality of the appointment.

Pending Criminal charges against the Civil Servant

The pendency of criminal charges and the alleged failure to have this fact properly brought before the recommending committee seems to be the reason which persuaded the Supreme Court to decide that P.J Thomas was unsuitable for an integrity institution namely Vigilance Commission. In the criminal law system and its practice in India, it is possible to drag a case indefinitely. Such long pendency and any adverse decision based on that basis is bound to have a very deleterious effect on the civil services. It is an important value for the proper functioning of the government that such damage should not be inflicted. According to some reports, the fear of criminal law proceeding for having carried out the decisions of

[6] *Id* para 63.

political bosses has already affected in a big way the implementation of valuable and important project.[7] This aspect has not been raised nor considered by the Supreme Court.

For the efficient functioning of the government in our country on which depend the hopes and aspirations of the teeming millions for life's necessaries, it is absolutely necessary that civil servants should not be driven to inaction, but there good faith action immunised by suitable changes in the law.

In the case of P.J Thomas, the case was started in 1991. It has been dragged on due to the changing opinion in the government and judicial tolerance of it. According to a report, it is still pending.[8] This is a poor commentary on the justice system in our country and a frightening prospect for civil servants. Now, if P.J Thomas is ultimately found to be blameless and is exonerated, it would be difficult to compensate him for the grave injustice. One would think that in fairness the Supreme Court should have, in exercise of its great powers given a direction to finally decide the pending criminal case in a short period and then only decide on the validity of the appointment as Vigilance Commissioner.

It seems desirable that all criminal cases against the government servants in relation to official functioning, should be taken outside the jurisdiction of the ordinary criminal and CBI courts: such cases could by suitable charges in the existing laws be entrusted to the Administrative Tribunals from whose decision a limited review to the High Court and an SLP appeal to the Supreme Court could be allowed. It would not be difficult to develop in the Administrative Tribunals a division to deal with criminal cases of this type expeditiously.

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[7]*See, Yatesh Yadav, Climate of fear cost India dear, many big ticket projects are delayed as a fear struck babudom doesn't moves files*, Indian Express, 22nd October, 2012 (Bhubaneswar.)'which describes how the fear among civil servants retard government work'.

[8]*P.J Thomas Plea dismissed as withdrawn,* The Hindu (Cochin ed.) September 18, 2012, 'P.J Thomas approached the Kerala High Court to quash the case pending against him in the vigilance court. The ground was "There was no legal justification in continuing a trial as it would amount to abuse of the process of the court. Besides the alleged irregularities took place more than 21 years ago and there was no justification to continue the trial of the case indefinitely. He was finding it difficult to face the trial as he was leading a retired life in Haryana" The court permitted to withdraw the petition without prejudice to the right of the petitioner to seek whatever namely available to him before appointment found under law."

The dichotomy between merit and legality in judicial review

Justice should be the leading star for the judicial process. Justice is a proper balance between individual interest and public interest. If individual interest is not protected within the limits allowed by the law, there is a failure of the purpose of the judicial process. Normative law is precipitated out of the felt necessities of the community and placed before the judges by the legislative authority. Judges find facts and apply the law in the attempt to render justice. '*it is emphatically the province and duty of the judicial department to say what the law is',* said John Marshall.[9] But law is concretely found and said to be what it is only in particular cases. Before this law exist and as an abstraction at different levels of generality. So finding of facts and applying the law are involved in saying what the law is in individual cases. Questions of facts are absorbed in the questions of law. The distinction between the law and the fact disappears. When the Court says what the law is justice is done. Every case only involves a question of legality.

When a judge decides a question of legality in individual cases the elements involved in a functioning legal order would seem to be the following.

i) The values of the legal system, (i.e. the fundamental postulates, in Roscoe Pound's sense at present derivable from the human rights).

ii) The interests protected by the legal order.

iii) The rules of behaviour prescribed, that is: the normative rules to guide the member's actual behaviour in the community.

iv) Authorities of the several functionaries (legislative, Executive and Judicial etc.)

v) The procedure to be followed at different levels of authority

vi) The finding of facts.

When the judge makes a decision involving the above aspects in an individual case, he says what the law is in that case. If there is any serious departure in any one aspect, in the opinion of the judge, it is an illegality. The judge's sense of justice and his ability to uphold it would be determinants of his decisions.

[9]Marbury v. Madison, 5 U.S. 137 (1803), 177.

In the case of Judicial control of administrative decisions all the above aspects of a case are decided by the administrator in the first instance. The judiciary only reviews the decision to maintain supremacy of the law or rule of law. It is impossible that all the questions decided by the administrator be re-decided by the judiciary. Such a procedure would paralyse governmental functioning. In this situation, deference to the sovereignty of parliament prompted the English Common law judges to develop a distinction between 'legality' and 'merits'. It is the sovereign parliament that entrusted the decision making to the administration. This has to be respected. The equilibrium established in the old struggle between the King's Council and the Kings courts regarding the finality of decision, in the light of the diminishing powers of the king and the rising power of the Parliament and of the rule of law, would also seem to have contributed to the distinction. In India with the written constitution and no parliamentary sovereignty, the distinction need not be adopted as it has developed in England.

The problem with the distinction is that unless the judge gives reasons for a decision that it is one of legality and not of merits, there will be no light to understand the correctness of the choice. What happens in India seems to be that if the judges is inclined to interfere with the administrative decision, he will classify it as one of legality, otherwise as one of merit. Some principles like error of law apparent on the face of the records and no evidence rule are there. But these would seem to be not sufficient to throw light on the choice unless the judge is prepared to discuss his criteria of choice. In the practice of American administrative law, 'reasoned decision' and 'substantial evidence on record' are insisted upon. What we should try in India is to encourage the judges to conduct the review only on legality, the elements of which are spelt out and discussed in deciding a case.

Application of the principle of integrity institution

In P.J Thomas, the principle of integrity institution has been applied to the appointment to the post of vigilance commission. But is it not of general application in all governmental and public appointments? Referring to this decision, a leading writer on Law relating to public Services has observed as follows:

"This judgment of the court is a significant development not only in relation to service law but also in the field of administrative law. The justifiability of a recommending body in making a recommendation has been clearly established and the enunciation of the court cannot be confined and limited on the plea that the court was considering a case of appointment of the Central Vigilance Commission who according to the court was a symbol of institutional integrity. There is no logic as to why the principle should not be applied to all appointment of public service which are required to be made on the basis of the recommendation of a particular recommendatory body"[10]

It is clear that the 'integrity institution' principle cannot be confined to Vigilance Commission or to the Judiciary. It would apply to the whole spectrum of appointment under the government and public authorities. The activism shown in introducing the principle is a welcome one. But the judiciary should develop the criteria of 'legality' for review and should also state the reasons for the choice so that the people could be satisfied that an informed choice has been made.

P.I.L. and Integrity Institutions

When it is admitted that all public appointments would come under the principles of Integrity Institutions, a question will arise about the procedure for raising the question before the judiciary. The appointments can be classified into two : (i) political appointments like Ministers at the top levels, (ii) appointments at lower level comprising civil servants and servants of various public authorities. As regards the political appointments, it is best that the integrity question is best settled in the election laws and the suitable provisions in the Rules regarding allocation of portfolios. These would seem to be political question, not suitable for judicial adjudication. But so long as rule of law prevails, absolute exclusion could not be possible. Judges in their discretion should strike the correct balance and leave the matter for political remedies. So PIL will have no role here.

The question of integrity in the other appointments (in the administrative appointments) can be ensured in the judicial review if proper principles and procedure are developed. But it is doubtful, if public interest litigation is fit procedure for this. In *R.K. Jain v. Union of India*[11], wherein the

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[10]Samadraditya Pal, Law relating to Public Service, 299 (3rded, 2011).

[11] *(1993) 4 S.C.C. 120*

appointments of a vice-President as the President of the Customs, Excise and Gold Control Appellate Tribunal was challenged in a public interest litigation, in the concurring judgment of Ramaswamy, J., observed

"In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of offending action. Third party has no locus standi to canvass the legality or correctness of the action."[12]

In that case the petition was not for a quo-warranto writ, While the nature of writ asked for is not important in our writ petition proceedings, the question of locus standi is important to keep out meddlesome interlopers and others seeking the writ for oblique purposes. Hence it is desirable that PIL is excluded in challenging the validity of public appointments. Suitable provision for this purpose can be made in Acts of legislatures and rules of the superior courts controlling the exercise of jurisdiction of courts.

Conclusion

In deciding constitutionality, judicial activism introduced the 'basic structure theory' which in the beginning was received with suspicion; but has since been accepted as a salutary check or unbridled political activism in amendments of the constitution. As a parallel, 'a basic structure of administrative legality' as discussed earlier should be developed. Much less activism, than the one displayed in the field of constitutional law needs be shown in administrative law. It would fully be covered by the judge's duty to say what the law is and his commitment to justice. To standardise administrative justice such a development is highly necessary. And PIL should not be allowed to impugn the validity of public appointments.

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[12] *ibid para 74 pg. 174*

Federal Structure
Panchayati Raj and Sharing of Resources

Prof. Surya Narayan Mishra*

ABSTRACT

The basic essence of Federalism is the notion of two/more orders of government combining elements of SHARED RULE for some purposes and regional self rule for others. A durable federal design aims at the contradictory goals of reconciling freedom with cohesion and a diversity of political cultures and identities with effective collective action. India is a federation. From a two-tier federal democratic dispensation India through devolution of power empowered the third-tier i.e, local government through statutory cover and economic entitlement. The 73rd Constitutional Amendment Act (1993) has substantially altered both political structure and economic sharing between and among the tiers. The Finance Commission play crucial role in distribution of accumulated taxes. Since 1990's the role of the Finance Commission have undergone changes with their attention to augment the resources of the third tier of the Government. Within the states, the tax collected in shares between urban and rural local governments for which the State Finance Commission must look to enlarge the tax base so that resources of PRIs can be enhanced and twin principle of economic development and social justice can be achieved.

Keywords: Shared-rule, Self-rule, Delegation, Deconcentration, Devolution, Social Justice, Panchayat.

Federalism is a method of promotion of self-rule and shared-rule. It intends to balance the interest of a nation with that of its regions.A durable federal design aims at the contradictory goals of reconciling freedom with cohesion and a diversity of political cultures and identities with effective collective action. (MITRA:2010) Thus, it is based on the objective of

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combining unity and diversity; i.e. of accommodating, preserving and promoting distinct identities within a large political union. Federations have some common structural characteristics they are – Two orders of government, a formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the orders of government ensuring some areas of genuine autonomy for each order, a written constitution, an umpire to rule on interpretation or valid application of the Constitution and processes and institutions to facilitate inter-governmental collaboration in those areas where governmental responsibilities are shared or inevitably overlap.

Federations are distinguished from decentralized unitary systems and from confederations. In a unitary system the governments of the constituent units derive their authority from the central governments. In a confederation the central institution ultimately derive their authority from the constituent units.

In a federation, each order of the government derives its authority, not from another order of government, but from the constitution.

Some political systems are hybrids combining the characteristics of different kinds of political systems. Those which are predominantly federations in their constitution and operation, but which include some federal government powers to override governments of constituent units, and arrangement more typical of unitary system, are known as Quasi -Federals. At different stages of their development Canada, India, Myalaysia and South Africa were Quasi -Federals. On the other hand, Germany while predominantly a federation, has a conferral element in the 'Bundesrat' (the Federal Second Chamber) which is composed of instructed delegates of 'Land' governments. Further, a 'Hybrid', predominantly a confederation but with some features of federation, is the 'European Union'. Hybrids occur as result of pragmatic political solution.

- This paper was presented at National Workshop on "A Freshlook at Indian Federal System" organized by ICSSR at Vadodara (Aug 2012)

In the opinion of researchers, while analyzing the distinctive characteristics of a federation, there are some important points to be noted: Firstly, there is the distinction between Constitutional form and operational reality. In many political systems, political practice has

transformed the way the Constitution operates. Therefore, to understand how a given federation operates, it is necessary to examine not only the constitutional law but also its political practices and processes.

India is a federation. All the pre-requisites of a federal system are visibly present. However, Indian federal system is different from other types of federations due to constraints at the time of independence which were both security related and politically manufactured. For both constitutional and political reasons, the institutionalization of a strong federalism in the Indian system was seriously compromised from the outset.

Since independence we have undergone three phases in the federal process. The first phase of the federalization of the political process continued up to mid 1960s. India's first Prime Minister Neheru pursued a democratic process involving the states in his political agenda by building consensus on issues. He respected congress ideology of provincial autonomy mooted in 1920s. Thus he institutionalized the process of consultation accommodation and consensus despite internal challenges from the party.

The second phase of development of the Indian federalism began with the fourth general elections of 1967 which disturbed the one party dominance system under congress and more than half a dozen states came under non-congress rule. It caused radical change in the nature of Centre-State relations. The Nehruvian political equation was not seen. The congress split of 1969 experienced the PM using the strategy of political rhetoric and strong centralized political leadership under her own design. In consequence, the regional accommodation which had been possible by way of internal federalization of the congress party was subsequently eroded (Mitra) the state of internal emergency of 1975-77 reduced the Indian Federation to a Unitary State and the election of 1977 which installed the first non-congress government at Dellhi helped to revert back to the era of cooperation of Nehru regime.

With the prolonged period of Coalitions, the Third phase of Indian Federal process appeared towards end of 1980s. the regional parties asserted their interests more openly. This increased assertion on the part of regional parties could cause change in the attitude of both the dominant national parties (Congress and BJP) to respect the Centre-State relations as was established from the first phase of the federalization process of the Indian politics.

The specialty of the Indian Federal structure was evidenced by the vertical expansion of 1993. A third-tier (Panchayatiraj) was added through constitutionally mandated authority and some financial autonomy accorded to the village level political institutions through 73rd Constitution Amendment Act. The provisions and messages of this Act has metamorphosed the whole process of federalization. This has turned the federal process into a major source of legitimization and democratization of power in India. At this stage we can look into the important legislative competence of Indian Multi level federation.

Table- 1 : LEGISLATIVE COMPETENCE

LEVEL	COMPETENCE	ENABLING PROVISION
Centre	Defence, Atomic Energy , Foreign Affairs, Currency, Transport, Infrastructure, Communication, Electoral law, etc	Art 246 plus List-I of VIIth Schedule
State	Public order, police, public health, Local Government, Agriculture Water, Land, Tax on Agr and land	Art 246 plus List-II of VIIth Schedule
Local	Economic Development, Social Justice	Art 243 G plus state legislation
Centre + State	Criminal Law, Criminal Procedure, Marriage and Divorce, Transfer of non-agr property, Economic & social planning	Art 246 plus List III of VIIth Schedule

Source – Government of India (1993)

A cursory glance of the information given in the above table as well s detailed constitutional provisions, it is well known that the central government in India possesses 'Superior Financial' powers and authority to regulate the whole fiscal regime. The lucrative part of the revenue is the corporate Tax, Import Export Duties and the non-agricultural Income Tax.

But the revenue of the States, on the other hand, Constitute a shrinking base in some states as they have reduced the tax base due to public pressure. Thus the receipt of land and agriculture does not enable them to share the burden of nation-building and development.

States revenue accrue mainly from four sources- (I) tax and expenditure assignments derived from the constitution of India, (2) Transfers allocated by the Finance Commission (Art 275), (3) transfer from the Planning Commission, and (4) transfer from the Central Ministry budget to the states. The transfers take the form of grants and loans to the states. Over the decades the capacity of the states to finance both revenue and capital expenditure from their own tax based resources has declined substantially. Around 40 percent of the states total expenditure was covered by their own resources, as per report before Finance Commission.

After going through the concept and reality of the federal political process and gloomy picture of fiscal imbalance existing between the Centre and the States, we are expected to known the process and politics of decentralization in India.

Manor (2010) observed that among all the existing federations, India is better able to make democratic local government work well. India, according to him, is a successful electoral democracy and people have internalized the benefits of the electoral process as there is broad popular understanding that elections do not yield winner take all the outcomes.

He further stated – although democratic decentralization has limitations, when it works well, it yields substantial benefits in terms of both development and of political renewal. Manor has found democratic decentralization producing extra-ordinary results in few states but the situation in other states are below average.

What is this decentralization? Let us examine the meaning. The term decentralization is understood differently by different individuals or groups. For many, decentralization has come to be a gospel of management. (Pfiffner) it is regarded as a way of life to be adopted at least partially on faith. Further, it is an idealistic concept with ethical roots in democracy.

The word 'decentralization' is often confused with 'delegation'; 'deconcentration' and 'devolution'. But it is not correct. Each word referred to above has its own meaning. Delegation is not transfer of authority but it is an assignment of authority to a lower body by a higher level of government. Delegation is merely a technique of administration or management while decentralization deals with deep urgencies of democracy.

Similarly, deconcentration is also a technique of administration. Deconcentration denotes assignment of certain functions to the agent of the Central/ State government to work in the

field. A huge country like India cannot run administration from one centre. For this deconcentration in one technique.

Devolution is close to deconcentration but it is also different. The method of devolution is applied to the formally constituted local authority while deconcentration is applied generally to the field agencies/ staff.

For those who deal with administration, delegation, deconcentration and devolution are simply the technical methods which are essential for efficient administration.

The meaning and scope of decentralization are much wider and deeper. It is a process of democratization of political power and there by aims at achieving democratic values in practice. Decentralization aims at widening the area of peoples' participation in decision making, micro-level political authority and autonomy through transfer of specific powers to peoples' representatives and their institutions at the grass root level.

Further from the angel of development administration, decentralization is important. Development administration stands for speedy socio-economic transformation. The post-war concern was to have new forms of administration which can deliver the goods. Decentralization has been looked at as a useful mode of administration to deliver the public service.

Decentralization is not new to India. Officially it was known to us Poom Ripon Resolution of 1882. This influenced the hesitant colonial administration to concede Indian demands for self-government and participation in administration.

After independence the constituent Assembly could discuss the issue of village democracy keeping Gandhi's vision of future India in which economic and political power would be decentralized and each village would be self-reliant economically. The inclusion of Article 40 in the part IV of the constitution bore testimony to this.

The planned economic development and social justice emerged as buzzwords in 1950s. But every age has its own vision and mission. To begin with India adopted 'Community Development' model. After five years of its introduction while it was under evaluation by B. R. Mehta Committee, they suggested three-tier panchayati Raj for democratic decentralization.

With much fun and fare it was introduced but it could not function properly as there were no functions and funds. In 1977 there was another attempt to revive it. The Ashok Mehta Committee recommendations were placed in the cold storage. The Ashok Mehta Committee commented- some would treat panchayati Raj just as an administrative agency, other as an extension of democracy at the grass root level; and still others as a charter of rural local government.

Thus, it was crystal clear that since the 'Ripon Reform' the 'Bureaucracy - democracy' debate was continuing. When it came to entrusting local development responsibilities, most state governments opted for their official field machinery and virtually by-passed panchayati Raj institutions on this issue Ashok Mehta Committee observed- "The luke warm attitude of the political elite at higher levels towards strengthening of the democratic process at the grass roots was generally the crux of the matter".

Due to this poverty and social injustices continued unabated. The country had a high profile central governance system but the grass root level popular institutions were not in order. This fact was indentified by the Committee for Administrative Arrangement for Rural Development headed by GVK Rao in 1985. The Committee stressed the importance of local initiative in local development and recommended prompt revitalization of the PRIs. This aspect was further examined by L.M. Shingvi who headed the Committee on Revitalization of PRIs for Democracy and Development in 1986.

The committee observed- "the PRIs have become moribund and they have been denuded of their promise and vitality. " The Committee recommended that to revive pnchayati Raj the local self-government should be Constitutionally recognized, protected and preserved by the inclusion of a new chapter in the constitution. Later the method of operation of this recommendation was corroborated by the Parliamentary Committee headed by P. K. Thungon. Ultimately, the 64th Constitution Amendment Bill was moved.

The then Prime Minister Rajiv Gandhi said on the floor of the Lok Sabha - "our democracy has reached the stage where the full participation of the people brooks no further delay. We are accused of rushing through the Bill. There has been no rush. For several years now, we have been holding well-publicized Consultations at several different levels on pnchayati Raj. To the people of

India, let us ensure maximum democracy and maximum development. Let there be an end to the power brokers. Let us give power to the People" (Lok Sabha May 15, 1989)

The much awaited Amendment Bill was rejected by the Upper House due to shortage of required number of votes. This led to the dissolution of Lok Sabha and announcement for fresh poll. The next Lok Sabha was short lived and under a national sorrow the nation experienced Lok Sabha poll again in 1991. Rao Government generated a consensus and 72nd Constitution Amendment Bill (1992) was moved and adopted.

On 24th April, 1993 the Bill received the assent of the President and it became the 73rd Constitution Amendment Act.

As per the provisions of the above Act,

- Panchayats at each level will be 'institutions of self-government'.
- Gram Sabha is the basic unit of the democratic system and it is composed of all the adult members registered as voters,
- There shall be three tier Panchayats at village, mandal and district level (Two tier for Small States)
- Seats at all levels filled by direct election
- Seats for SC & ST shall be reserved at each tier in proportion to their population.
- One-third of the total number of seats reserved for women. Out of the SC & ST reserve quota one-third is also reserved for women. One-third offices of chairpersons at all levels reserved for women.
- Uniform five-year term and elections to constitute new bodies to be completed before the expiry of the term. In the event of dissolution, elections to be held within six months.
- Independent Election Commission in each state for superintendence, direction and control of the electoral rolls.
- Panchayats to prepare plans for economic development and social justice in respect of 29 subjects listed in XIth Schedule. The District Planning Committee (74th Amendment) to consolidate plans.

- With regard to Funds the PRIs are to get budgetary allocation from State Governments, revenue of Certain Taxes, collect and retain the revenue it raises; Central Government grants and programme based receipts.
- In such state a Finance Commission to determine the principles on the basis of which adequate financial resources would be ensured for panchayats.

In this connection as per 'Eleventh Schedule ' the 29 subjects transferred to the panchayats are –

- Agriculture including agricultural extension.
- Land improvement, implementation of land reforms, land consolidation and soil conservation.
- Minor irrigation, water management and watershed development.
- Animal husbandry, dairying and poultry
- Fisheries
- Social forestry and farm forestry
- Minor forest produce
- Small scale industries, including food processing
- Khadi, Village and Cottage industries
- Rural Housing
- Drinking Water
- Fuel and fodder
- Roads, culverts, bridges, ferries, water ways and other means of communication.
- Rural electrification and distribution of electricity
- Non-Conventional energy sources.
- Poverty Alleviation Programme
- Education including Primary and Secondary
- Technical training and Vocational education

- Libraries
- Cultural activities
- Market and fairs
- Health and sanitation including hospitals, primary health and dispensaries
- Family welfare
- Women and child development
- Social welfare including welfare of the handicapped and mentally retarded
- Welfare of the Weaker Sections and in particular, of the SC & ST
- Public Distribution System
- Maintenance of Community assets.

Thus, the 73rd Constitution Amendment Act of 1993 caused and emergence of Vibrant grass root democracy in India. Later, on the basis of the commendation of Shri D. S. Bhuria Committee the provision were extended to the Scheduled Areas in 1996. (PESA ACT of 1996)

The Panchayati Raj whose roots were seen during ancient period has to undergo lot of internal ramifications before it could earn Constitutional identity and endowed with 'Funds, Functions, Functionaries and Freedom'

In the opinion of the George Mathew, after the 73rd and 74th Amendments the democratic base has widened enormously and enabling horizontal planning and implementation of development programmes.

Since 'Panchayat' is a state subject, after the much awaited constitution amendment Act all the states were required to pass confirmatory legislation. After the Act the political system in operation could undergo structural changes. Earlier the first and uppermost strata was the Union legislature Composed of Lok Sabha and Rajya Sabha. Below it was the second strata comprised of 28 states and 7 union territories and their law making bodies. With the panchayats becoming part of PART-IX of the constitution with a three-tier body over 32 lakh elected representatives have taken development initiative at their place of dwelling.

The entire political configuration is changed making it broad-based. The revival of Grama Sabha (Village Assembly) added popular participation and cooperation to the democratic governance system.

Shri A. B. Vajpai, the then Prime Minister of India in a letter to one of the Chief Ministers of the state in April, 2001 had written –

"Consequent to the Amendment, Panchayats have been visualized as the third tier of governance in the federal polity of India. "

Thus, Panchayats become integral part of the governance of our country.

The prospects of democratic decentralization depends upon the availability of three essential ingredients. They are –

1. Adequate powers to elected bodies
2. Adequate resources, mostly financial resources, must be provided, and
3. Adequate mechanism for accountability should be ensured – in order to ensure accountability of bureaucrats to the representatives and accountability of elected representatives to the electorate.

Unless the above fundamentals are made in built in to the system, the process of development through peoples participation cannot be achieved.

The 73rd Constitution Amendment Act provided Constitutional identity otherwise known as statutory recognition to three tier PRIs. It provided freedom, functions and functionaries. But 'Funds' happen to be the most valuable component for achieving success.

Before analyzing the constraints with regard to availability of funds, it will be wise to identify the existing fund scenario of the panchayats. This is relating to analyzing Panchayat Finance before expecting flow of funds to panchayats. It is to be accepted that funds of panchayats vary from panchayats to panchayats.

The provisions related to the financial powers vary not only from panchayats to panchayats in states, they also vary from state to states. One of the major factors behind this state of affairs is that most of the financial powers and functions to endowed to the panchayats

were left to the discretions of the concerned state legislatures. However, it was mandatory for the states to create state Financial Commissions (SFCs) to review the financial position of panchayats and review the financial relations between the state and the PRIs.

The Constitution of the First SFCs of all the sates and submission of their reports as well as their recommendations to the Financial Commission were not uniform with regard to the dates and datelines to be followed. Similar happenings were observed during the submission of Reports and recommendations of Second SFCs for which the National Finance Commissions could not get proper feed back before making their policy statements and awards. Baring a few states the recommendation of the Third SFCs were not available before the 13th Finance Commission.

The own income of PRIs (income generated through tax and non tax revenue) is very low. The devolution of finances to PRIs are also not uniform in all the states. Few states have become more pro-active in providing major chunks of their financial resources to grass root bodies.

It is to be noted that under Article 243-G of the Constitution the PRIs are given an important role to prepare plans at the local level. It has given power, responsibilities and authority (PRA) to the panchayats. These are –

(i) The preparation of plans for economic development and social justice,

(ii) The implementation of the schemes for economic development and social justice as may be entrusted to them including in relation to the matters listed (29 items) in the Eleventh Schedule.

(iii) The first provision is the original power of the panchayats which is regulated by the provisions of the State Panchayat Acts. But the second one, is the delegated function. Article 243-ZD directs conreation of District Planning Committee (DPC) in each district to consolidate the plans prepared by the panchayats and urban local bolides in the district and to prepare a draft development plan for the district as a whole. This is forwarded to the state government. Of course, inclusion of this in the state plan depends upon the attitude of the state. It is to be noted here that the state of

Kerala took a pioneering step to integrate the draft plan prepared by DPCs in the state plan. The decentralized planning, thus has two components - preparation of draft plan and then it included implementation for which adequate devolution of funds are essential.

In this context, an observation on panchayat finance in a report after survey may be looked into – the decentralization seems to take place when the State Governments take interest (UNDP) the devolution of power, function and functionaries are totally on state government's discretion. THE PRIs own revenue collection is low. During (1997-98) the per Capita tax collected by the PRIs in the country was Rs.9.38 on an average (the lowest in Assam Rs.1.66 and highest in Kerala Rs.43.45) the share of panchayat's own revenue in their total expenditure was as low as 3.23% during the same year at all India level (N. Ahmed – Centre for Budget and Governance Accountability) the same report found that the states still follow the earlier system of accounting conducted by Local funds Accounts Department.

Thus it seems, despite a high profile 73rd Constitution Amendment Act having Articles 243-H and 243-I providing for devolution of functions and finances a lot remains to be said. Even the Confirmatory Acts in states are passed but situations have not improved. It is to be remembered that without any mandate, the Tenth Finance Commission recommended financial provision for local bodies. The Eleventh Finance Commission was mandated to make recommendation for the PRIs. It recommended Rs.1600 crores per annum to the PRIs (Yr2001- 2005) to be distributed under certain criterion.

The Twelfth Finance Commission had the benefit of the work done by its predecessor (EFC) but it was also handicapped by the scattered and non-uniform reports by the SFCs as well as by gross inadequacy of usable data. The Commission tried to overcome these obstacles the Commission recommend Rs.4000 crore per annum (Yr.2005-2010) for the PRIs to be distributed amongst the states on the basis of a composite weighted index (proportion of rural population (2001)-40%, proportion of rural area (2001)-10%, distance from highest per capital income (primary)- 20%, with respect to GSDP (Primary Sector) – 10% and Index of Deprivation-10%) on the basis of calculation under C.W.I., U.P. got 14.64% (highest) share of recommended money.

The Thirteenth Finance Commission bsides making usual recommendation w.r.t a share of the divisible tax pool has introduced a performance based grant to the fulfillment of stipulated conditions. It is related to major improvement in the functioning of the panchayats. If more revenue generated more grants can be made available.

The Central Government has introduced many programmes and projects for the rural development. Besides MGNREGA, PMY, Rural Housing, IAY, SGSY, NSAP, NLRMP, WDP, NRDWP etc have augmented both fund and activity flow to panchayats.

In this context, it will be justified to look into the state of finance and resource mobilization in one of the States. For this purpose of I have picked up my own State (Odisha) to discuss the status of devolution and finances of PRIs.

Post 73rd Amendment picture in Odisha in nutshell

- Confirmatory Act promulgated
- Reservation for SC, ST and Women ensued
- SEC constituted and elections held regularly and next one due early 2013.
- SFC constituted- 2nd, 3rd SFC recommended for fiscal measures strengthening devolution.
- DPC Constituted and Functioning.
- PESA (1996) implemented
- Out of 29 subjects 21 subjects transferred to PRIs relating to 11 Departments.
- Devolved subjects like drinking water supply, sanitation, primary education, Health, anti poverty rural development schemes implemented.

The Ground Reality of Odisha

- Devolution depends upon strong political will.(MPs and MLAs resist transfer of power)
- There is no functional devolution.
- There is no financial devolution.
- There is no control over staff.
- PRI bodies do not have infrastructure and man power.

- PRI representatives do not have Capacities to absorb devolved functions.
- There is corruption at PRI level.

Research mobilization by PRIs depends upon the political will, administrative structure, the suitability of infrastructure, deployment of functionaries and empowerment for raising both Tax and Non-Tax revenue. Besides the above provisions we have noticed central assistance, Finance Commission grants, state grants etc. But many states have not yet introduced a pnachayat sector both in the state budget and state plan. In order to, give morale and motivational boosting government of India had conducted Seven Round Table Consultations in 2004. Picking up a sample from the state of Odisha, despite commitment given by the government the implementation is delayed for the disadvantage of the PRIs.

Table below provides a picture of 'Income-Expenditure' of gram panchayats in Odisha (2002-2008). It is evident from the tabular infomaiton that the expenditure (both revenue and capital) have remained constant or low over a period of five years. (2002-03- revenue expenditure capital expenditure being 48.52 Cr and 362.73 Cr where as the corresponding figures for 2007-08 were 47.65 Cr. And 331.92 Cr.) This implies that functional devolution was missing and GPs have not become resourceful in thinking and action.

Expenditure and Income of Gram Panchayats in Odisha (2002-03 to 2007-08) in c rore

YEAR	Expenditure		Own Resource		GOI Transfer	Finance Commission Transfer	Assignment and Devolution	Grants in Aid From State	Others
	Revenue	Capital	Tax	Non-Tax					
2002-03	48.52	362.73	1.28	7.84	168.12	67.14	23.88	24.43	118.57
2003-04	45.31	401.15	1.30	8.23	172.68	67.14	24.54	21.39	151.17
2004-05	31.61	398.78	1.30	8.39	197.32	67.13	17.55	10.81	127.90
2005-06	34.89	488.70	1.30	8.55	233.37	158.57	11.13	19.61	91.06
2006-07	42.83	435.49	1.37	8.75	130.12	158.62	20.83	86.15	71.98
2007-08	47.65	331.97	1.41	9.02	28.33	158.52	19.55	85.30	77.49

Source- Finance Department, Government of Odisha

From the tabular information it was evident that the own resources of panchayats are meagre. The task assigned under the eleventh schedule is enormous. Now in the state of

Odisha 21 subjects of 11 Departments are transferred to panchayat. But neither funds nor functionaries are given.

In this connection, the recommendations of 2nd SFC seem important. After a great deal of deliberation the Commission recommended for resource mobilization of the PRIs. But no step was taken in that regard by the concerned department of the state. The PRIs in Odisha are not self sufficient even to support their core establishment expenses. They depend upon the state grant as they do not have a wide base for revenue generation from their own internal sources.

Major Recommendations of 2nd SFC :

(a) RE-introduction of property tax
(b) Population Welfare Cess
(c) Pisiculture cess
(d) Education, Environment and Health care cess
(e) Education, Environment and Health care cess on mines, power plants, ports, jetties
(f) Parking fees
(g) License fees from shops
(h) Toll for using GP & PS roads
(i) Pilgrim fee
(j) Fees for birth and death certificate
(k) Turn over tax on MFP.

Despite a forward looking resource mobilizing recommendation by the 2nd SFC, the attitude of the state government was peculiar and there was inordinate delay in accepting the report and placing it before the legislature.

MAJOR RECOMMENDATIONS OF 3RD SFC –

The 3rd SFC headed by an economist who was also member of the 2nd SFC was critical of elusive attitude of the state government towards the 2nd SFC report. It has made the following recommendations –

(1) Release of state share by the Government of India.

(2) Revision of r ate of royalty.

(3) Opening of Panchayat Sector in the state budget.

(4) It recommended devolution of resources to PRIs for the following purposes-

(a) Livelihood (b) Education (c) infrastructure (d) Development of water bodies (e) Rural Water Supply (f) Up-gradation of village roads (g) Sanitation (h) Street lighting (i) Cremation/ Burial ground (j) Construction of Community Hall / Training Centre for SHGs (k) Herbal garden.

For all purposes it recommended Rs.3360-64 crores for a period of 5 years (2010-2015). There will not only raise living standards of the rural people, it will also help in the mobilization of funds through rent, fees and other taxes.

The Commission also recommended empowerment of Gram Panchayats to augment their own income through levy of new taxes/ fees. The GP was authorized to levy and collect the following taxes –

(a) Re-introduction of Panchayat Tax, (b) Advertisement Tax, (c) Permit Fees for construction, establishment or installation of factories, workshops or work places where electricity is used, (d) Share in cess on conversion of agricultural land for non-agricultural uses (e) social development and ecology protection fees (f) Transfer of sairat sources and minor minerals to the GP (g) License fees form shop & (h) Toll fee on roads.

The 3rd SFC also recommended to the 13th Finance Commission to provide Rs.8528.07 crores to PRIs in Odisha during award period 2010-15.

Finally, it is a known fact that the financial problems of the PRIs are their inadequate resource position. This is compounded by their limited and unremunerative tax resources, accompanied by niggardly grants from the states. The mounting problem of inflation disturbs the panchayat economy. It is expected that the SFCs should realize the plight of the panchayats and make realistic recommendations based upon needs of the panchayats as have been ordained upon them by the constitution. It is suggested that the whole scenario needs further examination and it required, the constitution should be further amended to assign the panchayats a given percentage or revenue of state taxes.

This would also take care to a large extent of the perpetual problem of their increasing expenses on account of inflation. This way, the panchayats will also be able to enjoy the revenue byouancy of expanding economic activities.

It is further suggested that the task of the SFCs should mainly confined to that of recommendation for grants and determining shares of individual panchayats within their collective share. Such a course can be accompanied with an outright abolition of terminal taxes, if any. The amount of resource relief which the panchayats would enjoy will be quite substantial. It panchayats receive 10% of States Sales Tax or 5% of Central Tax, then their resource crunch will disappear. They will also benefited by the resource buoyancy of the state government.

Hence, it is utmost importance that the appointment of SFCs, submission of their reports and action taken by the state governments should be according to a uniform time frame throughout the country. There should be a systematic and timely collection of all data relating to panchayats. To make panchayats resource-rich, there is urgent need to improve the administrative culture of grass root bodies.

Suggested Readings and References –

1. Constitution of India
2. 73rd & 74th Amendment acts (1973)
3. PESA Act (1996)
4. Odisha State Finance Commission Reports (2nd & 3rd)
5. Report Abstracts of 10th, 11th, 12th and 13th Finance Commisisons.
6. Public Finance by H. L. Bhatia
7. Decentralization of Power and Rural Development in India – by Dutta and Chakraborty (ED)
8. Decentralization of Finance – Survey Report by N. Ahmad (Centre for Budget and Governance Accountability, New Delhi)
9. Local Government in India – Present Status and Future Prospects - by Gerorge Mathew
10. Politics in India (Oxford) – Joyal and Metha (Ed)

Legal Process of Cases Relating to Offence of Rape : A Critique

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ABSTRACT

This paper is an attempt to look into the procedural aspects of rape cases with an object to critically examine the pre-trial as well as trial stages in trial courts in rural as well as urban areas in West Bengal. The selected cases reveal various gaps and aberrations of the legal processes by the police, lawyers and courts. The paper establishes that victims of rape offences are doubly victimized due to inappropriate legal process.

Keywords: committal of cases; legal process; trial; victim

Introduction

Women have been the target of violence by men since time immemorial. A survey of statistics of offences of rape shows that every year the number is spiraling higher and higher. The Mumbai Police Chowki Rape case, the German lady rape case, the Delhi gang rape case- the number has only increased over the years. Although the graph of crime of rape is galloping at a very fast pace, yet the authorities instead of taking positive steps keep passing the responsibility from one authority to another. Women as victims of rape, therefore, demand immediate attention of all concerned. One of the reasons for increase of such offence of rape is the uncertainty of conviction due to flaws in legal process. This article identifies the lacunas in our legal process.

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The paper has been developed from the data collected by the Author as Project Director in connection with the Research Project Access to Justice to Disadvantaged groups in West Bengal during 2007-2008 sponsored by UNDP and Government of India, Ministry of Law and Justice in collaboration with National Judicial Academy, Bhopal. The author is also acknowledging the information and observations made by Dr. A. Mukherjee in his unpublished Ph.D. thesis titled "Women as Victim of Crime: A Study of Legal Process in West Bengal" of University of Calcutta submitted in 2009.

STATISTICAL REALITY

The offence of rape continues increasing in India like other countries despite some legislative and administrative measures. According to *Crime in India 2011 incidences of rape in the respective years are as follows: 2001-16075; 2002-16373; 2003-15847; 2004-18233; 2005-18359.2006-19348;2007-20737; 2008-21467; 2009-21397; 2010-22172; 2011- 24206*[1].

The sharp increase from 2004 onwards is a discernible concern for the criminal justice administration.

METHODOLOGICAL EXPLANATION

The data used in this paper has been selected from cases collected in connection with UNDP sponsored Access to Justice Project in West Bengal which were collected from various trial courts in West Bengal during 2000-2005. In selecting six cases the author has given focus only on the variation of grounds of delay without repeating the similar situations. The legal process of the six cases described in the paper has been written in verbatim from case records as far as practicable but names of the victims have been changed.

LEGAL PROCESS OF CASES WHERE WOMEN ARE VICTIMS OF RAPE

The offence of rape is cognizable, non-bailable, non-compoundable and triable by the Court of Sessions. Punishment may extend to imprisonment for 10 years and fine (S.376 of I.P.C.) One author rightly observed the "rape is an expression of domination, power and aggression, a serious violation of the dignity and freedom of a person"[2]. The study will focus ovaries instances of such abuses of power and domination by the accused. The available cases show how the justice is being denied and delayed in various stages to the victim due to various abuses of legal processes

The inference drawn from studied cases is that in exceptional cases, when such type of crime is contested, the attitude of the court is not very encouraging and mostly it is the

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1 *Source: Crime in India 2011, published by Government of India, National Crime Record Bureau*

2 Dipa Dube,2008*, Rape Laws in India* ,Lexis Nexis Butterworths India, New Delhi,p.175.

guilty person who comes out victorious after an arduous legal battle, mainly on the basis of observation of the court that victim was a consenting party.

The study of the following cases has been done in victim's perspective wherein attention has not only been drawn on the violation of criminal law but also on the procedural laws and abuse of power. Hence 'victim' has been conceptualized under definition given in United Nation Declaration on Basic Principles of Justice for Victims of Crime and abuse of Power[3]. Let us observe the abuse of powers in the legal processes of rape cases in six selected cases hereunder.

CASE No. 1 : ***State of West Bengal v. Ajoy Mitra***[4]

Date and hour when incident reported: on 14/06/1996 at 15:10 hours

Place: inside a hotel room at 109, Ultadanga Main Road, Kolkata – 700067.

Complainant/ victim: Lotus aged about 15 years resided at Ultadanga , Kolkata – 700067.

Facts: Complainant Lotus was a worker of the accused person's eating house at 109, Ultadanga Main Road and serving that hotel since five years she used to sleep that hotel. In the month of January, 1996, one night while the complainant was sleeping in the hotel at that time, accused taped her. The victim did not made any complaint as she was assured by the accused that he will marry her. After that the accused raped her almost every day in the hotel. In the process, the victim became pregnant by the accused and she insisted to marry her, but the accused Ajoy Mitra driven the victim from his hotel.

Thereafter the victim girl came to the police station and lodged the complaint.

Date of charge sheet: After completing of investigation Charge Sheet (CS) was submitted on 17/05/1998 against the accused Ajoy Mitra under Section 376 IPC.

Legal process: Accused was arrested on 17/06/1996 and was released on bail on 01/08/1996. In the charge sheet 13 persons including victim have been cited as witnesses. Neither blood nor semen could be detected in Ex – A.B.C.D. but semen could be detected

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[3] See Part A. Victims of Crime, Article 1 of UN Declaration on Basic Principles of Justice for Victims of Crime and abuse of Power declared on 29 November1985

[4] Case No. G.R. 1329/96 T.R. 66/2000; Session Case No. 165 dated 14/06/1996 Under Section 376 IPC

in Ex – F but group of semen could not be determined as quantum was not sufficient for determination. The committal of the case to the Court of Session was made on 14/07/2000. As accused was absconded, so Warrant of Arrest (WA) against him was issued by Trial Court on 12/06/2001. W/A could not be executed by police since 28/04/2006 and for which trial could not be started.

CASE No. 2 : ***State of West Bengal v. Gopal Prosad Sharma***[5]
Date of incident: 24/11/1993 at about 23:50 hours
Name of complainant/victim: Miss Jui (15 years) of Kolkata – 700067.
Date and hour when reported: 29/11/1993 at 23:45 hours
Place of occurrence: In a vacant room at premises No. 18, Canal East Road, Kolkata – 700067.

Facts : On 24/11/1993 at about 23:50/55 hours while de-facto complainant was returning to her house after attending function near her house and she reached in front of her house suddenly accused Gopal Prosad Sharma appeared before her and asked her to go in a room near her house. On good faith complainant had gone to said room which was a dark room. When she reached in that dark room Gopal committed rape on her forcibly without her consent and he also molested . She tried to save her but could not succeed. After committing rape accused had threatened her for dire consequences, if she discloses it to others. In the next morning she narrated the incident to her brother when she felt pain on her abdomen. Immediately she was taken to R.G. Kar Hospital where she was admitted in ground floor in female ward. Due to severe pain, she could not lodge complaint before police earlier.

Legal process: Accused was arrested on 30/11/1993. As charge sheet could not be submitted within the statutory period accused was released on bail on 31/03/1994.

Date of filing charge sheet: Charge sheet filed against accused Gopal Prosad Sharma on 25/04/1995 Under Section 376 IPC.

Date of service of copy: Though C.S. was filed on 25/04/1995, but copy was not ready till 13/08/1998. The copy of CS was served to accused on 09/09/1998.

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[5] Case No. Section C-1, Case No. 304 dated 30/11/1993 Under Section 376 IPC.

Date of committal of the case: The case was committed to the Court of Sessions on 17/11/1998. The accused remained absconded since 12/03/1999 and trial of the case could not be started as police could not execute warrant of arrest at least till 20/04/2006(the date of collection of data).

CASE NO. 3 : State *of West Bengal v. Chitta Das* [6]
Date of occurrence: 29/06/1994 at about 17:00 hours.
Date of reporting: 03/07/1994 at 12:05 hours
Place of occurrence: inside the Jhupri situated on Canal West Road, Khalpul.
Complainant: Moon, (12 years) resideded in a Jhupri (slam area) adjacent to a canal, in Kolkata.

Facts : Moon is aged about 12 years resided in a Jhupri and passed her days by preparing paper packets (thonga- prepared from newspaper). On 29/06/1994 at about 5:00 pm. the accused Chitta, a neighbor whom she called as 'Chittamama', came to the house of victim. At that time brother of victim and sister were present and victim's parents were absent in the Jhupri. Then accused after giving a Rs.10/- note to the brother and sister of the victim asked them to bring 'chop-muri' from a nearby shop. After both brother and sister went away, the accused had forcibly put her in the inside room and forcibly committed rape upon her. She started to shout as she was feeling pain and at that time her brother and sister returned and accused fled away. She narrated the incident to her mother on the next day.

Legal process: Accused was arrested on 04/07/1994 and was released on bail on 30/09/1994 as C.S. had not been submitted inspire of getting reasonable time by the I.O.

Date of filing charge sheet: Charge sheet was submitted on 12/06/1997 against accused, Chitta Das under Section 376 IPC.

Date of service copies: C.S. submitted on 12/06/1997 but copy was not ready till 24/06/1999 and the copy was served to accused person on 20/07/1999.

Date of commitment: Case was committed to the Court of Sessions on 12/08/1999.

Witnesses: as many as ten persons have been cited as witnesses in the charge. sheet.

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[6] Case No. 154 dated 03/07/1994

Result of laboratory analysis: Neither spermatozoon nor gonococcus could be detected in the vaginal swab and said to be of Moon.

Accused absconded since 03/12/1999 and trial could not be started till 20/07/2006 as police failed to arrest accused person till that day.

CASE NO. 4 - ***State of West Bengal v. Badrud Jamal @ Jamal Doctor*** [7]
First Information Report lodged on: 02/10/2004
Date of occurrence: 01/10/2004.
Name of Complainant: Jahanara (mother of victim).

Fact: On 01/10/2004 (Friday) all the members of her family went to mosque and Anju the victim , aged about 14 years only, was doing domestic works alone in the house. Taking advantage of such a situation, accused illegally trespassed at the house of the victim and she was not suspicious as the accused used to come to their house. Then accused asked Anju to go in a room which she complied. Accused suddenly caught hold of her forcibly and committed rape upon victim . One Kusun Bibi who happens to be the sister-in-law of complainant had noticed the incident and she reported it to her neighbor and accused in the meantime had fled away from the place of occurrence by riding a bicycle.

Date of surrender: Accused voluntarily surrendered before the court on 19/10/2004 and he was taken into custody after rejecting his bail prayer. Ancipatory bail prayer of accused was also rejected on 18/10/2004 in Misc. case No. 396/04.

During investigation statements of victim Anju and eye witness Kusum Bibi's statements were recorded under Section 164 Cr. P.C.

Date of filing charge sheet: Investigating officer after completion of investigation has submitted charge sheet against accused Badrud Jamal under Section 448/376 IPC on 03/11/2004.

Date of serving copy to accused person Under Section 208 Cr. P.C. - 04/12/2004

Date of Commitment: 18/12/2004

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[7] **Case No. :** Kushmandi Police Station C/No.68/04 dated 02/10/2004 Under Section 448/376 IPC. Sessions Case No. 339/04;Sessions Trial No. 01/05

Date of framing of charge: Charge framed against accused person Under Section 376/ 448 IPC on 04/01/2005.

Forensic report: victim stated that immediate after occurrence she had washed her wearing apparels as per advice of family member and as such forensic report shows that no semen could be detected in either Salwar or Kamas and neither spermatozoa nor gonococcus could be detected in vaginal swab of victim .

Legal process : During trial the defacto complainant was examined as PW1, victim Anju as PW 2, Shyamal Kr. Ghosh as PW 3, Mazina Begam (neighbor of victim) as PW 4, brother of victim Asrafas Haque as PW 5, Ayasa Begum as PW 8, Massure Bewa as PW 9, Narul Hag as PW 10, S.I. Biswanath Halder as PW.11 and I.O. Jayanta Dutta as PW. 12.

Examination Under Section 313 Cr. P.C. : Accused was examined Under Section 313 answered that he is innocent.

On the same date argument also heard and accused was acquitted Under Section 235(1) Cr. P.C. as most of the witnesses turned hostile and on dock they did not support their statement earlier made by them before I.O. under Section 161 Cr. P.C. or Under Section 164 Cr. P.C. before Magistrate.

CASE NO. 5 : State of West Bengal - v. - Sew Narayan Bhumi Rajbanshi and Others[8]

Name of the Complainant : Tapasi (Victim)

Names of the accused persons:

i) Narayan Bhumi Rajbanshi ii) Gobinds Kr. Tatowa @ Sajan iii) Rajan Taswan iv) Rama Taswan

Fact of the Case: The victim Tapasi is a resident of Champdani, Bhadreshwar, Hooghly. She used to earn her livelihood by sewing quilt etc.

On 21/02/2001 at about 3:00 pm Accused No. 1 met her and asked her to come to his house, situated beside Northbrook Line. For taking some orders at about 3:30 pm. the

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[8] Case No. In the Court of Additional Sessions Judge, 1st Fast Track Court, Chandannagore, Hooghly.S.C.Case No. 168 of 2003; S.T. 1 of 2004. GR – 123/2001;U/s 376(2)(g) IPC. ; P.S. Bhadreshwar dated 26/02/01

victim went there and the Accused No. 1 forcefully took her to his house where there were other nine persons. They tied her mouth by a towel therefore all of them raped her one after another at the point of knife. At the intervention of her uncle Accused persons left the place and later on the victim was left to her house by accused Utpal who threatened her with dire consequences if she informed the police under compulsion she disclosed the incident to her husband and thereafter on 26/02/2001 she lodged the FIR with Bhadreshwar Police Station. The accused were arrested and forwarded before the Court of law for Legal recourse. The following are the dates fixed for the Case before the Court of Sessions Judge, Hooghly:

22/09/2003 : The accused persons prayed for bail before the Ld. Session Judge after being remanded in Jail custody

24/09/2003 : The bail prayer was rejected.

28/10/2003 : The case was transferred to the1st Additional Sessions Judge, Hooghly

07/11/2003 : The Ld. Additional Sessions Judge, Hooghly was busy with administrative work and another date was fixed.

19/11/2003 : The case was transferred to the 2nd Additional Sessions Judge Hooghly

05/12/2003 : The Learned Sessions Judge 2nd Court, Hooghly was busy with administrative work and next date was fixed for framing of charge against the accused person.

19/12/2003 : This date was fixed for framing of Charge against the accused person. But the case was again transferred to the Court of Additional Session Judge 1st Fast Track Court, Chandannagore, Hooghly.

20/12/2003 : The case record was received by the Court of Additional Session Judge, 1st Fast Court, Chandannagore, Hooghly. The next date was fixed for framing of charge.

12/02/2004 : Public prosecutor-in-charge was absent. The next date was fixed for framing of charge.

19/02/2004 : Charges were framed against the accused persons U/s 376(2)(g) IPC and a schedule was fixed for consecutive trial.

04/03/2004 : Prosecution witnesses (PWs) from 1 to 3 were examined and cross examined. The trial was held-in-camera.

05/03/2004 : Prosecution witnesses (PWs) from 4 to 6 were examined and cross examined.

08/03/2004 : Prosecution witnesses (PWs) from 7 to 9 were examined and cross examined.

09/03/2004 : Prosecution witnesses (PWs) from 10 to 12 were examined and cross examined.

10/03/2004 : Prosecution witnesses (PWs) from 13 to 15 were examined and cross examined.

11/03/2004 : Prosecution witnesses (PWs) from 16 to 18 were examined and cross examined. As there was need for further evidence by some vital witnesses, another date was fixed.

16/03/2004 : The date was fixed as there was need for further evidence by some vital witnesses, but the P.P-in-charge and the witnesses were not present and another date was fixed for the sake of Justice.

17/03/2004 : This date was fixed as there was need for further evidence by some vital witnesses, but the P.P - in - charge and the witnesses was not present and another date was fixed for the sake of Justice.

20/03/2004 : This date was fixed for examination of remaining Witnesses and examination of the accused persons by the Court U/s 313 Cr P C. But no Witnesses were present and the Ld. Advocate for the defence prayed for closure of the Case. The P.P.-in- charge also gave his consent for the closure and the accused persons were examined by the Court U/s 313 Cr.P C. After that the argument of both the sides were heard by the Court and next date was fixed for pronouncement of Judgment.

22/03/2004 : This date was fixed for pronouncement of Judgment by the Ld. Court. The accused persons were found not guilty of the charge and was acquitted U/s 238 Cr.P.C.

CASE NO. 6 : State of West Bengal v. Rajen Das. [9]

Police Station Chandannagore, District – Hooghly, DT 31/05/1996

U/s 376 I.P.C- Rape.

Name of the Complainant : Smt. Jamini of P.O. & P.S. Chandannagore, Hooghly.

Name of the Accused persons : Rajen Das @ Rajmohan Das, S/o Late Priyanath Das, Halderpara, P.S. Chandannagore, District – Hooghly.

Fact of the Case : On 31/05/1996 in between 20:00 hrs. to 20:30 hrs one aged man Rajmohan Das @ Rajen Das committed rape upon Jamini, an aged widow lady , in her house in absence of her son. The accused forcefully took off the victim's sareet and tore off her under garments and forcefully raped her by way of direct penetration. The victim raised a hue and cry and a local boy named Shyamal Biswas came to her rescue Shyamal caught Rajen red handed and gathered a crowd where Rajen confessed his guilt and offered a sum of Rs.50,000/- to the victim as compensation in lieu of which the victim should suppress the fact of the whole incident. But the victim refused to do so and lodged a complaint with the Chandannagore P.S. on the basis of which a Case was initiated and the accused was forwarded before the Court of Law for legal lecourse.

25/08/2004 : This date was fixed after commitment for appearance of the accused..

30/09/2004 : This date was fixed far appearance of the accused and framing of charges. The charge was framed and a schedule of consecutive dates was fixed for trial.

03/01/2005 : Examination of prosecution Witness (PWs) No. 1 & 2

04/01/2005 : Examination of prosecution Witness (PWs) No. 3 & 4

05/01/2005 : Examination of prosecution Witness (PWs) No. 5 to 7.

06/01/2005 : Examination of prosecution Witness (PWs) No 8 & 9. As some vital PWs. Were yet to be examined the P P. prayed for time. Time prayer allowed and next dates were fixed.

24/01/2005 : Examination of the rest PWs.

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[9] Case No.In the Court of Ld. Assistant Sessions Judge, 2nd Court, Hooghly;S.C. Case No. 122 of 2004 S.T. Case No. 41 of 2004

25/01/2005 : Examination of the rest PWs. Were completed and next date was fixed for examination of the Accused U/s 313 Cr.P C. and hearing of arguments.

27/01/2005 : The Accused Was examined U/s 313 Cr.P.C and after hearing of arguments. And on that date Judgment was pronounced. But due to lack of proper evidence the Court acquitted the Accused person.

FINDINGS

From this study one thing is apparent that the victim women is a "forgotten woman" in the criminal justice system. The Supreme Court in *Dayal Singh v. State of Uttarakhand* [10] rightly observed " The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the state and prosecuting agencies". The trend shows a moved increase of incidence of crime in one hand and a growing backlog on investigations, prosecutions and trials and declining rate of conviction on the other. The obvious inference is that more and more criminals are going unpunished. If this trend is allowed to go unchecked, it will further erode credibility of the criminal justice systems, reduce people's faith and confidence in its efficacy and further encourage a tendency on their part to take law in their own hands. Therefore from the rape cases depicted in this paper following lacunas have been identified and suggested some remedial measures also. The Supreme Court in *Ranjan Dwivedi v. C.B. I through Director General* [11] has formulated certain guidelines for speedy trial.

Victims do not want to continue with the arduous legal battle

Most of the rapes that are committed against women have become so institutionalized that they are condoned not only by the society and other institutions that are supposed to curb them but also by the victims themselves at the initial stage. The inference drawn from studied cases is that in exceptional cases, when such type of crime is contested, the attitude of the court is not very encouraging and mostly it is the guilty person who comes out victorious after an arduous legal battle, mainly on the basis of observation of the court that victim was a consenting party.

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[10] 2012, 8SCC 263

[11] 2012,7 SCALE 382

Inappropriate legal provisions

Most of the protective laws fail because of various loopholes and shortcoming. In most of the rape cases, instead of solving problems , its ambiguity and complication of evidentiary rules makes the situation more complex. The police, the lawyers, the judges are responsible in his own way to combat the rocket explosion of crimes and judicial delays.

It is found, as we see in the illustrative case No.- 1 & 2, if one of the accused evades appearance in court, the proceedings get adjourned till his presence is secured. Until then victim's witnesses are coming to the court without actually any progress in the case being made or achieved. The court issues non-bailable warrant against the absent accused. If the police is unable to execute the warrant and returned the same to the court, the court has to declare him as proclaimed offender and follow the procedure as laid down in sections 82 to 88 of the Cr.P.C. In this respect procedural law has not been suitably amended making it easy for the court to split up the case against the absconded accused and proceed with the case where the accused was available by giving separate case number.

Completion of Investigation report

Section 173(2)(ii) of Cr.P.C. specifically provides that investigating agency while submitting police report on completion of investigation, shall also communicate the action taken by him to the person by whom the information relating to the commission of the offence was first given. In spite of that police reports, be it in the form of charge-sheet or otherwise, are not being informed to the FIR maker by the police at the time of submission of report before court and as such court has to take the responsibility to inform FIR maker or victim about police action taken after conclusion of investigation.

Role of the investigating agencies

The shortage of police personnel has contributed sorry state of affairs. There is no special branch of investigation agency . Anything connected with politics and politicians becomes a mega affair and police men are requisitioned from nearby police stations. This has reduced the availability of the police force for protective, preventive and investigative work at the station level. That is why warrants are not executed in time and investigation report not submitted within reasonable time.

Most of the women are scared to go to the police station to report crime being committed against them as they have no faith in the police. Majority of the crime against women are committed by known culprits, yet the police man usually fail to collect evidence which will prove their guilty. They show their reluctance in making arrangement for prompt medical examination of the victim, seized of wearing apparel and other articles including weapon used, apprehending accused persons etc. for some reason or other.

The Role of Judiciary

In Court serious cases relating to crime against women are being adjourned without just cause and long dates are given to frustrate the victims. The release of persons, charged with heinous crime, on bail and anticipatory bail has a very demoralizing effect on the victim. Delay in lodging FIR is seen by the courts as a material to doubt victim's testimony without realizing that it does take time for a women to muster enough strength and support for the registration of a case which is socially stigmatized. The backlog crisis has brought about a virtual collapse of the legal system. It is source of intense frustration for the women litigants.

Researcher as a trial judge found that he had to post sometimes more than a dozen cases for trial knowing fully well that hardly 4 to 5 cases can be taken up for evidence in the present court management. Invariably some cases which include crime against women also got adjourned. In the present practice it is an unpredictable atmosphere to the victim and her lawyer who do not know definitely as to her case would be taken up for hearing on the given date. On being asked trial judges expressed their fear that posting of few cases, sometimes may render a workless situation, if all the posted cases get adjourned. In this regard the observation of justice Krishna Iyer is worth mentioning:"A socially sensitized judge is a better statutory armor against gender outrage than long clauses of a complex section with all the protections written into it."[12] " Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice[13].

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[12] Justice Krishna Iyer *in Krishnalal v.. State of Haryana* (AIR 1980 SC 926

[13] Ram Chander v. State of Haryana ; 1981, 3 SCC 191)

Lack of co-operation by witnesses

Study reveals that most of the cases under section 498A, 304B, 306 IPC ended without fruitful result for the victim, mainly because of lack of co-operation from the witnesses. A humane and dignified treatment of public witness, protection of witnesses, adequate seating facilities in the court room and better attention from the court staff towards witnesses are likely to go a long way towards removing indifference and unwillingness of witnesses to go to court.

Under Section 301 Cr.P.C public prosecutor may avail himself of the service of counsel retained by a victim but the management of the prosecution always remain with him. Lawyer engaged by victim has to act only under the direction of the public prosecutor. He can only submit written argument and that too with the permission of the court and therefore victim's privately engaged lawyer has no independent status of his own. Researcher has noticed during case study that many criminals go free because the public prosecutor has not cross examined the important witnesses in systematic manner. Management of prosecution has not been reformed with effective participation of victim in the criminal justice process so that quality of the management of the prosecution can be improved.

Hydra-headed legal process

As the criminal justice procedure is time consuming, so many victim expressed their unwillingness to process the criminal case through the criminal justice system. Magistrates have to record the proceeding of the court by long hand. Cases are usually adjourned on some reason or other. These are various factors which slow down court procedure and in turn discourage the victim seeking the criminal justice system. The Supreme Court in number of cases pointed out the lacunas and indifferent attitude of the trial court judges towards women as victims of crime; such as *Dinesh @ Buddha v. State of Rajasthan*[14] *(*Prohibition of mentioning names of rape victims in the Court Judgment, *Sakshi v. Union of India*[15] *(*Guidelines for dealing with cases of sexual/child abuse*), Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty*[16]*, (Rape* amounts to violation of the Fundamental Right

[14] *AIR 2006 SC 1267*

[15] *AIR 2004 SC 3566*

[16] *AIR 1996 SC 922;*

guaranteed to a woman under Article 21 of the Constitution), *Delhi Domestic Working Women's Forum v. Union of India*[17], *(*Direction in handling rape victims*), State of Himachal Pradesh v. Raghubir Singh*[18], *(*Sole testimony of the prosecutrix in a rape case*), Zahira Habibulla H. Sheikh and Anr. Vs. State of Gujarat and Ors* [19]*(*protection of witness and fair trial*), State of Punjab Vs. Gurmit Singh & Ors*[20]*(*In-camera trial in rape cases*); Sheba Abidi v. State & Anr*[21]*(* regarding examination of victim in rape cases*); and many other cases.*

In the last case, women domestic servants subjected to indecent physical assault by army personnel in train. A writ petition filed by women's forum to expose pathetic plight of such victims. The Court gave certain directions to deal with such victims. It also called upon the National Commission for Women to engage itself in drafting scheme providing relief to victims of such cases. It also urged the Union of India to take necessary steps**.** The law relating to restitution of victim of crime is basically contained in Section 357 of the Cr.P.C, but this provision leaves it entirely to the discretion of the court and unfortunately courts have seldom invoked this power due to ignorance of the object of it. In this context law commission of India observed that the courts are "not particularly liberal" in utilizing this section (S.357)and also commented that it is regrettable that our courts do not exercise their statutory power as freely and liberally as they could be desired.[22]"The defects in the present system are : Firstly, complaints are handled roughly and are not even such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself. [23]

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17 *(1995) 1 SCC 14*

18 *(1993) 2 SCC 622.*

19 (2004) 4 SCC 158;

20 AIR 1997 SC 3011

21 (1996) 2 SCC 384;113 (2004) DTL 125

22 Law Commission of India 41st Report

23 Law Commission of India 42nd Report

CONCLUDING REMARK

The morass into which the criminal justice delivery system has presently fallen into is not on account of the failure or lacunas of the law but on account of the failure of the men both by the police and in the judiciary who wielded the law. The Supreme Court of India in *High Court of Rajasthan Vs. Ramesh Chandra Paliwal*[24] observed that the Judiciary in India failed to response proper by to the gaps of legal process. Their mission is to supply light and not heat". The Supreme Court also observed "If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine[25]. To do justice to victims of crime in general and women as victims of crime in particular we have to change our social, legal as well as infrastructure of justice delivery system. Moreover to check the increasing trends of violence against women, it is necessary to create a wide atmosphere of resistance and protective measures in which women at all levels are increasingly stand up to fight the violence and seek well established victim justice support system to live with dignity and honour. The lapses or lacunas of our procedural laws are not given due attention compared to our substantive law. In a study sponsored by UNDP and Ministry of Justice on Access to Justice[26] for poor and disadvantaged group attention was drawn regarding the unusual delay (even 3years to five years) of framing of charges and supply of copies of charge sheet to the accused in 2008 to the Government of India but no steps have been taken and no improvement of the situation even today. The Government of India has taken steps to reform the law relating to offence of rape but the focus is in the substantive provisions of law and not in the area of procedural aspects of law[27]. The Committee though made 12 key recommendations but

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[24] AIR1998SC1979

[25] 1981,3SCC191.

[26] see Report on the Research Project "Access to Justice by Poor and Disadvantaged People: West Bengal" conducted by State Level Project onitoring Committee,West Bengal 2008, pp.18-24 and Table-6

[27] see The Telegraph dated 24th January 2013; The Committee was constituted on 23rd December 2012and submitted its 631pages Report after considering about 80,000 representations. The Committee comprised of Justice J.S. Verma Former C.J.I , Justice Leila Seth and Mr. Gopal Subramaniam. Also the Criminal Law (Amendment) Ordinance 2013 promulgated by the President in February, 3, 2013.

not a single recommendation was there on the procedural lacunas for getting justice to victims and certainty of punishment. My experience with the reality of legal processes of cases on the offence of rape reminds me the words of the famous jurist Oliver Wendell Holmes,Jr.: "The life of the law has not been logic, it has been experience …. in order to know what it is, we must know what it has been, and what it tends to become…"[28]. The author, therefore, expecting legal reforms in the areas identified in this study in near future to make our criminal justice processes more efficient and effective.

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[28] Holmes (1881) *The Common Law* , Boston: Little Brown,pp.1-2.

Alienation of Tribals from Land and Forest vis-a-vis Tribal Retaliation in India : An analysis through the lens of Human Rights Jurisprudence

Shambhu Prasad Chakrabarty Dr. Rathin Bandyopadhyay***

ABSTRACT

Around 461 tribal communities live in India. The total scheduled tribe population according to the 2011 Census Report is 84,326,240. The biggest challenge that these communities faces in their struggle for existence concentrates on land. Land has however been considered in various international instruments as the physical, cultural and spiritual validity of the indigenous communities. Several specific legislations have been enacted by the Central and State Governments for the welfare and protection of the tribal people and their tribal domain but the promises are yet to be fulfilled.

Keywords: communities; adivasis and aboriginal; criminal tribes; tribal-state.

Prologue

Inequality reigns over equality, un-education over education and barbarism over civilization. This has been the characteristics of most colonial states that led to the worldwide movement of de-colonization. Along with it, another movement developed during the post World War II era, the human rights movement. Thus, the two great innovations in international law in the post war years are:

1. De-colonization and
2. Development of the international law on human rights. [1]

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[1] Douglas Sanders- 'Indigenous Peoples on the International Stage', Social Action Vol.43, Jan-March 1993, pp 1-7 at p 1.

Indigenous communities got little from the former but did gain considerably as the area of human rights expanded to provide them a distinct place in the stage of international law.

Even when there is little ambiguity as to the need of protection of human rights of the indigenous people, debates raised high as to the use and protection of the term indigenous in Asia.

The term got its acceptance in the UN in respect to those communities prevalent in the countries which are clearly understood as indigenous, viz., Maori and Aboriginals' in New Zealand and Australia respectively and the Red Indians and the Aleut of the USA.

Demographically, the indigenous communities may be classed in the following three layers:

1. Where these communities are of minor population.
2. Where the majority of the population are these communities e.g., the Atan of China and
3. Where the communities do prevail without governmental recognition. E.g., the Sami people of Norway or the Ainu of Japan.

1. Indigenous or Tribals: The conceptual Debate

India, from the very outset during 1984 stated that the scheduled Tribes of India are not indigenous. It was designated that India has long been a 'melting pot'. It was argued that it is now very difficult in India to come across communities which retain 'all their pristine tribal character'. However, if this logic is to be adhered to then there cannot be any tribal communities anywhere in the world.

The double standard reflected by India in the international forum when it was stated that the tribals survive but not as indigenous communities. However, this distinction took place at much later stage as India being a party to the ILO Convention of 1957 on Indigenous and Tribal Population. India supported the document at the early stages when it only used the term Indigenous. In a number of Government publication the term adivasis and aboriginal have been used interchangeably. The current rejection of the

term indigenous developed in the context of the Working Group in 1984 and later in 1992. [2]

The term tribe has not been defined in the Indian Constitution. However, Art. 342 state that the Scheduled Tribes are the tribes of those communities, which the President may specify by Official Notification.

The international definition of the term indigenous people is indeed problematic in the Indian context as the population movement and the experience in India have been different from the new world. The benchmark being the territory where they live in, being the primary determinant of indigenous shall always be debated. However, the communities in question have considered themselves as indigenous as against those of other communities. They consider themselves to have prior and preferential if not surely an exclusive right over the territory where they lived either on account of their prior settlement or numerical or other dominance. Following this they aspired to promote and protect the interest and welfare of the community and confer on the members of their, special rights and privileges.[3]

To abate the debate the term tribe shall be given preference in this article. The object of this article is not only to identify the tribals but to understand the problems faced by them and what leads them to frequent retaliation. There is overwhelming discussions relating to tribal rights movement in the era of human rights in the international forum. And this paper would try to explore the various difficulties of this section of the Indian populace. The issue is to identify tribes. Even when there is no clear identifier of tribes, some basic patterns are developed to incorporate them in the Fifth and Sixth Schedule of the Indian Constitution.

The term 'tribe' came from the Latin term '*tribuz'*, meaning three divisions. The basic pattern for which they are commonly identified are primarily geographical isolation, simple technology, and simple condition of living, tribal language, specific physical features etc. the most common traits amongst all being geographical location, homogeneity, self contained and self sustained economy, unique ethnic, linguist and religious practices,

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[2] IWGIA, 1992. Report of the Working Group on Indigenous populations on the tenth session, Geneva, International work Group for Indigenous Affairs.

[3] Virginius Xaxa, 'Tribes as Indigenous People in India.' 34 EPW 3589 December 1999 at 3593.

various customs, traditions and over all, depravity from the non-tribals and the State administration for a considerable period of time. However, a brief study of these tribal communities referred to in the Schedule to the Constitution, portrays a plethora of diversity amongst themselves but each community distinct themselves from that of the other.

There are also markers of each tribal community that distinguish each of them from the other. For instance, a flag is identification mark of Khasi Khynexian of Meghalaya.

1. Tribes in India: The Demographic Scenario

Around 461 tribal communities live in India. After the continent of Africa, India is the second country to host a large number of diverse tribal communities. Each community has its own cultural and economic differentiation besides ethnic identities.[4] The Anthropological Survey of India stated as per the 1991 Census Report that the tribal population is around 67,583,800 which are around 8.08% which grew to 84.3 million in the 2001 Census Report. The total scheduled tribe population according to the 2011 Census Report is 84,326,240 out of the total population of 1.028,610,328. Out of them 77,338,597 lives in rural and 6,987,643 lives in the urban areas.[5] The table below provides the trends in the proportion of the scheduled tribe population in India.

TABLE A: TRENDS IN SCHEDULED TRIBE POPULATION IN INDIA[6]

SL NO.	CENSUS YEAR	SCHEDULED TRIBAL POPULATION (IN MILLIONS)	TOTAL POPULATION (IN MILLIONS)	PROPORTION
1.	2011	84.3	1220.2	8.1
2.	2001	84.3	1028.6	8.2
3.	1991	67.8	838.6	8.1
4.	1981	51.6	665.3	7.8
5.	1971	38.0	547.9	6.9
6.	1961	30.1	439.2	6.9
7.	1947		350.0	

[4] Sugana Pathy, "Destitution, Deprivation and Tribal 'Development', "Economic and Political Weekly, July 5, 2003, pp 2832-3836 at p 2832.

[5] Census Report, office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, Government of India.

[6] Ibid.

The main tribal settlements in India may be classified into two zones:

a. North Eastern States bordering China and Burma and

b. Highlands and plains of its Central and Southern Regions. In this zone around 80% of the tribal population concentrates.[7]

The vast variety and number of Indian tribes in tribal Plateau region are considered to be of the Kotarian Stock.[8]

Tribals are considered to be the oldest ethnological sector of the Indian population. According to official sources the density of tribes in India are mostly in the following six states.

TABLE B: TOP SIX STATES WITH NUMBER OF TRIBES.[9]

SL. NO.	STATE	NO. OF TRIBES.
1.	MADHYA PRADESH	73
2.	ARUNACHAL PRADESH	62
3.	ORISSA	56
4.	MAHARASHTRA	52
5.	ANDHRA PRADESH	43
6.	WEST BENGAL	38

1. Land Alienation and Tribal Retaliation:

Land is at the heart of tribal life. More than a thing of value, land to him is mother earth, which satisfies both his material and spiritual needs. Hence depriving him of his land is to snap his continuation as a self respecting member of society. In fact, the root cause of all human right violations perpetuated on them can be traced to land alienation, since the tribals depend on land for their identity, existence, security and livelihood**.** [10]

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7 APOORV KURUP, Tribal Law in India: How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better, Indigenous Law Journal/Volume 7/ Issue 1/2008 at p 89.

8 R.C.Verma, Indian Tribes Through Age, Publication Division, New Delhi, p 89.

9 Ibid.

10 Lingappa Pochanna Appelwar v. State of Maharashtra. (1985) 1. SCC 481.

"Imagine if ours was the oldest culture in the world and we were told that it was worthless. Imagine if we had resisted this settlement, suffered and died in the defense of our land, and then were told in history books that we had given up without a fight. Imagine if non-Aboriginal Australians had served their country in peace and war and were then ignored in history books. Imagine if our feats on sporting fields had inspired admiration and patriotism and yet did nothing to diminish prejudice. Imagine if our spiritual life was denied and ridiculed. Imagine if we had suffered the injustice and then were blamed for it. It seems to me that if we can imagine the injustice then we can imagine it's opposite. And we can have justice."[11]

- **The State:**

Their right to sustenance was vehemently attacked by the government, both Central and State, as land was needed for the so called developmental projects or for public purposes. The Land Acquisition Act and its subsequent Amendment in 1894 indiscriminately invoked to alienate tribal resources in the name of public purpose. Most of the big projects like construction of dams, power plant, mines etc are located in these tribal areas causing gross human rights violation in tribal belts leading to eradication of life and livelihood of the tribals.[12]

So is the story of tribal and indigenous communities across the world. The biggest challenge that these communities faces in their struggle for existence concentrates on land. The administration made various efforts to take the land away from the poor and innocent tribals. The human rights violation was so massive that a separate category of tribes were made. They were popularly known as the criminal tribes.

There were many tribes which were beyond the control and regulation of the British. Because of their extremist movements to protect their land from intruders, they were declared to be criminals by birth and an act was introduced to enlist them as criminal tribes. Amongst others, the Bhills were referred to as thieves and drunkard by the British. Stereotypes and stigma associated with them have provided immunity and legitimacy of their assaulters from any type of accountability. It is another matter they were acclaimed by Abul Fazal in

[11]The First Australians. http://apology.west.net.au/redfern.html accessed on February 25th, 2012.

[12] Jaganath Patty, 'Contemporary Struggles of the Tribal People in India', 59 JSW 1998 at p 214.

Ain Akbari as they were illustrious and law abiding.[13] They did play a significant role in the past when Bhagui Naik of Sinnar near Sangamner rebelled against British regime.[14] They were attributed as a marital race that was closely associated with Rajput.[15] Even it is said that the Maharana Pratap's force that fought against Akbar's regime, had over sixty percent of them belonging to the Bhil tribe.[16]

In 1871, the British passed the Criminal Tribes Act notifying about 150 tribes around India as criminal. The sole purpose was to give arbitrary power to the police to arrest and monitor the member of these communities. "A number of such tribes are passionately nomadic, and since food gathering and hunting in the jungle, in the traditional manner, is often impossible, they have switched over to the rather dangerous…life of foraging in the fields, villages and towns… This has gained them a bad reputation and in the British times some of them were branded criminal and held under close police supervision. Since independence this stigma has been taken from them, but the watch over them has not been relaxed….They are forced by the prevailing adverse circumstances to practice subsistence thieving."[17]

The transhumant Gujjar pastoralists of Jammu and Kashmir were designated as a criminal tribe by the colonial state and although they were de-notified in 1952, they still continue to be regarded with suspicion by police and authorities. In 1991 they were designated as a schedule tribe.

- **The Non-Tribals:**

The tribals suffered not only by the State and its machinery but also by the non-tribals. The non-tribals took every opportunity to manipulate the ignorant tribals and tricks them away their land. Matrimonial ties became a trend to acquire huge areas of tribal land. The non tribal make full use of the beneficial legislations for the tribes. For example, where the

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13 Asad Bin Saif, 'Eviction of landless tribes in Ahmadnagar' Economic and Political Weekly', September 6, 2003, at p 3761.

14 ibid

15 ibid

16 ibid

17 Stephen Fuchs, "The Aboriginal Tribes of India, (1973) at p 38.

legislation prohibits transfer of tribal land from tribal to any non tribal, a non tribal used to marry an adivasi and transfer the said tribal land to his tribal wife's name.

Other modes of acquiring tribal lands unlawfully being, *inter alia*, were in the guise of money lenders. Again, transfer by threat and coercive means, illegally prepared tampered and forged documents relating to title deeds were rampant to alienate tribals from their land.

The entry of the settlers in different tribal areas became rampant due to the lack of law to protect tribal-land. They used various methods to get land from the simple and illiterate adivasis. The truthful and ignorant tribal people were easy prey to these settlers. It is said that 28 percent of land was alienated in Wayanad, Kerala, due to indebtedness.[18]

Protection of Land Rights of the Tribals: Role of UN.

Land has however been considered in various international instruments as the physical, cultural and spiritual validity of the indigenous communities.[19] The Universal Declaration of Human Rights 1948 played a pivotal role in the acknowledgement of indigenous and tribal rights universally and voiced the need to protect these communities from depravity. International treaties also reflect the importance of land to the indigenous and tribal communities.

Article 27 dealing with 'rights of minorities' and Article 1 dealing with 'right to self determination' of the Human Rights Committee in relation to the Indigenous Communities on Civil and Political Rights and also the Committee for the Elimination of Racial Discrimination (CERD) in relation to Article 5 and other relevant provisions of the Convention for the Elimination of All Forms of Racial Discrimination plays a significant role in the protection of tribal communities across the world.

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[18] Mathew Aerthayil, 'Muthanga Police Firing in Kerala: Tribal Reaction to Exploitation and Alienation of their Land', Mainstream, July 19, 2003 at p 28.

[19] IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, Para. 155.

In 1997 CERD adopted its General Recommendation on Indigenous People in which it set forth, *inter alia*, the obligation of state parties in relation to the protection of indigenous lands and territories and the right to own, develop and use their communal lands, territories and resources.[20]

Within the international legal framework for the protection of the rights of indigenous peoples, the ILO has adopted two legally binding international instruments that specifically address indigenous and tribal peoples:

- The Indigenous and Tribal Populations Convention, 1957 (No. 107).

  This Convention No. 107 remains in force in 18 countries. However, it is no longer open to counties for ratification.

- The Indigenous and Tribal Peoples Convention, 1989 (No. 169).

This Convention No. 169 has been ratified by 20 countries. The various aspects that this Convention covers include inter alia land rights, access to natural resources, health, education, conditions of employment, contacts across borders and vocational training. The main aspect of this Convention is the participation of the indigenous and tribal peoples in the issues which concerns them.

The ILO also adopted the Resolution on ILO Action Concerning Indigenous and Tribal Peoples in 1989. It outlines the means to promote the rights of indigenous and tribal peoples.

With the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, the UN as a whole has taken a major step forward in the promotion and protection of indigenous and tribal peoples' rights throughout the world. The provisions of the Declaration and Convention No. 169 are compatible and mutually reinforcing. While the Declaration does not provide for specific mechanism to monitor its implementation, it provides for a specific role of UN agencies to support the realization of its provisions (Articles 41 and 42). In particular the ILO, as the agency responsible for the only legally binding international

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[20] General Recommendation XXIII, Indigenous Peoples, CERD/C/51,Misc. 23/rev.1(1997), Para 5.

instrument on the rights of indigenous and tribal peoples, has an important role to play in this context.[21]

The UN Declaration on the Elimination of All Forms of Racial Discrimination gave a platform to the indigenous and tribal people to protest against the social and economic exploitation they have been facing for ages.

Problem in India: Mechanism and Policy formation under Indian Law

The tribal communities everywhere were egalitarian with common ownership of land and the phenomenal change in the policy relating to ownership of land made things worse for the members of the tribes. The process of settlement of land based on private ownership recognized through legal deeds, records and complicated measurement process was completely different and alien from tribal practice, most tribals failed to understand and consequently fail to take their respective ownership from the government. The new system was welcomed by the non-tribals like the landlords, moneylenders and the settlers as they took full advantage of the laws to get full ownership of lands and subsequently dispossessed the adivasis of their land in various parts of India.

Alienation of land from the tribals is like depriving them from their heritage. Land alienation from the tribals started during the medieval period and gathered momentum during the British era. The advent of Zamindari system to the introduction of Land Acquisition Act has played a dominant role in the destruction of tribal culture and economy to a great extent. Inter alia, the notion of *res nullius* were introduced which held that any land which is without ownership, shall vest in the State. This with the principle of *eminent domain* obliterated the customary rights of the adivasis over their land and forest and consequently threatened the survival and social reproduction of large masses of adivasis.

- **Pre-Independence Legislations**

The Zamindari system was introduced by enacting the Permanent Settlement Act 1793. This caused great pain to the tribals and was the main reason to a lot of upsurge in India. A significant struggle in Jharkhand led to a series of forcible enactments viz., the Chotonagpur

[21] http://www.ilo.org/indigenous/Conventions/lang—en/index.htm accessed on 26th February, 2012.

Tenancy Act, 1908, the Santhal Pargana Tenancy Act, 1949 and also the famous Wilkinson Rule in 1837 for the protection, preservation and self governance of tribes in the tribal belts of Jharkhand. However, these enactments were not been adhered to.[22]

Sub-Section (1) and (2) of Section 92 of The Government of India Act, 1935 portrayed the rules relating the protection and rehabilitation of the tribes in India. Similar provisions were reflected in the Cabinet Mission Statement of 16th May, 1946 which calls for special attention to the Tribal areas in India, but with little effect.

- **Post Independence Scenario:**

Later the concept of eminent domain prevailed and the state became the ultimate owner of all the resources including land. Everyone else became the secondary or subsidiary right holders in the land. This trend continued even after the British left India. In the post independence scenario, the Indian legal system ironically had no place for the tribes and the development of the concept of private or exclusive ownership was absolutely alien and contradictory to the tribal system of land administration.[23] Most of the laws made during this period by the British Parliament were alien to the basic customary habits and practice of the tribal communities. Some of them being, The Criminal Tribes Act, 1924, The Land Acquisition Act, 1894, The Code of Civil Procedure, 1908, The Indian Easement Act, 1882, The Transfer of Property Act, 1882, The Registration Act, 1908, The Prisoners Act, 1908, The Agency Tracts Interest and Land Transfer Act, 1917, The Indian Succession Act, 1925.

- **The Constitution of India:**

Land refers to heritage to tribals and this heritage is the primary source of livelihood to them. Land plays the most dominant role in their sustenance. As a matter of practice the land belonging to them is the basis of their social, economic, political and cultural platform. Alienating tribals from their land is at par with infringing their rights as granted by Article 19(1)(g) of the Constitution of India and not merely the violation of Article 19(1)(f) and Article 31(as it was then before the amendment of the Constitution deleting the said provisions).

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[22] Gladson Dunglung, 'Adivasi Towards Violence' 60 Social Action July-Sept 2010 at p 253.

[23] B.D.Sharma. 'Rights of Tribals' 1 JNHRC 2002 at p 79.

The provisions *inter alia* in Part III, IV, X calls for special attention to the protection of Tribes and tribal areas. Schedule V and VI were specifically created for the Scheduled Tribes in India.

It is worth mentioning that the Executive and the Legislative power of the State to transfer Land under Article 298 and Article 245 respectively is subject to the provisions of Fifth Schedule. A host of Articles in The Directive Principles Of State Policy also refers to the responsibility of the state to protect and promote the welfare of the tribes in India.

- **Other Enactments:**

Various enactments were passed by both the centre and the state to alienate the lands of the tribals. Some of these *inter alia* are worth mentioning; The West Bengal Land Reforms Act, 1955, Abolition of Zamindari Act, 1950, Tenancy Legislation. 1957, The Transfer of Property Act, 1882, The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Orissa Gram Panchayat (Amendment) Act, 1997, Tripura Land Revenue and Land Reforms Act, 1960.

- **The Judicial Awakening:**

The Human Rights jurisprudence relating to the protection of tribal rights flourished in India with the aid and influence of the judgments of the Supreme Court of India and the High Courts of different states. Some of the remarkable decisions relating to the protection of rights and recognition of certain rights within the ambit of Constitutional Rights have helped the tribals to a great extent to retaliate in the Courts through a series of legal battles leading to further declaration of rights for the tribals. The most influencing aspect of these judgments is the right to use Article 32 and Article 226 to retaliate against the state administration. The case of *Olga Telis*[24] needs special reference in this regard as the apex court declared that 'right to livelihood' is an integral part of the 'right to life' as has been enshrined in Article 21 of the Indian Constitution. The Apex court declared "It would be great injustice to exclude the right to livelihood from the context of the right to life."[25]

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[24] *Olga Telis Vs Bombay Municipal Corporation* AIR 1996 SC 180.

[25] Ibid.

Another landmark judgment came in the case of *NCERT vs. State of Arunachal Pradesh*[26] where the Supreme court ordered the rehabilitation of displaced tribals. Again the Supreme Court in N.D.Jayal vs. Union of India stated that 'rehabilitation' of the tribals displaced is within the 'right of life' under Article 21 of the Indian Constitution.[27]

The Gujarat High Court made a commendable effort in the protection of the right of the tribes in Bipinchandra Diwan vs. State of Gujarat.[28]

Retaliation by the Tribes: Some instances

There has been terrible instances of 'tribal-state' and 'tribal–non-tribal' conflicts due to the continuous exploitation of the tribals by the State as well as the non-tribals with Government showing blind eyes to the legitimate pleas of the tribals.

The police firing on adivasis at Muthanga in Wayanad District of Kerela lead to the death of adivasis and policemen, and with hundreds of adivasis including women and children getting injured. The incident occurred when over 2000 adivasis occupied the protected forest land and were there in temporary huts and tents for 45 days with the demand which the then Chief Minister has made to them two years ago in Trivandrum. When the police came to evict them, the activists captured one policeman and one forest guard and keep them in custody. A massive police force was subsequently diploid which unleashed a brutal attack on the innocent adivasis and opened fire resulting in the death of two adivasis.[29]

Another incident happened in Madhya Pradesh in the district of Dewas, where the police opened fire on tribals in the village of Mehndi Kheda and has shot and killed four persons. The police had leashed a reign of terror and thousand of adivasis had fled their villages and were hiding in the forest while the police and administration ransacked their village. This

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26 *NCERT vs State of Arunachal Pradesh* 1996 (1). SCC 742.

27 N.D.Jayal vs Union of India (2004) 9 SCC 362 at p 394.

28 Bipinchandra Diwan vs State of Gujarat AIR 2002 GUJ 99 at p 103.

29 Mathew Aerthayil, 'Muthanga Police Firing in Kerala: Tribal Reaction to Exploitation and Alienation of their Land', Mainstream, July 19, 2003 at p 28.

state supported repression on groups' unarmed and unprepared shows the true nature of the state towards the tribes in India.[30]

In yet another incident there was retaliation by the tribes, in Orissa, in 1998, thousand of tribal prisoners demolished the jail, killed two under trial prisoners and then burnt both of them in front of the police station. In fact one of them was alive and had tried to run away from the fire but was quickly chased, killed and again thrown into the fire.[31]

Thus is this struggle between the tribals and the non-tribals, which may be compared to a race between a disabled one legged person and an able bodied two legged person. Parallel, the two branches of the State, the Legislature and the Judiciary are in constant tussle relating to the various issues of tribals in the arena of both property right as well as the amending powers of the Constitution and more recently, on human rights violation and they must be respected by all means.

Mechanism and Policy formation under Indian Law.

The constitutional debates and also the Nehurian vision[32] has lead to the protection and preservation of culture and economy of the tribes. The resolution went onto say that adequate safeguard shall be provided to the minorities, backward and the tribal areas, and depressed and other classes.

The architects of the constitution, being conscious of the distinct identities of the tribal communities in India provided certain Articles exclusively for the cause of the tribal people. Articles 244, 244A, 275(1), 342, 338(A) and 339 were solely dedicated for the special protection of the tribes in India. Two separate schedules were formulated for the tribes and the tribal areas namely, Schedule V and VI. Following these provisions in the

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30 Srilata Swaminathan, 'A Tale of Continued Oppression: Government Atrocities on Tribals in Dewas', Economic and Political Weekly, May 5, 2001 pp 1510-1512 at p 1511

31 Lalit Das. 'Tribal Policing- A Nightmare, The Indian Police Journal, July-September 2001 at p 39.

32 On December 13th, 1946, Jawhar Lal Nehru moved the objective Resolution in the Constituent Assembly of India. It stated that, India soon will be a free nation and would be an Independent Sovereign Republic. That its Constitution would guarantee its citizens, justice, social and economic and political. Equality of status, of opportunity, freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and morality.

Constitution aimed at ensuring social, economic and political equity, several specific legislations have been enacted by the Central and State Governments for the welfare and protection of the tribal people and their tribal domain.[33] More than sixty years have been passed but the promises are yet to be fulfilled.[34]

The whole legal framework reflects the dream that the forefathers of our constitution has seen. But unfortunately most promises were never respected. The dreams of a world where the tribes can be what they were still remain a reverie. The continuation of the broken heart, the conspiracy to favor the business communities has ultimately raised the issue of the division of the integrity of our country. Various efforts are made by the tribals with the help of various extremist groups to avenge the deceit that the country did to them. The demand of separate tribal land[35] is the outcome of the erosion of faith on the broken promises of the administration and various politicians. The simple forest dwellers and food gatherers have now in various cases joined hands with the extremist movements today, inviting more bloodshed and gross violation of human rights.

Other Enactments:

There has been a plethora of laws made for the tribal welfare starting from the constitution in the independent India till the Forest Rights Act, 2006. The pre independence era starting from the Government of India Act 1935 ,[36] made various efforts to protect the tribal areas. The Forest Act, 1927, being an enactment created by the British Parliament, was an Act to regulate the produce out of the forest than the protection and conservation of the forest. The Act continued for a long time till it was finally repealed. The Environment Protection Act, 1976, the Water (Protection and Control of Pollution) Act, 1974 and The Air (Protection and Control of Pollution) Act, 1981 ultimately took the necessary measures to protect the environment from further degradation. The Wildlife Protection Act, 1972 also to some extent provided the rights of the tribals in their forest habitat.

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[33] Development Challenges in Extremist Affected Areas, Report of the Planning Commission, 8 (Government of India, New Delhi 2008)

[34] Ramchandra Guha, "Adivasis, Naxalites and Indian Democracy" 42 EPW 3305, August 11, 2007.

[35] The first state to be declared as a tribal state in India is Jharkhand.

[36] Sections 52 and 92 of the Government of India Act 1935 provided for tribal majority areas to be demarcated into the excluded and partially excluded areas.

The Forest Conservation Act 1980 prohibits all the encroachments of the forest which dramatically affected the adivasis and tribal communities all across India. This enactment actually highlighted the tribals as the biggest enemy of the forest. It was a gross violation of justice to the tribal life and economy.

The 42nd Constitutional Amendment Act shifted 'forest' from the State list to the concurrent list of the Seventh Schedule. Sustainable forest management through participatory approach was introduced for the very first time with due regard to the traditional rights of the tribal people on forest land, which did more injustice than remedying them.

The Forest Rights Act, 2006 for the very first time acknowledged the historical injustices that were made towards the forest dwelling tribal communities in relation to their ancestral land. [37]

The Judicial Awakening

There have been some famous cases both national and foreign that uplifted the tribal rights and acknowledging the State inefficacy towards providing justice to these communities. One of interesting decision came in the famous case of Mabo[38], given by the Australian High Court.

Later the famous case of Samatha[39] gave rights to the tribal in furtherance to their forest land. Samatha was a triumph for the tribals struggling to protect their constitutional rights to life and livelihood. Legislative intervention must also be needed to provide adequate relief to these communities who have suffered unilaterally and consistently for centuries.

"Mabo and Samatha are two remarkable judgments of the 20th Century on the rights of tribals. On 3rd June 1992, the High Court of Australia decided to declare that all land, which belongs to the aboriginals, had been wrongly misappropriated by the settlers and

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[37] B.D.Sharma, Unbroken History of the broken Promises- Indian State and the Tribal People (Freedom Press and Sahyog Pustak Kendra, New Delhi, 2010) at p. 107.

[38] MABO and ANOTHER v. THE STATE OF QUEENSLAND and ANOTHER (1989) 166 CLR 186 F.C. 88/062

[39] Samatha Vs. State of Andhra Pradesh.AIR 1997 SC 3297.

had to be returned to the aboriginals. Two centuries of colonial history was reversed. The colonial assumption of *res nullius* was nullified."[40]

However, there has been very little implementation of these orders. The judicial decisions have been disrespected by the government in a series of cases. The administration has offered deaf ears to the legitimate demand of the tribals. There are innumerable instances of violation of fundamental rights of tribals in every form in the past 100 years. The poor and the uneducated of the modern civilization have been brutally humiliated day in and day out by the rich and the famous. The simplicity of tribal communities are used to exploit them and to rebut them with the armor of state machinery in case of tribal usurp. Unfortunate but true various analysis of laws for the welfare of the tribes are made by various legal experts, anthropologists, economists, politicians and judges, but the outcome is massively disturbing when it comes to the implementation of those legal provisions. The very basis of the rights as provided by the constitution is unknown to these millions of people. Modern education is far away from them. Among the few thing that they know about is the law of nature, the law of responsibility and reasonability.

Epilogue:

The political will is directed toward greater good and for the greatest number of people. Hence, the tribals now only in marginalized number of the land where they were once the majority shall inevitably be deprived. Thus a comprehensive legal framework to protect the minority tribes for the future is the need of the day. Irrespective of their geographic locations, the tribals face hardships as their basic rights are violated. They are refrained from exploiting their natural resources or to seek justice within their own traditional and customary laws. Poor financial condition of the Government has been one of the many reasons for the socio economic degradation of tribes in India. Because of the scarcity of land with rich resource base, the state has moved towards commercialization of various natural resources of the country which are mostly situated in the tribe populated areas. Commercialization and industrialization has led to the altered framework of forests from the natural way.

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[40] Dr.Rajeev Dhavan, "Mabo and Samatha", The Hindu, March 9, 2001 p 10.

There have been plenty of instances of tribal right violation in the last century and the trend has continued in this century as well. Starting from land alienation to depriving them from forest lands and resources, the government whether central or state has done enough to vitiate the basic rights of the tribal which every human being is entitled to enjoy just by being humans. There has been massive annihilation and uprooting of tribal communities due to developmental projects leading to gross violation of human rights. .The tribals have been indebted with the gradual erosion of their traditional rights to land and forests and a large scale intrusion of their culture. The judicial decisions, the legislations and the government notifications for the protection of tribal rights have been disrespected by the State in a series of cases. Today the settlements where these communities live in are in dire state as the promises made towards their welfare ended up in smoke. On the contrary the legislative efforts made on their behalf remained only in papers or ended up as colorable legislations. Grave instances of tribal-nontribal disputes followed. In the absence of any effort by the State various non-governmental organizations have come in their rescue but could do very little for the poor tribal communities apart from winning a few legal battles or formulating some tribal organizations. The law which was even acknowledged by Professor Hart that led to the revival of the natural law theory in the 20th Century. The need of reason as the basis of law has been appreciated in all modern societies and India should not lag behind to protect that segment of the society who lives a life of poverty and oppression just because they are non-commercial in their approach. The progress of a country must not only be judged by its economic progress but also the rights the citizens enjoys in their motherland.

Job-contentment in Police Service : An Appraisal by Officers of the Kolkata Police Force

Dr. Arpita Mitra*

ABSTRACT

Police work being an emergency service requires officers to be on toe most part of the day. Apart from that police officers are expected to be patient and well-mannered in dealing with the community it is to serve. Too much of work pressure agitates the mind-set of the police officers. They lose the passion that this job demands and it becomes just a source of livelihood. Lack of leisure and the guilt for not being able to fulfill familial responsibilities affects their performance at work, making them short-tempered and cynic. The present study attempts to explore job contentment of the Kolkata Police officers by evaluating their perception about police service.

Keywords: *police culture, stress, leisure, recreation*

INTRODUCTION

Police service is unique in terms of authority, hazards and diverseness of functions. It is a 24 hour service to the people and is projected to be community-friendly. Police service demands a lot of expectation from the people and calls for criticism if it fails in meeting up. The electronic and the print media have always been very loquacious with any kind of failure of the policemen to fulfill the demands of the society. Police is supposed to be polite, agile and always on their toes. The complexity of their role, the need to exercise prudent discretion, the threat of using violence and having violence used against them and isolation

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from the rest of the society take a toll on law enforcement officers. Police officers' stress[1] leads to negative attitudes, burnout, loss of enthusiasm and commitment (cynicism), increased apathy, substance abuse problems, divorce, health problems and many other social, personal, and job-related problematic behavior.[2]

While recommendations have been made by the different commissions on police reforms in India on the duties and responsibilities of the police, the stress related to police service has been a neglected area. The dearth of relevant literature in India on job-stress with special reference to the police makes it all the more important to explore a primary cause of police atrocities. In this regard the present work attempts to assess the job satisfaction of the Kolkata Police officers. It evaluates the perception of the police officers about police work in comparison to other occupations. In lieu of this, the leisure[3] and recreational activities of the police officers are also explored. Again the involvement of officers in household work was appraised to assess whether fulfillment of familial responsibilities suffered owing to their job pressure.

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[1] **Stress** is a biological term which refers to the consequences of the failure of a human or animal body to respond appropriately to *emotional* or *physical* threats to the organism, whether actual or imagined. It is the autonomic response to environmental *stimulus*. It includes a state of alarm and adrenaline production, short-term resistance as a coping mechanism, and exhaustion. It refers to the inability of a human or animal body to respond. Common stress symptoms include irritability, muscular tension, inability to concentrate and a variety of physical reactions, such as headaches and elevated heart rate. (See http://en.wikipedia.org/wiki/Stress_(biological) visited on 12.10.10).

[2] Lumb R & Breazeale, R. (2003). 'Police officers Attitudes and Community Policing Implementation : Developing Strategies for Durable Organizational Change', *Policing and Society*, 13(1) : 91-107.

[3] **Leisure** or **free time**, is a period of time spent out of work and essential domestic activity. It is also the period of discretionary time before or after compulsory activities such as eating and sleeping, going to work or running a business, attending school and doing homework, household chores, and day-to-day stress. Leisure is of two types: a) Active leisure activities involve the exertion of physical or mental energy. Low-impact physical activities include walking and yoga, which expend little energy and have little contact or competition. Some active leisure activities involve almost no physical activity, but do require a substantial mental effort, such as playing chess or painting a picture. Active leisure and recreation overlap significantly; b) Passive leisure activities are those in which a person does not exert any significant physical or mental energy, such as going to the cinema, watching television, or gambling on slot machines. Nevertheless, passive leisure activities are a good way of relaxing for many people. (See http://en.wikipedia.org/wiki/Leisure visited on 25.11.10).

Policing, Police Culture and Stress

Jones and Newburn defines policing as "those organized forms of order maintenance, peacekeeping or law enforcement, crime investigation and prevention and other forms of investigation and associated information brokering which may involve a conscious exercise of coercive power – undertaken by individuals and organizations, where such activities are viewed by them and by others as a central or key defining part of their purpose".[4] Policing ensures specific patterns of behavior and attributes of those involved setting a culture of its own. According to Morgan, organizational culture refers to "shared meanings, shared understanding, and shared sense making.[5] Early police research has shown concern for police culture in the writings of for instance Wilson (1968), Skolnick (1966), Manning (1977) and Reiner (1985). Police culture is defined as an occupational culture because it provides a shared and transmitted lifestyle consisting of material and non material elements.[6] Police culture is often characterized as being suspicious, authoritarian, isolationist and conservative.[7] Maintenance of these negative values and attitudes which are attributes of the police culture divide officers from the people they serve and create an 'us against the world' mentality.[8] The police officers often believe that no one else understands their problems and that their job is made more difficult by an apathetic, uncaring, unsupportive, antagonistic and sometimes hostile public. Police officers have a tendency to withdraw behind what Goldstein has referred to as the 'blue curtain' in order to shield themselves from public criticism.[9] Thus, the officers band together in a police subculture, characterized by cynicism, secrecy, and insulation from others in society - the so called blue curtain which isolates officers from the rest of the society. Police officers tend to socialize together and believe that their occupation cuts them from relationships with civilians. Police officers perceive their working environments to be laden with danger or the risk of danger, and

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[4] Jones, T. & Newburn, T. 1997. Private Security And Public Policing, 18.

[5] Morgan,G.. 1986. Images of Organization,128.

[6] Stevens, D. J. 2003. Applied Community Policing in the 21st Century, 98.

[7] Carter, D. L. and Radelet, L. 1999: The Police and the Community, 181.

[8] Garcia, V. 2005. Constructing the 'Other' within Police Culture : An Analysis of a Deviant Unit within the Police Organisation, *Police Practice &Research*, 6(1): 65-80

[9] Goldstein, H.1977. Policing a Free Society, 503-522

they preoccupied with the danger and violence that surrounds them, always anticipating both.[10] However police culture is not negative in itself because it encourages group loyalty which is necessary for officers working under frequently dangerous, unpredictable and alienating condition.[11]

Six core beliefs are viewed as being at the heart of the police culture:

(1) Police are the real crime fighters;

(2) No one else understands the real nature of police work;

(3) Loyalty to colleagues counts above everything else;

(4) The war against crime cannot be won without bending the rules. Courts have awarded criminal defendants too many civil rights;

(5) People are quick to criticize police unless they need police help themselves and

(6) Patrol work is the pits. Detective work is glamorous and exciting.[12]

The complexity of police work makes it difficult for the police officers to maintain social and familial relationships. They suffer stress in their family lives when they when they bring the work home or when their work hours are shifted.[13]

Police psychologists have divided stressors into four distinct categories.

(1) External Stressors such as verbal abuse from the public, justice system inefficiency, and liberal court decisions that favour the criminal. It may alienate police and reduce their self-confidence;

(2) Organizational Stressors such as low pay, excessive paperwork, arbitrary rules and limited opportunity for promotion;

(3) Duty Stressors such as rotating shifts, work overload, boredom, fear and danger and

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10 Paoline, E. 2003. 'Talking Stock : Towards a Richer Understanding of Police Culture', *Journal of Criminal Justice,* 31 (3): 199-214.

11 Sato, M. 2003. 'Police Recruits Training and Socialization Process : Fromthe Network Perspectives', *The Police Journal*, 76: 289-303.

12 Sparrow, M. , Moore M. & Kennedy D. 1990. Beyond 9/11 :A New Era for Policing, 51.

13 Cullen, F. *et.al* 1985. 'The Impact of Social Support on Police Stress', *Criminology*, 23(3): 503-522.

(4) Individual Stressors such as discrimination, familial discord and personality problems.[14] These result in physical (fatigue, nausea, rapid heart rate, headaches, thirst, dizziness, vomiting, weakness and profuse sweating); cognitive (confusion, memory problems, difficulty accepting responsibility, concentration problems, disturbed thinking and hyper vigilance); emotional (anxiety, denial, fear, guilt, depression, intense anger, loss of emotional control, and agitation) and behavioral (alcohol consumption, hypersensitivity, withdrawal, change in sexual functioning, change in speech pattern or communication and loss or increase of appetite) stress. Traditional management practices which rely heavily on authority, discipline, and obedience to rules to gain compliance by members of the organization irritates police officers.[15]

Methodology

In this exploratory study, the necessary data has been collected by multiple methods. The Kolkata Police personnel from the rank of Additional Commissioner of Police to sub-Inspectors have been interviewed through open-ended questions to get access to relevant data. Observation of the non-verbal attributes of the police officers was also studied. The Kolkata Police website, print media and electronic media reports have also yielded necessary information.

51 police personnel were interviewed to get access to primary data and about 30% of them were Indian Police Service (henceforth IPS) officers. 16% of the respondents are Additional and Joint Commissioner of Police. 18% of the respondents were Deputy Commissioner of Police out of whom 1 was a non-IPS officer. He was in-charge of a battalion in the Armed Police. The total number of IPS officers interviewed was 16, which is 31% of the total sample. 43% of the officers were Officers-in-charge or Additional officer-in-charge of local police stations. 10 of the officers were in-charge of different departments under Detective Department, Computer Cell, Traffic Department, Women police. 6 or 12% of the police officers were women. The data has been collected as part of doctoral research between the year 2006 and 2007.

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[14] Blackmore, J. 1985: 'Police Stress' in Clinton,T (ed) *Policing Society*, 395

[15] Hale, C. D. 1994 . Police Patrol : Operations and Management, 87-97.

Job Contentment in Police Service: Empirical Findings

78% of the officers who were in service for more than eighteen years were non-IPS officers while the rest were IPS officers. 92% of the police officers who were in service for more than 29 years were non-IPS officers. Promotion in the service period of the non-IPS officers is after every seven years. This system requires change as such long gaps in promotion do not lure either the professionals or the future ones towards this occupation. Promotion should be speedy and based on performance rather than period of service. This can result in greater tenacity of the officers towards their jobs and erase the accusation on the police of being sloppy and sloth.

Police work in comparison to other services

19% of the IPS officers were not interested in joining police service. This may be because they were interested in other options like Indian Administrative or Foreign

Service. So possibly they took up police service out of compulsion of being the only available option. Again for non-IPS officers the percentage of officers not willing to join the police service is only 11%. This may be because they had other compulsions like family pressure forcing them to take up this service. The security of a government job often forces the officers to take up police service. They need to provide security to their family members and relieve their parents during old age from familial responsibilities.

58% of the non-IPS officers who were interested in joining the police service felt that police service is a good career option while only 30% of the IPS officers felt the same. 46% of the IPS officers believed the police service to be a dynamic and noble profession. While officers in the higher rank considered policing as an august profession, those down in the rank admire the perks and the benefits that it brings forth. So we can say that the value of serving the people and the community is possibly more grounded in the superior officers than those lower down. Since the lower ranks of police officers face the public more regularly they often face the wrath and the distrust of the common people. This makes them frustrated and police service becomes just a source of secure livelihood.

3 officers believed that there is no difference between policing and other careers. More than 90% of the police officers feel that police service is different from other occupations. However the reason put forward by them is that unlike any other public service policemen are always in direct contact with people of all sections of the society. Some of the non-IPS officers complained that policemen earn poor salary in comparison to the labour that they have to put every day. Any other career would have been more lucrative and less strenuous.

More than 80% of the officers consider police service as a good choice for a career. Although police work is strenuous, it ensures job security. Quite a few officers considered this profession to be noble and challenging. The experiences in this service are vivid and everyday they have to face newer challenges. It is also novel as they get a direct chance to serve the people of every section of the society. The police are supposed to provide the public with security and a healthy and safe environment. Policemen are entitled to come to the help of all sections of the society and bring relief and safety in their lives. They are the people whom we rush to during any crisis. The services that they provide range from crime management to helplines for medical assistance, from traffic control to disaster management. These diverse arrays of services make this work pulsating and zestful.

Police Service and Leisure

50% of the IPS officers believed that they got normal leave while not a single superior officer complained about not getting any holidays in their job. However 23% of the non-IPS officers who were all Officers-in-Charge and Additional Officers-in-charge of different police stations of the city complained that they do not get any holidays. 54% of the non-IPS officers had grudges for having very few leave or day-off.

The senior subordinate officers have to work for longer hours and enjoy very few leave. The first and second in command of the police stations enjoy the least break. They even have to visit the police station on Sundays. They have complaints for not having a single day-off. The officer and additional officer in-charge of police stations suggested that they can manage at least one day-off at an alternative basis between themselves but that too is not permissible. They have to go for two or three rounds of the area under the jurisdiction

of that particular police station everyday and manage the administration and other affairs till midnight. They only manage a small break in the afternoon but that too is hampered most of the time because of emergency calls. The long and tedious working hours in the police stations take a toll on their health and have severe effect on their mental state. A report of the Kolkata Police Association after diagnosing 5000 policemen revealed that many of the policemen suffered from diabetes, high blood pressure and pulmonary disorders owing to pollution.[16] Too much of work pressure makes them short- tempered and they tend to suffer from chronic ailments like diabetes and hypertension due to extensive stress.

50% of the IPS officers spent their leisure in entertainment while only 23% of the non-IPS officers indulge in recreation during their leisure time. 20% of the non-IPS officers complained that they have no leisure, while 34% of them like to spend their spare time with family members. The disparity in choice of spending leisure among IPS andnon-IPS officers may be as a result of difference in socio-economic status. While IPS officers can spend their leisure in luxuries like watching movies, visiting clubs, sports or other expensive medium of entertainment the same is not possible for the lower rank officers. The officers of the lower rank belong to the middle-income group and cannot permit too much indulgence. A good percentage of them do not get any leisure due to rigorous hours of work. Those who get it prefer to spend it with their family. Some of them even help their children in their studies. They have a feeling of depriving their families of their companionship and whenever they get time they like to spend it with their near and dear ones. A senior officer- in- charge of a police station regretted "My wife has been complaining about some health problem but I cannot manage to get time to take her to the doctor, I feel deeply embarrassed and guilty for not being able to find time for her." This is a common problem among officers who are in-charge of local police stations. They have to spend extensive hours in the police station which not only affects their health but also their psychological frame of mind. They suffer from guilt, frustration and fatigue which affects the quality of work that they put in.

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[16] The Statesman, Kolkata Plus, "Pop goes the cop's health!", 10.5.07, p.I

Police Service and Discharge of Household Duties

Nearly 70% of the IPS officers could afford to take part in household work. About 45% of the non-IPS officers hold grudges that their service does not allow them to shoulder familial responsibilities. 13 out of the 15 non-IPS officers who believe that it is not possible to participate in household work were Officers-in-charge or Additional Officers- in-charge of police stations.

A senior Deputy Commissioner of Police (non IPS) remarked, "The long hours of service hampers our social life for which we loose the respect of our spouses." All the officers who believed that police service does not allow them to take part in household chores agreed to the fact that their family life has been suffering. They gave full credit to their spouses for shouldering majority of the responsibilities. They also felt guilty for making their family life suffer. The family gratifies ones emotional needs and any sort of guilt or dissatisfaction at that front can have serious effect on one's mentality and performance in the professional field.

6 out of the 8 officers, who said that they do everything as far as household work is concerned, were women. 73% of the police officers take part in less than three household works. It was found that the most common household duty that they performed was the weekly shopping of raw food products and the monthly marketing of the basic needs of the family like grocery. Some of the officers even managed to find time to teach their children. Attending social functions, entertaining guests at home are other commonly performed family chores. Women officers, mostly have to fulfill all of the household responsibilities even after being engaged in such a demanding profession. The data reveal that policing eventually does not allow officers to give much of a time to perform household responsibilities. The family life is neglected and it is their spouses, children and their nearest kin who are the most sufferers. The long and demanding hour of work deprives them of a healthy family life and possibly takes a toll on their physical and mental heath. Even some of the officers suffer from guilt for not being able to give enough time to their family members.

74% of the IPS officers do their household work on Sundays, holidays or on leave. Only two IPS officers do so before and after office. 41% of the non-IPS officers execute their household responsibilities before and after office hours.51% of the officers perform their family chores on holidays, Sundays or during leisure hours.

The number of household tasks which most of the police officers do is few. The officers in-charge of police stations attend long hours in the office while the inspectors and sub-inspectors also have extensive duty hours. As policing is a 24 hour service all officers have minimum holidays. Their holidays are cancelled one month before important festivals like Durga Puja, Diwali, and Independence Day or during General Elections. This points out the plight of the families of the senior non-IPS police officers as their family members are deprived of their support most of the time. So when they manage little amount of leisure they prefer to look after their families and spend time with them.

The IPS officers prefer to do their household chores on normal holidays when they manage to find time for their families and even for themselves. Their social and economic status also allows them certain amount of luxury which officers in the lower rank cannot afford.

Conclusion

Job satisfaction in police service is lacking among the non-IPS officers of the Kolkata Police force. Long hours of work, few day-off and rigorous amount of labour hassle the officers both physically and psychologically. They are not contented with their job as it deprives them of fulfillment of familial duties. They are working like machines and the basic needs of a healthy life like having proper leisure and recreation is nearly absent in the lives of the lower ranks of police officers. Again the guilt of not being able to spend quality time with kids and family also affects their mental frame. The non-IPS officers suffer from guilt and lack of motivation which affects their efficiency at work. Weekly day-off and distribution of work at a roster basis will result in less stress and higher overall job productivity. Greater use of Information and Communication Technologies (ICTs) in administrative and field work can reduce job stress and ensure speed and accuracy. A Police Welfare Board can play a constructive role by focusing on the tribulations of police service and disentangling issues of health, housing, insurance and other anxieties of police personnel. An employee-friendly work environment, greater perks and healthy work culture can make police service attractive and interesting to the future generations and entice them to opt for it.

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Intellectual Property Rights Over Plant Genetic Resources : Enviro-Legal Issues and Perspective in India

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ABSTRACT

The concept of property occupies one of the central positions in the whole realm of jurisprudence. The new paradigm of Intellectual Property Rights (IPRs) expands the horizon of property in several new areas form a center of attention both for the legislature and the common men in India. The protection of plant genetic resources(PGRs) by means of IPRs has been a subject of increasing importance in the aftermath of the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) which resulted a hue and cry among the common men for its ecological, economic and human rights aspect. In this backdrop the present work examines the interrelationship between IPRs over PGRs and the soundness of the idea of human right to a satisfactory environment. An attempt has been made, to explore, how agricultural biotechnology protected under intellectual property regime has assumed significance in the present global economy, and its possible effects upon the environment and the realization of other human rights in India. An attempt has also been made to give a brief account of the various legislative measures adopted at the national level, considering the development taking place at international level. This paper is limited in its approach as it does not focus on scientific aspects of agricultural biotechnology rather it seeks to address some legal issues revolving around IPRs over PGRs, environment and sustainable development in Indian perspective.

Keywords: Plant genetic resources, intellectual property rights, agricultural biotechnology, biodiversity, environment, human rights, sustainable development.

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Introduction:

The concept property, its ownership, possession and the commercial exploitation of such occupy the significant position in the whole realm of jurisprudence. With the development of science and technology the concept of property[1] has undergone a radical change. Property rights are now being claimed over Plant Genetic Resources (PGRs) beyond the traditional material things in the form of Intellectual Property Rights (IPRs).[2] Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPs)[3] under the auspices of WTO not only internationalized the traditional items covered by the intellectual property laws, but also introduces new items which were kept outside the domain of IP laws for various fundamental reasons. Its adoption generated institutional competitions with WIPO and gave birth to a useful range of alternative law making devices. Article 27 of the TRIPs Agreement globalised the IP protection of biotechnological inventions that were cultivated in the US and the EU and other industrialized countries for some decades so that these industrialized countries could ensure a comparable level of protection worldwide.

Since the early 1990s, an interesting parallel process has taken place: on one hand, international law and policy have shifted from considering biological genetic resources as common heritage of humankind and therefore free to all- to giving State sovereignty and

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[1] Generally, the Law of Property deals with material objects. In some cases however, ownership on some non-material things produced by human labour and skill is recognized as property in the form of Intellectual Property (IP). The principle for such protection is that what man produces belongs to him, and the non-material product of a person's intellect may be as valuable as other material property.

[2] The term "intellectual property" refers to a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia. The economic and cultural of this collection of rules is increasing rapidly. The fortunes of many businesses now depend heavily on intellectual property rights. *See generally,* Stephen R. Munzer (ed.). *New Essays in the Legal and Political Theory of Property168-199* (Cambridge University Press, Cambridge, 2001)

[3] The TRIPs provisions bring within the scope of IP laws any inventions, whether products or process, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Article 27(3) makes it mandatory to give either protection by patent or an effective *sui generis* system. The TRIPs Agreement seeks to stimulate international trade and economic development by setting international minimum standards for the protection and enforcement of intellectual property.

control over these resources. In addition, this situation has been further affected by the increased promotion of private ownership and the use of intellectual property rights (IPRs) over plant and crop varieties.[4] IP protection originally concerned non-living matter. So it is hardly surprising that IP protection incorporated new features when it was called to extend the self-replicating materials, including PGRs.[5] The study of environment as a human right cannot be separated from biology, ecology, economics, medicine, political science, psychology and public administration. The contemporary development of globalization resulted in a new concept of 'industrial agriculture'.

Breakthrough in genetic engineering[6], availability of IPRs on seeds, transgenic plants, genetically modified crops and globalization of agricultural trade are causing apprehension and threat of genetic pollution which has a direct impact upon the right to environment and other human rights as well. Environmental degradation and harm arising out of unsustainable practices of development, and the conflict between environmental rights and other human rights cannot be righted unless more is done by way of major structural and substantive reform to environmental protection.[7] The development of science and technology especially agricultural biotechnology must be

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[4] Carolina Lasen Diaz, *Intellectual Property and Biological Resources: An Overview of Key issues and Current Debates* 5 (Wuppertal Institute for Climate, Environment and Energy, 2005)

[5] Jonathan Curci, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property*, 29-48 (CAMBRIDGE UNIVERSITY PRESS, New York, 1st ed. 2010)

[6] Genetic engineering presents an alternative to traditional plant breeding. Using the techniques of molecular biology, a single gene that code for a desired trait, such as insect resistant resistance, increased protein content, or tolerance to drought is isolated and then combined with a promoter sequence that will allow the gene to be expressed. This combination of genes is then introduced directly into the plant genome. The concept is actually quite simple, although the techniques are technologically complex. Barbara A. Schaal, "Biodiversity, Biotechnology and the Environment" in Charles Mc Manis (ed.), *Biodiversity & The Law- Intellectual Property, Biotechnology & Traditional Knowledge* 139 (earthscan, London, 1st ed. 2007)

[7] *See generally,* Charu Sharma, "Human Rights and Environmental Wrongs: Integrating the Right to Environment and Developmental Justice in the Indian Constitution" in C. Raj Kumar & K. Chockalingam(ed.) *Human Rights, Justice, & Constitutional Empowerment.* 318, 329,334 (Oxford, 1st ed. 2007)

used in order to further and protect the human rights throughout the world. The intellectual property system has to be viewed as an important instrument of economic and trade competition. The development and dissemination of new technology protected by IPRs is an important factor determining the future of agriculture for which a roadmap needs to be prepared considering the national requirements to face and tap this challenges posed by new technologies and IPRs over PGRs.

Plant IPRs and Indian Agriculture: An Overview

Historically living organisms have not been subjected to private ownership and the belief was that plants and animals were the products of nature and as such these cannot be subjected to monopoly in the form of IPRs. Although plant breeding in Europe and America commenced during 19th Century there was no certainty as to its patentability. Living things were considered non-patentable as they were not amenable to accurate written description for an adequate disclosure.[8] In 1930 United States enacted Plant Patent Act, with a view extend to the plant breeder the benefits widely believed to have accrued to industry from the existence of patent law.[9] The land mark event for the patenting of plants was the 1985 judgment in the US now famous as *ex parte* Hibberd, in which' molecular genetics' scientist *Kenneth Hibberd* and his co-inventor were granted patents on the tissue culture, seed and whole plant of a corn line selected from tissue culture. Patenting of micro-organisms gained legal recognition much later with the decision in *Diamond* vs *Chakraborty*[10] in 1980. By a small majority of 5:4 the court

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8 Venkatachala G Hegde, "Intellectual Property Rights: National and International Legal Aspects Relating to Patenting Life Forms", 38 *Indian Journal of International Law*, 28 (1998)

9 The US provides a natural anchor for the discourse of intellectual property pertaining to PGRs at the global level for several reasons, a couple of which warrant mentioning at this point. In comparison to Europe and the rest of the industrialized world, the US had a head start in scientific plant breeding. Also the same is true in biotechnology. The US' stakes in these critical fields were part of the reason it championed the most revolutionary review of intellectual property jurisprudence at a global level in ways that brought its municipal intellectual property standard to the global stage via the TRIPs Agreement. The TRIPs Agreement, is a strategic economic and legal instrument under the WTO to shape America's vision of neoliberal economic order in a post-Cold War epoch. Chidi Oguamanam, *Intellectual Property in Global Governance* 109 (ROUTLEDGE, Oxon, 1012)

10 447 US 303 (1980)

allowed the patentability of a microorganism that could digest oil and thus prove useful in controlling oil spills and the court held that *"any thing under the sun made my man is patentable, provided there is novelty, inventiveness and industrial application……."*[11] Genetic engineering has, rendered the transfer of genes across sexual barriers possible and thus enhanced the economic value of biodiversity.[12] By the proper application of biotechnology, the desirable characteristics of PGRs are synthesized through DNA technology, and a new variety is created using available PGRs. Realizing the importance of PGRs, the Multinational Companies (MNCs) and developed countries tried to get control over the genetic resources available in the world by creating germplasm banks with the help of various World Organizations.[13] They preserved it and made it available to the scientist in both public and private sectors for research and development and the product of such research have been monopolized and sold back to the south from where the collected the maximum germplasm. New plant varieties are protected as 'trade secrets' and can be released on a contractual basis using terms and conditions that are similar to license agreements. Historical Experience shows that countries have used and adapted IP regimes according to their level of development and technological capability to facilitate technological learning and promote their own industrial policy objectives. With the advent of TRIPs, this flexibility is completely removed. All member countries of the WTO are compelled to adopt a uniformly strong IPRs regime irrespective their technological capability level, notwithstanding the clear evidence and arguments suggesting that the

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[11] Having decided that "*any thing under the sun that is made my man"* could include living organisms, the court majority cleared the way for the patentability of diverse GMOs, including macroscopic plants, animals and even mammals. Of particular relevance to GM crops, the Supreme Court specifically held whole living plants to be utility patent eligible in its 2001 decision, JEM *v.* Pioneer Hi-Bred (JEM Ag Supply, 534 US at 132). In this case, the organism in question was the corn plant (*Zea mays*). The Supreme Court held that all plants whether sexually or asexually reproducing, are eligible for utility patent protection. The Court also noted that the same plant invention might be entitled to simultaneous protection under either the PPA or the PVPA. *See Generally*, Dr. Andrew W. Torrance, "Planted Obsolescence: Synagriculture and the Law" 48 *IDAHO LAW REVIEW* 328-332 (2012)

[12] J.P. Mishra, "Biodiversity, Biotechnology and Intellectual Property Rights: Implications for Indian Agriculture", 3 *JW Intell Prop* 211-213 (2000)

[13] The most important one are : CGIAR- International Agricultural Research Centre, IRRI- International Rice Research Institute, CIP- International Potato Centre and ICARDA- International Centre for Agricultural Research in Dry Areas

optimum strength (degree) of patent protection depends on the product, sector and nation concerned.[14] The impact of TRIPs requirements on agricultural biotechnology can be categorized as two separate issues. The first is whether compliance with TRIPs can be reconciled with domestic social policies in the area of agricultural biotechnology, such as sustaining domestic agricultural industries and providing adequate access to food. The second issue is whether TRIPs conflicts with other international norms, namely, the right to food under the Universal Declaration of Human Rights (UDHR) and the goal of benefit-sharing from biological resources under the Convention on Biological Diversity (CBD).[15]

Indian agriculture is characterized by pre-dominance of small and marginal farmers. Agriculture is and will continue to be central to all strategies for planned socio-economic development of this country.[16] Agriculture has slowly developed over thousands of years with the domestication of plants and animals.[17] Farmers and rural communities by their traditional practices have greatly contributed to the creation, conservation, exchange

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[14] *See generally*, Amit Shovon Ray, "The TRIPs Agreement: Public Health Concerns for India" in Alokesh Barua, Robert M. Stern (eds.) *The WTO and India: Issues and Negotiating Strategies* 242-243 (Orient Blackswan Private Ltd., Hyderabad, 1st ed. 2010)

[15] C.M. Ho, "Agricultural Biotechnology under TRIPs and Beyond: Addressing Social policies in a Pro-patent Environment" in Jay Kesan (ed.), *Agricultural Biotechnology and Intellectual Property: Seeds of Change 305* (CAB International, UK, 2007)

[16] At the time of independence in 1947, agriculture and allied sectors provided all over 70% of the country's employment and more than 50% of the GDP which is now 17.2%. *See generally* Economic Development, Evolution of Policy, *available at*: http://reference.allrefer.com/countryguide-study & http://business.map sofindia.com/india-gdp/sectorwise/ (Visited on 14.09.12)

[17] As an integral aspect of human civilization, agriculture has a modest origin. From hunting and gathering, pioneered farmers veered into crop domestication some 10,000 years ago. Through careful selection of seeds or propagating materials and meticulous observation of the ecosystem or ecological dynamics and responses thereto, farmers were able to develop an initial handful of crop varieties in to several. By means of shrewd management, innovation, cultural practices of seed exchange and sharing of knowledge, today there is "an inconceivable wealth of crop diversity" comprising an estimated 7000 species of key food crops, each with a distinct varieties estimated in the region of 100,000. *See generally* , Chidi Oguamanam, *Intellectual Property in Global Governance* 106-107 (ROUTLEDGE, Oxon, 1012)

and utilization of genetic diversity. Over the last half century, India has probably grown over 30,000 different indigenous varieties and land races of rice. Plant varieties, seeds, land races *etc.*, developed by the farmers is a part of the broader aspect of *biodiversity,*[18] which provides the feedstock to the biotechnological industry as well. The ability to transfer genes across breeding barriers can produce novel products (transgenic plants[19]), which can respond more rapidly than conventional breeding. Biotechnology, hybrid technology, bio-control agents, bio-fertilizers, vaccines, diagnostics, improved implements and machinery are now being used in Indian agriculture very frequently. Development of transgenic plant varieties or breeding new varieties of plants require investment in terms of skill, labour, material resources and funds, and may take many years', intellectual effort and technological experiment. These technologies, together with the introduction of beneficial plant traits, have now become the subject matter of IPRs as a consequence of economic globalization and the Indian agriculture is not an exception to that. Since the mid-1960s, the traditional agriculture practices are gradually being replaced by modern biotechnology and farm practices in India, and a veritable revolution is taking place. In modern agriculture, the focus is rapidly shifting to biotechnological means to develop transgenic varieties which are of superior qualities in terms of beneficial plant traits.[20] Scientific advancement particularly, in the field of biotechnology and tissue culture resulted to the development of new plant varieties and better quality of seeds, which accelerate the agricultural development in modern times. A new variety, once released, may in many cases be readily reproduced by others so as to

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[18] *Section 2(b)* of the Biological Diversity Act, 2002 defines the term Biological Diversity as, 'the variability among living organism from all sources and the ecological complexes of which they are part, and includes diversity within species or between species and of eco-system'.

[19] The term transgenic plant refers to 'plant with unique gene combinations that do not occur naturally and are produced by using recombinant DNA technology'.

[20] Special attention has been given to develop new crop varieties, with the application of biotechnology. Indian Government has established the Department of Biotechnology (DBT) in 1985 to favours biotechnology. The DBT, the Indian Council of Agricultural Research, the Department of Science and Technology, the Council for Scientific and Industrial Research are all actively engaged in research in agricultural biotechnology.

deprive its breeder of the opportunity to profit adequately from his investment. It is argued that granting to a breeder of a new plant variety, the exclusive right to exploit his variety, both encourages him to invest in plant breeding and contribution to the development of agriculture, horticulture and forestry.[21] The production of transgenic plants has become possible through the development of a number of enabling and transformation technologies. There are large numbers of public and private organizations engaged in plant improvement programme based on the exploitation of existing genetic diversity which calls for strong intellectual property protection.

Enviro-Legal Issues & Perspectives:

The development of new plant varieties, transgenic seeds and the claim of proprietary rights over PGRs are the new phenomenon; which has ethical, legal and environmental consideration also, particularly in the context of the increasing role of patenting in the area of biotechnological inventions. With the availability of IPRs on seeds, new plant varieties and other agricultural inputs, agricultural biotechnology research has already got further boost in terms of investment and development. In the agricultural arena, biotechnology tools have been used for animal and plant disease diagnostics, for production of recombinant vaccines against animal diseases, and for the improvement of livestock and crops. While the use of genetically engineered drugs and vaccines has not stirred much controversy, the deployment of genetically modified (GM) crops has met with fierce resistance, particularly in Europe, on ethical grounds and on concerns of perceived negative impacts of GM crops on the environment and food safety.[22] Genetically-modified (GM) organisms have raised

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[21] Shahid Alikhan & Raghunath Mashelkar, Intellectual Property and Competitive Strategies in the 21st Century, 22 (2006)

[22] Ethical considerations revolved around topic such as : (1) the "unnatural" nature of gene transfers across species, (2) possible widening of the gap between the rich and poor farmers and countries, and (3) the increase in global food supply's dependency on a few multinationals corporations that control agricultural biotechnology and the seed industry. There are concerns that the negative publicity of and the resistance of GM crops by consumers in Europe may have hindered the transfer of this new innovation to the developing countries where increasing crop productivity is most urgent. See, Hoan T. Le, "The Principl;e of Biotechnology to Promote Agricultural Development and Food Security" in Joseph Cooper, Leslie Marie Lipper et. al.(eds.) Agricultural Biodiversity and Biotechnology in Economic Development 275 (Springer, New York, 2005)

safety anxieties since their development began several decades ago. Alleged concerns have ranged from threats to human health from ingestion of toxic "Franken-foods", to dangers to biodiversity from escape of GM crops into the environment[23], and to contamination of organic crops by GM crop pollen.[24] There is no protection during cross-pollination, and this sometimes resulted in super weeds, impact on small farmers. Traditional agriculture relies heavily on indigenous inputs such as the use of organic manures, seeds, simple plough, on the other hand modern technologies protected by IPRs consists of chemical fertilizers, pesticides, improved varieties of seeds including hybrid seeds, which affecting the environment at large particularly the agro-biodiversity. The strategy for employing more toxic chemicals as pesticides and herbicides which in due course give rise to resistant varieties is suicidal, in lethal sense. Thousands of people die annually as result of poisoning. In 1987, more than 60 farmers in India's prime cotton growing area of Prakasam district in Andra Pradesh committed suicide by consuming pesticide because of debts incurred for pesticide purchase. The introduction of hybrid cotton created pest problems. Pesticide resistance resulted in epidemics of white-fly boll worm, for which the peasants used more toxic and expensive pesticides, incurring heavy debts and thus being driven to commit suicide. In April 2003, the Standing Parliamentary Committee in India reported that *Bt* Cotton appeared to perform "only marginally" better than conventional varieties, both in terms of productivity and resistance to bollworm infection.[25] Even when pesticides and herbicides do not kill people, they kill people's source of livelihoods. The most extreme example of this destruction is that of *bathua,* an important green leafy vegetable with very high nutritive value which grows as an associate of wheat.[26] The introduction of

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[23] Andrew W. Torrance, "Intellectual Property as the Third Dimension of GMO Regulation", 16 KAN. J.L. & PUB. POLY' 257, 269-73 (2007), Quoted in Dr. Andrew W. Torrance, "Planted Obsolescence: Synagriculture and the Law" 48 IDAHO LAW REVIEW 324 (2012)

[24] Matthew Franken, "Fear of Frnakenfoods: A Better Labeling Standard for Genetically Modified Foods" 1 MIINN. INTELL. PROP. 153 (2000), Quoted in Dr. Andrew W. Torrance, "Planted Obsolescence: Synagriculture and the Law" 48 IDAHO LAW REVIEW 324 (2012)

[25] BRIDGES Trade BioRes, "BT Cotton Remains Highly Controversial in India" Vol.3 No.8 May 2003 *available at*: http://ictsd.org/i/news/biores/8764 (Visited on 16.08.2012)

[26] Vandana Shiva, *Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology,* 112 (TWN, Malaysia, 1993)

agricultural biotechnology also results in '*biopiracy*'[27], which has a direct impact upon environment and human rights. This negates all the rights of the Indian people having, both the economic and environmental importance. Moreover the *'terminator* of organic manures, seeds, simple plough, on the other hand modern technologies protected by IPRs consists of chemical fertilizers, pesticides, improved varieties of seeds including hybrid seeds, which affecting the environment at large particularly the agro-biodiversity. The strategy for employing more toxic chemicals as pesticides and herbicides which in due course give rise to resistant varieties is suicidal, in lethal sense. Thousands of people die annually as result of poisoning. In 1987, more than 60 farmers in India's prime cotton growing area of Prakasam district in Andra Pradesh committed suicide by consuming pesticide because of debts incurred for pesticide purchase. The introduction of hybrid cotton created pest problems. Pesticide resistance resulted in epidemics of white-fly boll worm, for which the peasants used more toxic and expensive pesticides, incurring heavy debts and thus being driven to commit suicide. In April 2003, the Standing Parliamentary Committee in India reported that *Bt* Cotton appeared to perform "only marginally" better than conventional varieties, both in terms of productivity and resistance to bollworm infection.[28] Even when pesticides and herbicides do not kill people, they kill people's source of livelihoods. The most extreme example of this destruction is that of *bathua,* an important green leafy vegetable with very high nutritive value which grows as an associate of wheat.[29] The introduction of

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[27] For example*, Neem, Basmati, Turmeric* etc. During the period of 1976-2000 almost 46 patents have been guaranteed to U.S. based firms on the insecticidal properties of Neem.

[28] Terminator technology refers to plants that have been genetically modified to render sterile seeds at harvest, in the second generation. It is also called Genetic Use Restriction Technology or GURTS. Terminator technology was developed by the multinational seed/agrochemical industry and the United States. Terminator technology runs counter to the peasant conception of life and work by creating genetically modified crops that have seeds that poison themselves and become sterile, so that farmers cannot save the seeds produced in the harvest and sow them again. They will be forced every year to buy new seeds from the companies or to buy another product from the companies to "activate" the seeds. *See generally* "Terminator Technologies" *available at*: http://www.planet-diversity.org/fileadmin/files/planet_diversity/Programme/Workshops/Termiator/Villa_15_5_history_doc_en.pdf (Visited on 29.07.2011)

[29] Lesser W., "The Effects of TRIPS-Mandated Intellectual Property Rights on Economic Activities in Developing Countries, April 2001, at http://www.wipo.int/about-ip/en/studies/

agricultural biotechnology also results in '*biopiracy*'[30], which has a direct impact upon environment and human rights. This negates all the rights of the Indian people having, both the economic and environmental importance. Moreover the *'terminator technology'*[31] if used, has a very bad impact upon the traditional farming practice and agro biodiversity. With regard to globalization and food safety, the introduction and strengthening of IPRs in agriculture raises concerns that over-patentability in the agro-biotechnology industry may have the potential to stifle innovation rather than promote it.[32]

Agricultural biotechnology, fostered by agribusiness, promises food for all; pharmaceutical biotechnology promises health for all; industrial biotechnology promises sustainable development for the world and the human genome project, among other things, now promise new possibilities in therapeutics and benign human cloning. The belief that biotechnology provides unprecedented vistas of human progress is not just media hype; its practitioners, in all parts of the world, live by it.[33] Private investments from plant breeders will inevitably lead to modernizing agriculture. While acknowledging

pdf/ssa-lesser-TRIPS.pdf quoted in Carolina Lasen Diaz, *Intellectual Property and Biological Resources: An Overview of Key issues and Current Debates*11 (Wuppertal Institute for Climate, Environment and Energy, 2005)

30 Upendra Baxi, *The Future of Human Rights,* 270 (3rd ed.2008)

31 For example, the introduction of the Green Revolution a movement to increase the yield per acre of certain crops like rice and wheat fulfilled the promise of high-yielding varieties. It resulted, however, in other social issues for developing nations. Studies conducted after the Green Revolution indicates that the landlords were benefited more than the peasants, leading to social tensions. Furthermore, small-scale farmers suffered a variety of economic and social woes including lower wages, displacements from land, loss of employment and higher rents. The studies reflected a bias in the diffusion of improved varieties, which resulted in huge benefits to the large-scale farmers and meager benefits to the small scale farmers. *See Generally*, S. Ragavan, "To Sow or Not to Sow: Dilemmas in Creating New Rights in Food" in Jay Kesan (ed.) *Agricultural Biotechnology and Intellectual Property- Seeds of Change* 320-346 (CABI, Oxfordshire, 2007)

32 *Ibid* at 325

33 It is estimated that some 10 thousand species have been used for human food and agriculture. Currently no more than 120 cultivated species provide 90% of human food supplied by plants, and 12 plant species and five animal species alone provide more than 70% of the human food. Hundreds of thousands of farmers' plant varieties and landraces that existed until the beginning of the 20th century in farmers' fields, have been substituted by a small number of modern and highly uniform commercial varieties. In the United States alone, more than 90% of the fruits tree and

its benefits, developing nations express concern that modernization of agriculture will affect small-scale farmers by widening the gap between the rich and the poor.[34] Currently, developing nations engage in innovative plant breeding through government-funded public institutions. The public funded research activities concentrate on staple food crops rather than on consumer-oriented research to achieve national goals like access to food and poverty eradication. Private investors, however, will not benefit from plant breeders' rights unless research is directed towards crops with greatest profit potential. Hence, private R&D investments would cater to consumer food rather than staple food. A shift in the goals of agricultural research may not cater to the welfare necessities of developing nations, even if agricultural production increases.[35]

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vegetable species that were grown in farmer's fields at the beginning of the century can no longer be found, and only a few of them are maintained in gene banks. Similarly alarming figures can be given for the genetic erosion of domestic animal breeds and varieties. The picture is much the same throughout the world. *See generally,* Jose Esquinas-Alcazar, "International Treaty on Plant Genetic Resources for Food and Agriculture and Other International Agreements on Plant Genetic Resources and Related Biotechnologies" in Joseph Cooper, Leslie Marie Lipper *et. al.*(eds.) *Agricultural Biodiversity and Biotechnology in Economic Development* 432-33(Springer, New York, 2005)

[34] The concept of sustainable development contains three basic components or principles. *First* among these three is the *precautionary principle,* whereby the state must *anticipate, prevent* and *attack* the cause of environmental degradation. The *second* component of the doctrine is the principle of *'polluter pays'.* The principle states that the polluter not only has an obligation to make good the loss but shall bear the cost of rehabilitating the environment to its original state. In operation, this principle is usually viable alongside the precautionary principle. *Thirdly,* each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations. This is the principle of *'conservation of access'*. *See generally,* Y.K. Sabharwal,CJI, "Human Rights and the Environment" *available at*: www.Supremecourtofindia.nic.in /new-links/humanrights.htm (Visited on 23.09.08)

[35] The most significant provision in CBD in this regard is the Article 8(7) which provides: *Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices*. Thus it requires countries to respect and protect indigenous and local community knowledge, ensures that such communities are asked before using their knowledge for wider societal benefits and encourages the equitable sharing of benefits arising from such use.

Concerns are expressed that the introduction of agricultural biotechnology may lead to erosion of biological diversity of cultivated plant species as more and more area would be occupied by genetically uniform crops, thus narrowing the genetic base of cultivated crops.[36] There is a chance that transgenic commercial crops may push the food crops to the back stage due to high private research investment in commercial crops having many negative impacts on the environment. The modern agricultural practice, which leads to monoculture, results to the reduction in diversity increases vulnerability to natural resources, to pest/weed attack and other plant diseases. Industrialization, loss of indigenous knowledge, widespread use of simple variety of crops, loss of natural habitats, global warming, monopoly and monoculture in the seed industry, lack of gene bank are the main causes of genetic erosion, an irreparable loss to the environment. The erosion of biodiversity has serious ecological and social consequences since it is the basis of sustainable development.[37] The ecological vulnerability of agricultural monoculture has thus made the conservation of agricultural biodiversity an environmental imperative.

National Legal Framework: An Overview

There is a growing concern about the increasing loss of plant and animal species as well as destruction of habitats, as also the loss of knowledge concerning these. An environmental perspective must guide the evaluation of all development projects, recognizing the role of natural resources in local livelihoods. The integration of agriculture with land and water management, and with ecosystem conservation is essential for environmental sustainability and agricultural production. Preservation of the natural environment and promoting development to meet the basic needs of humanity are the burning issues for the present

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[36] *See generally*, *Introducing Human Rights: An Overview including Issues of Gender Justice, Environmental and Consumer Law*, 195-208 (South Asia Human rights Documentation Centre, 2007)

[37] *Most importantly,* The Environment (Protection) Act, 1986, The Forest Policy, 1988, The Rules for Manufacturer, Use, Import and Storage of Hazardous micro-organisms, Genetically engineered organisms or cells, 1989, Constitution (73rd Amendment) Act, 1992, National Conservation Strategy and Policy Statement on Environment and Development, 1992, Panchayat (Extension to Schedule Areas) Act, 1996, The Plant Variety Protection and Farmer's Rights Act, 2001, The Biological Diversity Act, 2002 *etc.*

policymakers at both international and national level. The United Nations Conference on the Human Environment, Stockholm, 1972 is the first International recognition to environment which stated that;

"Human have the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and a solemn responsibility to protect and improve the environment for present and future generations".

The United Nations Convention on Biological Diversity, 1992 (CBD), recognizes the sovereign right of states over their genetic resources and stipulates that access to genetic resources can occur only on mutually agreed terms and with 'prior informed consent' of States. This convention also mandates equitable sharing of benefits arising from commercial use of a country's biological resources and stresses on protection and promotion of rights of communities, farmer and indigenous people. The CBD lays down three objectives: - (i) the conservation of biological diversity; (ii) the sustainable use of its component; and (iii) the fair and equitable sharing out of the utilization of genetic resources.[38] The United Nations Conference on Environment and Development

(UNCED), Rio de Jenerio, 1992 known as 'Earth Summit' sought to find ways to stop the destruction of irreplaceable natural resources. It emphasized the connection between environmental protection and natural resource management, and such economic and social conditions as poverty and development. This involved an emphasis on the need to find and ensure a maintainable balance between social, environmental, and economic needs. The Johannesburg Summit, 2002 expanded the vision to encompass social justice and the fight against poverty as key principles of sustainable development, and placed the human and social aspects of solidarity, equity, partnership, and cooperation as equally crucial as scientific approaches to environmental protection. [39]

At the national level, a large number of environment and related laws and policies have been adopted to ensure the human right to environment, sustainable use of plant genetic

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[38] *Section 3* of The Biological Diversity Act, 2002

[39] Ashish Kothari & Anuprita Patel, *Environment and Human Rights*, 85(National Human Rights Commission, 2006)

resources (PGRs) and right to development.[40] The Biological Diversity Act, 2002 has been passed to advance the objectives related to conservation of biological diversity, sustainable use of its component and fair and equitable sharing of the benefit arising out of the use of biological resources and knowledge. The Act puts stringent limit on the access to biological resources or related knowledge for all foreigners to overcome the problem of bio-piracy and block the unhindered access to genetic resources.[41] The Act insists on sovereign rights over the natural resources thereby, intends to protect the human right to environment in India. An ambitious attempt to break the conventional barriers between environment and development, and between state-dominated planning processes and 'ordinary' citizens, has been the National Biodiversity Strategy and Action Plan (NBSAP) process. From early 2000 to end-2003, this process focused on twin priorities of ecological security (including the conservation of ecosystems, species and essential ecological functions on which all life depends), and livelihood security (especially of those people who depend directly on the health and diversity of natural resources for survival).[42]

The Plant Variety Protection and Farmer's Rights Act, 2001 is the most progressive plant variety protection legislation among those adopted by the developing countries in furtherance of its TRIPs obligation.[43] The Act contains various provisions to protect the rights of the

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[40] The international intellectual property system has become a network of numerous institutions with many new actors, establishing and operating under new structure, and generating a welter of new norms. This is a much less convenient, much messier picture than the narrative of TRIPs as the central framework. But it is fuller picture of the system by which intellectual property norms are generated and implemented internationally. The adoption of TRIPs generated institutional competition with WIPO and gave birth to a useful range of alternative law making devices. The enhanced protection that TRIPs ensured on a broader geographic scale raised the visibility of intellectual property rights and drew a broader range of actors into the public debate and the law making process. Graeme B. Dinwoodie, "The International Intellectual Property Law System: New Actors, New Institutions, New Sources", 206 *Marquette Intellectual Property Law Review*, 10:2 (2006)

[41] Dr. Phillippe Cullet & Radhika Kolluru, "Plant Variety Protection and Farmers Rights- Towards a Broader Understanding"24 *Delhi Law Review* 48,2002 (2003)

[42] *Introducing Human Rights: An Overview including Issues of Gender Justice, Environmental and Consumer Law*, South Asia Human rights Documentation Centre(2007)

[43] Jidesh Kumar, "Biotechnology Patenting" 9 *Journal of Intellectual Property Rights* 471 (2004)

Indian farmers which they claimed as human rights and fundamental rights. The Act envisages that farmers should be treated like commercial breeders and should receive the same kind of protection for the varieties they develop.[44] This will, obviously, ensure the farmers right to livelihood. The Act recognizes the farmer not just as a cultivator but also as conserver of the agricultural biodiversity. It also acknowledges the role of rural communities and indigenous people as contributors to biodiversity. In order to encourage the Indian farmers, a concept of National Gene Fund has been put into place under this Act, which will be used to reward the farmers for conserving biodiversity and for sustainable use of genetic resources. The use of farmer's varieties to breed new varieties by using biotechnology will have to be paid for. Revenue will be flow into National Gene Fund, payable to the farming community under various heads. The concept of equitable benefit sharing has also been introduced under this Act.

The challenge before the country like India is how to provide economic growth with the rapid change of global economy that is suitable with a healthy, diverse environment. This challenge involves two human rights: the right to attain basic needs, and the right to a sound environment. In the International environmental law, the prime concern has been given to lay down the obligations, responsibilities and duties of the nation-state relating to the protection, improvement and preservation of the environment.

Attempts to resolve these two paradoxical rights have taken the form of the concept of sustainable development, that is, development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'. The United Nations Environment Programme in its follow-up document entitled 'Caring for the earth: A Strategy for Sustainable Living', defined sustainable development as 'improving the quality of human life while living within the carrying capacity of supporting ecosystems'. These two definitions capture the ideas of intergenerational responsibility and safeguarding the delicate balance of existing, restorative life on the planet, while improving the quality of human life.[45]

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[44] Mr. G. Chandrashekhar, "Role of technology in agriculture" 5 *The Hindu Survey of Indian Agriculture* 2006

[45] *See generally*, Markandey Katju, J., *Law in the Scientific Era- The Theory of Dynamic Positivism* 56-59 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2000)

Government has achieved consensus in support of this concept as a balance between environmental and economic rights, and have periodically pledged to carefully formulate policies with the aim of achieving developmental ends that do not irreparably compromise the human rights to environment. Trade regimes, specifically WTO, are sometimes in conflict with sustainable development priorities.

Conclusion:

The problems associated with trade in globalised world and with human and economic development are vast and complex. Agricultural biotechnology has often resulted in reduction of biodiversity, the introduction of damaging pesticides and fertilizers, soil erosion, agricultural monoculture, poses direct threat to the human right to healthy environment. At the same time, the development and dissemination of new technology protected by IPRs is an important factor determining the future of agriculture. In considering this new technology from the point of view of intellectual property rights, it is useful to keep in mind that there are in principle three options for each new technology. First, do not protect at all. Second, protect in principle while applying the rules in such a way as to balance incentive and access. A variant of this second option is to protect in principle but because of some societal judgement, to decide-often case by case to emphasize access over incentive in particular situations. Third, protect not through patent, but through a tailored sui genris system.[43] In recent years the growth rates of world agricultural production and crop yield have slowed, raising fears that the world may not be able to grow enough food and other commodities to meet the need of future population.[44] The development of agricultural biotechnology must be used in order to further and protect the human rights and environment as well. The growth of scientific knowledge has transformed man from a creature who could not understand natural and social forces, and was therefore helpless before them, to a being who has discovered many of the laws of nature and society, and can utilize this scientific knowledge to control and regulate his environment with a view to satisfy his wants. The law of a scientific society will have a high democratic and moral content. The higher the forces of production develop and correspondingly the higher man's intellectual and cultural level, the greater is felt the need for independence and creative activity. A scientific society can only be a planned society where decisions at every level are taken on

a rational scientific basis. In view of the high degree of specialization in modern science it can only be a specialist who can be a legislator. The legislator by utilizing his scientific knowledge will function like a scientist free of prejudices, subjectivism and vested interest.[45] However, it is also argued that, the global communities of techno-science, not the 'duly' elected representatives of the people, should not be the custodians of public policy and human futures. Their legitimation derives in responding to the peoples' needs, wants and desires. Therefore, the law, policy, and administration must stand in fiduciary relationship to the potential of self-regulation amongst the techno-scientific peer groups. These understand best the need for self-restraint on where to go next and how far to go.[46]

A revolution in agricultural technology is the need of the times to meet the challenge of food insecurity. The importance of GM crop varieties, pest-resistant varieties are to be given due consideration. However potential risks and concerns cannot be ignored. Issues of bio-safety, especially food safety and environmental impact, of agricultural biotechnology have to be adequately addressed. The Declaration on International Economic Cooperation adopted by the General Assembly in May 1990 clearly recognizes that, 'Economic development must be environmentally sound and sustainable'. Imperatives of trade, and concerns related to environment, equity and social justice need to be dealt with independently. Environmental and social clauses which are implicitly part of international agreements must not be used selectively to erect trade barriers against developing countries like India. Recognizing the serious impact of a degraded environment upon the realization of human rights we have to adjust our policies within the social, economic and cultural framework. Articulation of more integrated approach to deal with socio-economic and environmental problems is the contemporary need. Policies are to be framed materializing the sustainable model, for the preservation of biological resources and natural ecosystem to protect environment and human rights. Challenges are to be accepted for mapping out the ways to implement the concept of sustainable development in order to survive on this planet.

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[46] *See generally*, Upendra Baxi, *The Future of Human Rights* 270-271(3rd ed.2008)

Community Collaboration in Rehabilitation of Prisoners as a Sentencing Policy - National and International Perspectives

Paromita Chattoraj *

ABSTRACT

In the process of imprisoning an offender, the reformative ideal of punishment focuses on the utilization of the duration of incarceration to modulate the offender positively, so that he or she can be amalgamated back to the society as a positive, contributing and law-abiding citizen. This paper tries to highlight the various ways through which community collaboration aimed at reintegration of offenders, helps in bridging the gap between the civil society and the prisons through active interest of the members of the community on one hand and the involvement of the prison authorities on the other hand,, at the national as well as the international level.

Keywords: Reformative justice, community collaboration, rehabilitation, national, international.

Introduction:

Punishing an offender through imprisonment results in deprivation of his/her most fundamental human right to free movement and freedom of association. Imprisonment serves a two-way function by protecting the community and by rehabilitating offenders during the period of incarceration. If imprisonment is to serve any function other than to give back the pain that the offender caused to the victim and the society, it is crucial to alter the way in which prisons are perceived. And if the sentencing policy is towards rehabilitating the offender as a law-abiding citizen, it is the community (where the prisoner belonged and to which he/she will return after his/her release), which should be involved in their rehabilitation during incarceration. A philosophy and practice must be encouraged which keeps the individual's

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rights and human dignity intact, and creates opportunities for the development of skills and aptitudes that will be beneficial to him/her upon release from the prison. This could be achieved by two-fold cooperation between the civil society and the prison functionaries. This paper makes an endeavor to highlight the initiatives of community collaboration in prisons in the international as well as national perspective for rehabilitation of the prisoners.

Background

Individuals who are offered punishment for their wrongs, although socially and economically handicapped, however, are not bereft of their human dignity. Bentham considered that all punishment is mischief: all punishment in itself is evil[1] and Hart specified that punishment "involves pain and other consequences normally considered unpleasant"[2]. George Fletcher sees the diverse rationales of punishment falling into two neatly distinguishable groups: one—under the general heading of "social protection"— aiming at "general deterrence, special deterrence, rehabilitation, and isolation," and the other founded on different theories of retribution. Whereas the utilitarian purposes of social protection are described as "focusing attention on the good that might follow from punishment and ignoring the justice of punishing the particular suspect," retributive theories instead consider punishment a requirement of justice.[3] Rehabilitationists from the very beginning blasted proponents of other views on punishment for their failure to eradicate pain from the practice of punishment.[4] Fichte suggested that the offender had a right to punishment, though not *qua* rational being, but in a contractual sense. The offender was entitled to punishment as the only means of expiating his crime. Expiation, however, was a necessary precondition for his reentry into the community of rational parties to the social contract.[5]

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1 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 16 (Oxford Clarendon Press,1907)

2 H.L.A.Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 331(Oxford University Press, 2008)

3 George P. Fletcher, *The Grammer of Criminal Law: American, Comparative, International*, 359 (2007)

4 Alfred L Gausewitz, *Considerations Basic to a New Penal Code, Part I*, 11Wisconsin Law Review, 364, 346- 378(1936).

5 Fichte, *Naturrecht*, sect. 20, Pp. 253-56.

With the emergence of imprisonment as the dominant mode of punishment during the late eighteenth and early nineteenth centuries, the problem of punishment became the problem of imprisonment.[6] Its privacy and duration dramatically distinguished imprisonment from all previous methods of punishment infliction and therefore posed new and difficult questions of legitimacy. Most immediate, the seclusion of imprisonment meant that it carried an enormous potential for abuse. The Enlightenment had moved the imposition of punishment into the public spotlight by establishing a system of public oral jury trials. At the same time, however, it had moved the infliction of punishment from the marketplace into secluded prisons, which were often built in remote areas or otherwise made impenetrable to the general public.[7] The unprecedented duration of punishment as imprisonment meant, among other things, that the state's officials had more opportunities to engage in the illegitimate infliction of punishment. The infliction of corporal punishment might last a day; the infliction of imprisonment could last a lifetime. [8]

Rehabilitative ideals of punishment seeks to present such justification for imprisonment whereby, the seclusion for the sentence duration could be utilized to modulate the offender in such a manner that he could be granted re-entry into the society or community. Imprisonment serves a two-way purpose of protecting the community and reforming the offenders. If the ideal of imprisonment is to rehabilitate the offender as a law-abiding citizen, it is the community (where the prisoner comes from and to which he/she will return after his/her release), which should be actively involved in the treatment during incarceration. Of late, the idea that prison officials serve only to lock and unlock prisoners and to keep them secure, is getting replaced by a more inter-actionist approach. They are being given the responsibility to actively engage with prisoners and participate in their rehabilitation.[9]

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6 Schmidt, *Einführung*, (1925), P.308 (citing Herbert Dannenberg, *Liberalismus und Strafrecht im 19. Jahrhundert unter Zugrundelegung der Lehren Karl Georg v. Waechtlers*. Abhandlungen des Kriminalistischen Instituts der Universität Berlin, 4th ser., no. 1).

7 Benjamin Rush, (1787), *An Enquiry into the Effects of Public Punishments Upon Criminals, and Upon Society*, Philadelphia, P.10-11.

8 Beccaria, *Dei delitti e delle pene*, sect. 16, 146.

9 Priti Bharadwaj,Ed., (2008),"*Community Participation in Prisons- A Civil Society Perspective*", Commonwealth Human Rights Initiative Prayas (A field action project of TISS).

Concept and Evolution of Community Collaboration in Prisons

Cessare Beccaria in the 18th century in Europe could be identified as the person who eloquently, talked about the appalling condition of the prison in his much coveted work in the year 1764 "On Crime and Punishment"[10]. Thereafter in UK Elizabeth Fry, an enthusiastic social worker of early nineteenth century and perhaps the first non-official person to show interest in the life of those incarcerated, had been persuaded by her companions and co-workers to make her visit to New gate (prison for women) in Britain. She organised regular visits and started a school for the prison children. She gave the women-prisoners clothes, food and work. [11]

The initiatives of reformers such as John Howard and his successor James Neild, the work of Sarah Martin who devoted her life for the welfare of prisoners in Yarmouth Gaol, and the services of Samuel Hoare, Thomas Fowell Buxton and Elizabeth Fry, who had formed the 'Society for the Reformation of Prison Discipline' in 1816, all are towards prison reforms.[12]

Widespread development of community correction programs in the United States began in the late 1970's as a way to offer offenders, especially those leaving jail or prison, residential services in halfway houses. The first state community correction programs began in Oregon, Colorado, and Minnesota as pilot projects with very little government-funded support. They diverted nonviolent offenders in selected pilot project areas from jails and state prisons into local alternative punishment programs. [13]

In the late 1980's, prison systems across the country began experiencing serious overcrowding of correctional facilities. The overcrowding served as a catalyst for lawmakers to develop new options for sentencing criminal offenders. Parole and probation have always been a way of community correction, but with technological advancement and considering

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[10] Lilly, Cullen and Ball, (2002*), Theoretical Criminology*, Oxford University Press, New York, P.18-22.

[11] Id 10

[12] Ibid

[13] http://www.library.ca.gov/crb/96/08/index.html, visited on 21.06.2012

the psychology of convicted people, correction programs have widened to accommodate work releases, day fine programs, electronic monitoring, home confinement, community service, half way houses, boot camp prisons, restitution, check-in programs, mediation, curfews, restorative justice centers, drug checks, alcohol checks and other methods where there is a certain level of trust between the offenders and the people involved.[14]

Apart from the above mentioned non-incarcerative community based correction programs there are also certain areas in the prison administration that focuses on community collaboration inside the prisons or correctional facilities. In the United States and many other developed countries there exist separate Community Based Correctional Facilities, one of such example is that of Western Ohio Regional Treatment and Habilitation the W.O.R.T.H Center is a Community Based Correctional Facility that houses felony offenders for a period not exceeding six months. The following areas listed indicate the programs that are currently available[15]-

1. Moral Reconation Therapy (MRT)
2. Thinking for a Change (TFAC)
3. Skills Class
4. Chemical Abuse/Dependency
5. Substance Abuse/Chemical Dependency Counseling
6. 12-Step Education
7. AA/NA Meetings
8. Educational Services

Community Collaboration in Prisons at the International Level

Community involvement in prison can take many forms. It may be more organized, with community groups going in to help prisoners to learn to read and write or to learn skills. This involvement should be a two-way process. This can be done directly or indirectly. In

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[14] id

[15] http://www.drc.ohio.gov/web/CBCF_ProgramProfiles.pdf as visited on 21.03.2012

Brixton, for example, prisoners recover second hand books which a charity then sends to all corners of the world. They do simple administrative work for a cancer relief charity, repetitive, time-consuming work which otherwise would cost the charity thousands of pounds. They also entertain local groups of handicapped and old people on feast days.[16] The instances of best practices of community collaboration in prison worldwide can be found in many prisons around the world. Prison Art in Washington, U.S.A, was created by Ed Mead, a former political prisoner, in 2001. He came up with the idea of providing progressive prisoners with the means to sell their crafts and artwork on the Internet. And to his surprise there was a huge demand for such an outlet from social prisoners and he has been providing this service to regular prisoners, mostly for free[17].

The Prison Phoenix Trust (PPT) founded in 1988 in UK, encourages prisoners in the development of their spiritual lives through the practice of meditation and yoga. They offer individualized support to prisoners and prison staff through teaching, correspondence, books and newsletters. It has been operating for 20 years and sending over 9000 quarterly newsletters to prisoners and members of the prison community, and a separate quarterly is sent out to support prison yoga teachers[18].Training for Employment Positive Support for Rehabilitation is a partnership project between North Devon College and Her Majesty's prison service in UK, providing vocational training and employment opportunities for prisoners, both within prison grounds and on licensed release. In early 2003, North Devon College started to deliver construction training at Her Majesty's Prison (HMP) Dartmoor.[19].Fine Cell Work is a registered charity in UK that teaches needlework to prison inmates exhibits their work and sells their products. Anne Tree - a prison visitor for twenty-five years, a prison entertainments officer and prison inspector - founded the company in the 1960s to develop the skills of prisoners, engage them in meaningful work and foster a rehabilitative environment.[20]. Made-in-Jail is a $250,000 a year business

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16 Dhavan Shankardass., Rani Ed., *Punishment and the Prison-Indian and International Perspectives*, Sage Publications New Delhi, 2000, P.85

17 http://www.prisonart.org/, visited on 21.06.2012

18 www.prisonphoenixtrust.org, visited on 21.06.2012

19 http://www.esf.gov.uk/archive/2000_2006_esf_programme/case_studies/, visited on 21.06.2012

20 www.finecellwork.co.uk, visited on 21.06.2012

started by ex-prisoners and employing prisoners in Italy selling its logo products throughout the country. Made in Jail label produces a wide range of products from logo T-shirts to handbags, sold through shops in downtown Rome and at roadside restaurants across the country.[21] The Paralegal Advisory Service (PAS) started in Malawi as a joint venture between civil society groups and Malawi Prison Service in May 2000 engaged in two main projects - establishing legal aid clinics in prisons for remand prisoners and assisting remand prisoners imprisoned for bailable offences in filing bail applications.[22].

Rehabilitation of **prison** inmates who are an important vulnerable group for risk behaviors including drug abuse and HIV/AIDS is another issue. The impact of any HIV/AIDS prevention and care programme in prisons depends on cooperation of all stakeholders in prison settings (prison staff, civil society and inmates). A crucial breakthrough has been made in this regard through pilot interventions being undertaken by UNODC ROSA in collaboration with Governments and NGOs in South Asia.

This project is supporting 27 prison intervention sites in South Asia (Bangladesh-2, Bhutan-1 India-4, Maldives-1, Nepal-5 and Sri Lanka-14). It has successfully conducted14 capacity building programmes i.e. 1 Regional training, 13 National Trainings (Bangladesh-2, India-2, Maldives-2, Nepal-2 and Sri Lanka-5) and 27 site specific trainings across the region.

The primary focuses of the prison interventions seek to provide requisite knowledge and skills on prevention of drug abuse and HIV/AIDS with the aim of initiating behavior change among the prison community[23].

Community Collaboration in Indian Prisons

The Prison Act of 1894 sought to streamline prison administration and put it on a uniform footing throughout the country. Modern prison reform in the country can be said to emanate from the Indian Jail Reforms Committee of 1919-20. For the first time this report identified reformation and rehabilitation as the true objective of prison administration. Community

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21 www.madeinjail.com, visited on 21.06.2012

22 www.mps.gov.mw/paralegal.htm, visited on 21.06.2012

23 http://www.unodc.org/india/prison_setting_south_asia.html as visited on 20.03.12

collaboration as an ingredient of rehabilitation was identified in the All India Committee on Jail Reforms which recommended that public participation in prevention of crime and treatment of offenders must be made a part of our national policy on prisons. However, these recommendations have not been implemented. The Report laid down the selection procedure and criteria that should be considered while engaging representatives of the community. The Mulla Committee Report also identifies the need for this when it mentions: "The principal objective is that an inmate should be imparted such skills and attitudes as can facilitate his resettlement in society after his release."[24] The Model Prison Manual also mentions that Non-Governmental Organizations should be extensively involved especially in the educational programmes. Prison visitors of the state visit in small batches to such prisons to see how they function and how those conditions can be emulated in other prisons.[25] For instance, Tihar correctional home is frequently visited by Judges of Supreme Court of India and Delhi High Court, Deputy Commissioners, Session Judges, Board of Visitors, NGOs, Members of Parliament/Member of Legislative Assembly, Director General/ Inspector General (Prisons) of various States, Senior Government Officers from Center and Delhi State Government, Members of National and Delhi Commission for women, members from Visual and Print Media and Consular access for the Pakistani prisoners in the presence of Senior Pakistani Embassy officials. [26] Apart from these, various academic groups like students and research scholars also visit Prisons.Community participation in prisons can be two fold, namely collaboration between community members and prison staff where the security of prisons is not affected and secondly, community based rehabilitation programmes for deviants, which can range from humanitarian approaches helping them build a strong foundation for themselves, targeting spiritual development, physical and mental health, education and job placement, and involvement in community services. This involves direct interaction of NGOs with the prisoners. This includes performing a need-based assessment of the prisoner, and providing him the appropriate training and skill that might become a sustainable means of livelihood when he reintegrates

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[24] Report on the All India Committee of Jail Reforms 1980-1983, p. 143

[25] Ibid.

[26] http://chitranet.org/yahoo_site_admin/assets/docs/REFORMS_IN_TIHAR_JAIL_A_Correction_Centre_of_Excellence as visited on 20.03.2012.

in the society. [27] The Guiding Notes on Prison Reforms[28], list the many forms that civil society involvement can take:·

- providing humanitarian aid to prisoners, such as food and medicines;·
- assisting the social reintegration of released prisoners;·
- assisting with prison activities such as education and sport;·
- simple befriending;·
- monitoring adherence to human rights standards;·
- using the law to protect prisoners' rights;·
- carrying out non-partisan campaigning; and·
- providing public education.

A few examples of best practices in community collaboration for reformation of prisoners in Tihar Correctional home are as follows-1.

1 NGOs' participation is mainly concentrated in the field of education, vocation and counseling. Apart from the formal education with the NGO support, the classes in various languages like Urdu, Punjabi, German, French etc. are also held. 2.

2 Some of the NGOs have trained selected prisoners on various trades and have been bringing job for them against payment of remuneration. They also rehabilitate these prisoners after their release. 3.

3 The concept of introducing Yoga and meditation in the jail has created history and has received wide accreditation from various national and international human rights organization. For cleansing and disciplining mind, yoga and meditation classes are conducted in a big way with the help of various voluntary organizations. In the year 1994 Tihar Jail created a history by organizing a Vipassana Meditation camp for more than one thousand prisoners. Since then a permanent Vipassana center has been opened in Tihar Jail No.4, where two courses of ten days duration are organized regularly. [29]

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[27] Supra 10, P.12.

[28] Guiding Notes on Prison Reforms (2004), compiled by King 's College, London: International Centre for Prison Studies

[29] ibid

Another instance of community collaboration in prison is in the Parappana Agrahara prison in Bangalore which is crowded with 4700 inmates, more than twice its capacity, because small-time criminals are refusing to apply for bail. Juvenile offenders are also overstating their age to qualify as adults and enter the facility, the newspaper added. The reason is the healthy food served by ISKCON, or the International Society for Krishna Consciousness, a Hindu evangelist organisation. ISKCON started serving its pure vegetarian fare in the jail on May 21, 2007 under contract from the prisons department.[30] However, rising food prices could spell the end for supply of subsidized food for prison inmates. ISKCON has indicated that it may discontinue supplying food to jails in Bangalore because prices have shot up and it needs higher compensation per person.[31]

Community Participation at Jharpara Special Jail, Bhubaneswar- A Case Study

A field study assignment was undertaken by 4th year LL.B. Criminal Law Honours students of School of Law, KIIT University under the guidance of the author in September 2011 to Special jail, Jharpara, Bhubaneswar. In this prison also instances of community participation was observed which are as follows-1.

1 The Jailor and Welfare officer are very well-versed with the backgrounds and other antecedents of almost all the convicts and most of the under trials and they act as a bridge between the prisoners and the community.

2 The co-operative welfare officer and the jail authority are trying their best in order to provide the prisoners with access to free legal aid. However, most indigent under trial prisoners are inside the jail only because of lack of availability of financial support and lack of representation because more than 90% of prisoners were not satisfied with their legal aid lawyer appointed by State Legal Services Authority/ District Legal Services Authority.

3 There is also a school inside the prison premises with a small library. A Primary School teacher teaches there.

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30 http://news.iskcon.com/node/486, visited on 7.06.2012

31 http://articles.timesofindia.indiatimes.com/2009-08-29/bangalore/28200053_1_iskcon-food-prices-price-hike, visited on 07.06.2012

4 Interested prisoners are provided Vedanta Computer Courses that provide elementary computer training.

5 Anyone who would like to pursue higher studies can also do it through IGNOU Curriculum Courses.

In general the prison environment was very well maintained and the prisoners were well disciplined. They were adequately nourished and lived in hygienic conditions. There were also facilities for their entertainment, viz. television, games and library. There is also provision in each cell for worshipping. In totality, the earlier notion of prisons as dens of treachery was completely washed off by this field study and especially the community participation in education and skill development is an opportunity to rehabilitate the prisoners and get back into the mainstream of the society and lead a crime free life.

Conclusion

Community based correction as it is known worldwide is a non-incarcerative option whereby the offenders are not sent to the prisons but let off in the society with partial surveillance either by keeping them for a short term in community-based correctional facilities, or by releasing them under probation or parole or electronic monitoring. In India, however, when we talk of community based correction we also include community collaboration inside prison that acts as a catalyst in the proper and sometimes speedy rehabilitation of the prisoner. As discussed in this paper the major players in community collaboration are the Government itself, through its various projects and functionaries, including the prison authorities; the Non-Governmental Organisations, students, researchers and miscellaneous civil-society members. The major areas where community collaboration can work best are in imparting educational including computer literacy and vocational training, legal aid, psychological and moral counseling, through yoga, spiritual indoctrination and awareness building on HIV prevention and addiction.The best possible way to see that these community interventions for rehabilitation of prisoners are effectively utilized, it needs to be incorporated as a sentencing policy at a statutory level. Also the community and the civil society members must be sensitive enough so that there is active and voluntary participation of the public and it also requires prison officials to reciprocate in an appropriate way.

A study of liabilities arising in application of Medical Technology and Devices

*Ms. Shreya Chatterjee**

ABSTRACT

In this study an attempt has been made to discuss about liability arising out of medical devices. The current system of regulation is inadequate to deal with such liabilities. There is a dilemma as to the liability of the doctors, manufactures and hospital authorities. The study shall also attempt to analyze laws in other countries with regard to Medical Devices.

Keywords: Medical Devices, Product Liability, Negligence, Technology, Health Care

Introduction:

A 80-year-old patient goes to a diagnostic centre for an Angiogram of an artery believed to have blockage. The test result reveals "90 per cent blockage" Surgical intervention recommended[1]." The patient goes to another centre for a repeat test in spite of spending thousands of rupees on the first test on the advice of the physician as surgery is a risky at an advanced age This time around, the result is: "50 per cent blockage. Consult physician." This is the present condition of health care in India. The patient is at a dilemma as to which report he should believe. With the growth of science and technology and advancements made in the field of medicine it is essential that there is a proper mechanism to deal with medical devices liabilities.

We have witnessed from ancient times that health of an individual is of primary importance. The Medical Council of India provides for the Code of Medical Ethics which discusses

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[1] Monitoring Medical Devices available at http://www.frontlineonnet.com/fl2107/stories/20040409001408700.htm last visited on 7/06/2012.

about the duties, responsibilities, professional conduct and etiquette of doctors. The prime object of the medical profession is to render service to humanity. Though a physician is not bound to treat each and every person asking his services, he should however be ready to respond to the calls of the sick and the injured. He should be mindful of the high character of his mission and the responsibility he discharges in the course of his professional duties. Provisionally or fully registered medical practitioner shall not willfully commit an act of negligence that may deprive his patients from necessary medical care[2].

In this paper an attempt has been made to discuss about the liability of medical professionals with special focus on the liability created by medical devices and appliances. According to World Health Organization Medical Device Regulations, the term "medical devices" includes everything from highly sophisticated computerized medical equipment down to simple wooden tongue depressors[3]. An article, instrument, apparatus or machine that is used in the prevention, diagnosis or treatment of illness or disease, or for detecting, measuring, restoring, correcting or modifying the structure or function of the body for some health purpose[4]. Typically, the purpose of a medical device is not achieved by pharmacological, immunological or metabolic means[5]. Medical devices include a wide range of products such as medical gloves, bandages, syringes, contact lenses, disinfectants, X-ray equipment, surgical lasers, pacemakers, dialysis equipment, baby incubators and heart valves[6].

Product Liability:

While dealing with cases of product liability claims, courts turn to custom in determining whether the defendant's product design was defective. Deviation from industry custom,

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2 Medical Council of India available at *www.mciindia.org last visited on 25/05/2012.*

3 World Health Organization Medical device regulations. Global overview and guiding principles. Geneva: Available from: http://www.who.int/medical_devices/publications/en/MD_Regulations.pdf [last accessed on7/5/2012]

4 Information document concerning the definition of the term "medical device. Global Harmonization Task Force, 2005 (http://www.ghtf.org/documents/sg1/sg1n29r162005. pdf, accessed March 2011).

5 Id.

6 Id.

therefore, runs a greater risk of a ruling that the product is unsafe[7]. Finally, in the area of medical malpractice, courts hold doctors to the "customary care" standard[8]. While dealing with the problems of product liability usually courts have dealt it under the following regimes: liability in contract, fault or negligence liability, strict product liability, liability under consumer protection laws and penal laws. Liability in contract which is one of the oldest form of remedy, requires a contractual relationship between the injured party and the supplier and manufacturer of the goods. The problem with this regime is that the consumers can take action directly against the persons who has supplied them with the product like the physician, hospital, clinic or other supplier of medical device or diagnostic procedures. Implied terms are imported into the contract by statute, in case of the product manufactured by the Sale of Goods Act, 1979, which requires the goods sold to be fit for their purpose and of merchantable quality[9]. However one of the dilemmas related to such liability is that the direct supplier may not be responsible for the defect which leads to difficulty for the patient to take action.

As a bedrock principle of negligence liability, duty must have an analytical role immanent in the ordinary negligence case involving bodily injury or property damage[10]. The typical negligence case therefore should reflect the rudiments of duty analysis[11]. Tortious Liability for negligence has two main purposes. Firstly it provides compensation to those injured as a result of the negligence of others, thereby acting as a source of insurance. Secondly, by imposing sanctions on persons found guilty of negligence, it acts as a deterrent to future negligent behavior[12].

Strict liability is the legal principle that a person or company who sells a product in "defective condition" that is unreasonably dangerous to the ordinary user may be liable for any resulting

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7 Gideon Parchomovsk, Alex Stein, Torts and Innovation, 107 Mich. L. Rev. 285, November 2008.

8 Id.

9 Dr Lily Srivastava, Law and Medicine, Universal Law and Publishing Co. Pvt. Ltd. New Delhi, 253-255 2010

10 Mark Geistfeld , The Analitics of Duty: Medical Monitoring And Related Forms Of Economic Loss , Virginia Law Review Association ,December, 2002, 88 Va. L. Rev. 1921.

11 Id.

12 Id.

damage or physical injuries. The defect may be in the products design or manufacturing, in the products container or packaging, or in the instructions provided. In cases dealing with strict liability, the injured person is not required to prove to the manufacturer or seller was negligent.

'Criminal Negligence' is an offence against the State while 'Civil Negligence' is an offence against the individual act, which leads to injury i.e. physical injury. High degree of negligence is necessary to prove the charge of criminal negligence u/s 304-A IPC. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be as high as can be described as "gross negligence".

ROLE OF CDSCO/ICMR

The Central Drugs Standard Control Organization (CDSCO) is the key medical regulatory organization in India[13]. As the CDSCO is in charge of implementing and enforcing the DCA (Drugs and Cosmetics Act), it is the only government body that regulates medical devices in any way[14]. Since 2008, both the Indian Department of Science and Technology and the Ministry of Health have sought to completely restructure the regulations for medical devices[15]. The Department of Science and Technology proposed creation of a Medical Devices Regulatory Authority that would operate similar to a division within the CDSCO and the Ministry of Health further proposed revision of the DCA that would create a Central Drug Authority to function similarly to the U.S. FDA[16]. A draft of the Medical Devices Regulation Bill has been formulated for the classification of such medical devices which may not be covered by the Drugs and Cosmetics Act.

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13 Medical Devices Manufactures Association available at www.medicaldevices.org last visited on 09/09/2012.

14 Id.

15 Ames Gross and Arthur Chyan , India's Latest Medical Device Regulation Developments, available at http://medicaldevices.org/sites/default/files/India%20Medical%20Device%20Regulations.pdf last visited on 6/08/2012.

16 Id.

The Indian Council of Medical Research has provided with ethical guidelines for Biomedical Research on Human Participation[17]. With regard to India several biomedical devices and critical care equipment have been imported and successfully used in diagnostic and therapeutic services in the country[18]. Similarly, various academic and research organizations as well as private entrepreneurs are taking active interest in the development and manufacture of medical devices[19]. Several important devices such as cardiac valve and spin offs from defence research laboratories like Kalam-Raju Stent, cardiac catheters, eye lasers and external cardiac pacemaker have been successfully developed and many more are in various stages of development[20]. However, through good manufacturing practices (GMP) the end products reach the stage of large scale utilisation by society. Most of these products are only evaluated by Central Excise testing for taxation purposes, which discourages entrepreneurs to venture in this area with quality products especially when they do not come under the strict purview of the existing regulatory bodies like ISI, BSI and Drugs Controller General.

Some low technology devices such as thermometers and weighing instruments seek optional certification from Indian Standards Institute (ISI) as a proof of quality rather than as a pre-market approval requirement[21]. The Bureau of Indian Standards (BIS) certifies and regulates few other low technology devices. However, these procedures are not adequate to assure the quality of high technology medical devices. It appears that some imported high technology devices, approved or cleared by the country of origin or by the Federal Drug Administration (FDA) of the United States of America (USA), are permitted for marketing in India. No regulatory mechanisms exist even with the Drug Controller General of India (DCGI) for certification, quality assurance and post market surveillance of both imported and indigenous medical devices[22].

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17 Ethical guidelines for Biomedical Research on Human Participation available at http://icmr.nic.in/ethical_guidelines.pdf last visited on 27/06/2012.

18 Available at www.icmr.nic.in last visited on 09/09/2012.

19 Id.

20 Id.

21 Supra note 17.

22 Id.

The concept of regulations governing investigations involving biomedical devices is therefore relatively new in India[23]. Earlier only needles, syringes and blood bags were covered by the Drugs and Cosmetics Act, 1940. Now sterile devices like cardiac stents, drug eluting stents, catheters, intraocular lenses, IV cannulae, bone cements, heart valves, scalp vein set, orthopedic implants, internal prosthetic replacements have been included in the list with effect from 1.3.2006[24].

The attendant health risks through the errors caused by use of implantable devices require systematic and rigorous pre-clinical and clinical studies to evaluate their efficacy and safety besides the quality. In addition, every implant and installed diagnostic device needs to be assessed for its long term safety and performance through an appropriate mechanism. Execution of these measures, i.e. evaluation, certification, post-market surveillance and regulatory action in the event of any inadequacy, is possible only through a well conceived regulatory agency, which is supported by adequate legislative safeguards. All countries which have a medical device industry, have policies and regulatory processes or mechanisms in place. Most of these countries ((mainly USA, EU, Australia, and possibly Japan. China, South Korea and Brazil) are attempting to harmonize the medical device regulations of different countries with a view to enhance their export potentials. However, the devices permitted for export by other countries have been approved for commercialisation in their own countries. Therefore, the Society for Biomedical Technology (SBMT), an inter-ministerial initiative to utilize defense research spin offs for health care sponsored a review of the existing certification procedures and regulatory mechanisms in other countries. As a second step in this direction, it was decided to conceptualize a framework for medical device regulation

In order to consolidate laws related to medical devices and to establish a Medical Device Regulatory Authority of India for establishing and maintaining a national system of controls relating to quality, safety, efficacy and availability of medical devices that are used in India, the Medical Devices Regulation Bill was prepared in 2006 by the Department of Science and Technology but has not been enacted till date. The bill defines 'Medical device' as any

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[23] Available at www.ssmcrewa.com last visited on 10/09/2012.

[24] Id.

instrument, apparatus, implement, machine, appliance, implant, in vitro reagent or calibrator, software, material or other article intended by the manufacturer to be used for human beings for the purposes of diagnosis, prevention, monitoring, treatment or alleviation of a disease, injury, or for investigation, replacement, modification, or support of a physiological process, supporting or sustaining life, and control of conception[25].The Bill views risk management as systematic application of policies, procedures and practices to the tasks of analyzing, evaluating and controlling risk; risk being defined as 'combination of the probability of occurrence of harm and the severity of that harm[26]. The Bill proposes to establish a Medical Device Regulatory Authority who shall ensure the standards maintained by Medical devices. It further provides for the classification of medical devices and the standards to be maintained for these devices. The Medical Devices Regulatory Authority is bound by the following essential principles while regulating safety and performance of medical devices namely use of medical devices should not compromise health and safety, design and manufacture of medical devices must conform with safety principles, medical devices should be suitable for the intended purpose, long-term safety of the medical device should be ensured and benefits of medical devices must outweigh any side effects[27]. The bill has further classified medical devices under four categories Class A devices involving lowest risk levels, Class B devices involving low to moderate risks, Class C devices involving moderate to high risks Class D devices involving highest risks[28]. The bill enumerates imprisonment and fine in case any medical device doesn't conform with the Act, delivers a misbranded medical device and tampers with a medical device. These current and future medical device regulations only will improve the already impressive opportunities in India's medical device market. In principle the focus on risk management is commendable but a precautionary approach is not reflected adequately in the functioning of the Bill.

As witnessed in India there is essentially very little regulation of the medical device industry. However if we observe policy steps taken, in European Union, the United States, and Canada we can see that there is minimum regulations that require devices perform as

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25 The Energy and Resources Institute available at www.teriin.org last visited on 08.09.2012.

26 Id.

27 Department of Science and Technology available at www.dst.gov.in last visited on 06.10.2012.

28 id

claimed by their manufacturers, or sellers, before any product can be marketed[29]. In the United States this regulatory responsibility is executed by the Food and Drug Administration (FDA)[30]. In the European Union, this function is essentially that of an autonomous implementing agency, known by different names in various countries (e.g., Medical Device Agency in the United Kingdom)[31]. The process basically requires suppliers to produce documentation on performance, and it may also involve verification, such as by independent (privately run) "notified bodies" that undertake this for the EU in consideration for a fee. The assessment would also include any harmful risks as an outcome of the use of the product. It is further ensured that any harmful effects that come to light after approval of market entry are also covered by regulation, including possible withdrawal of the permission to enter the market. It is a two-fold process involving some form of record-keeping in the form of a history of adverse incidents, and associated steps and sanctions and voluntary reporting by patients and users of the equipment, or statutory reporting by manufacturers and diagnostics service providers. The regulatory authority is also responsible for putting out safety notices for information to the general public. However, whether such a system where autonomous entities are capable of undertaking the quality checks would be successful is a arguable issue.

As a science-based regulatory agency, the US Food and Drug Administration (FDA), is responsible for a large and diverse array of products. Since 1976, that responsibility has included ensuring the safety and effectiveness of medical devices. The universe of these medical devices is immense, including approximately 5,000 different types of products encompassing a spectrum of technologies from microelectronics to microbiology. The US FDA registers the product and authorizes the manufacturer to market it in USA. All the technical monographs published by the profession (associations of manufacturers), as well as the profession's practices have legal force. The US FDA is a single body being imposed by the national authorities. Congress enacted the Medical Device Amendments of 1976, in

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29 World Health Organization Medical device regulations. Global overview and guiding principles. Geneva: Available from: http://www.who.int/medical_devices/publications/en/MD_Regulations.pdf [last accessed on7/5/2012]

30 Id.

31 Id

the words of the statute's preamble, "to provide for the safety and effectiveness of medical devices intended for human use".

One of the major issues raised in the US with regard to medical devices was to decide whether premarketing approval of a medical device by the Food and Drug Administration (FDA) immunizes the manufacturer against product-liability litigation in state courts. The 1976 law arose out of the Dalkon Shield disaster. Like all medical devices introduced before 1976, the Dalkon Shield intrauterine device underwent no premarketing assessment of safety or efficacy by any federal agency. In the wake of thousands of deaths and serious injuries caused by the device, Congress took action, empowering the FDA to regulate all medical devices. To avoid conflict with state laws, the 1976 law included a section that preempted certain state-law requirements that differed from federal (FDA) requirements with respect to the safety and efficacy of devices.

Lora Lohr and her husband had sought damages for an allegedly faulty pacemaker lead manufactured by Medtronic. The company argued that the Medical Device Amendments preempted any damages claims because the device had been approved for marketing by the FDA. *Medtronic v. Lohr,* the Court's majority opinion, written by Justice John Paul Stevens, held that none of the Lohrs' damages claims were preempted by the 1976 law. Thus, in the *Lohr* case the Court ruled that FDA approval of a medical device did not preclude subsequent product-liability suits in state courts.

In *Medtronic v. Lohr*[32] the pacemaker lead had been approved by the FDA in a "substantial equivalence" process in which, because the design of the lead was deemed to be "equivalent" to that of an existing lead, no further study of the safety and efficacy of the specific device was required. The existing pacemaker lead to which the new lead was judged equivalent had itself never undergone full premarketing assessment. However in the case of *Riegel*[33], on the other hand, the angioplasty catheter had received premarketing approval from the FDA in accordance with current standards on testing for efficacy and safety. However, Medtronic argued that, given the rigor of the FDA approval process, any action at the state level, including tort litigation against the company, would represent a further requirement

[32] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)

[33] Riegel v. Medtronic, Inc., No. 06-179 (2008)

and thus be preempted under §360k(a) of the Medical Device Amendments. Medtronic further mentioned that the granting of FDA approval shields any device manufacturer from state tort liability.

In another case[34] appellant Mark Knowlton and his mother, Bonnie B. Tetrault brought suit for injuries from chemical burns incurred by Knowlton during open-heart surgery at Children's Hospital in Boston. The jury found that defendant-appellant Deseret Medical, Inc. was liable for failing to adequately warn the surgeon-user of the danger involved in the manner in which the surgeon used the devices.

The plaintiffs sued Deseret Medical, Inc., the manufacturer-seller of the catheter and needle used during the open-heart surgery. They alleged: (1) breach of warranty and negligence in the design of the catheter and needle; (2) breach of warranty and negligence in the manufacture of the catheter and needle; and (3) breach of warranty and negligence in failing to give an adequate warning of the danger involved in the use of the catheter and needle.

The jury made the following findings as to the liability of Deseret. It found that Deseret was neither negligent nor liable for breach of warranty in the design of the catheter and needle. The jury found that Deseret had not breached its warranty in respect to the manufacture of the catheter and needle. It found that Deseret was negligent in the manufacture of the devices but that this negligence was not a proximate cause of the injury. As to warning, however, the jury found liability. It found that Deseret breached its warranty because it failed to provide an adequate warning of the danger inherent in the use of the catheter and needle or properly instruct foreseeable users of the catheter and needle. It also found that Deseret was negligent in respect to warning and proper instruction. The jury further found that this breach of warranty and negligence were proximate causes of the injury sustained by Mark Knowlton.

In Slate v. Bethlehem Steel Corp[35] the court reiterated the principle that a manufacturer of a product which it knew or should know is dangerous by nature or is in a dangerous condition has a duty to warn of the dangers associated with the product.

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[34] Deseret Medical Inc. vs. Mark T. Knowlton, et al**.** No. 89-2139 Decided On: 19.04.1991

[35] 400 Mass. 378, 510 N.E.2d 249, 251 (1987)

The introduction of new medical devices in Canada is regulated by the Medical Devices Regulations of the Food and Drugs Act[36]. The process is governed by the Medical Device Regulatory Framework and undertaken by the Medical Device Bureau (MDB, one of the bureaux of the Health Canada Therapeutic Products Division)[37]. The mandate of MDB is specifically to evaluate and monitor the safety, efficacy and quality of diagnostic and therapeutic medical devices[38]. Manufacturers of medical devices require licenses to sell their products in Canada[39]: New surgical device is classified according to risk, based on factors such as degree of invasiveness, duration of contact with patient, energy transmission hazard and consequences of device malfunction or failure[40].

CONCLUSION

The situation in the medical device regulations in India calls for institutions to ensure that devices perform as claimed by their manufacturers and that any harmful effects are an "acceptable" risk. Government of India committee has proposed forming an Indian Medical Devices Regulatory Authority (IMDRA) based on the European Union or the United States Food and Drug Administration. Medical field changes at a very rapid pace so the law should be dynamic to address this growing problem of liability arising by using advanced medical devices and new technology. The system should identify and address all essential issues that can be raised due to defective medical devices.

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36 Department of Justice Canada: Food and Drugs Act, Medical Devices Regulations (SOR/98-282) [http://laws.justice.gc.ca/en/showtdm/cr/SOR-98- 282//?showtoc=&instrumentnumber=SOR-98-282], (accessed 17 November 2011).

37 Available at www.biomedicalcentral.com last visited on 09/10/2012.

38 Medical Devices Program: Strategic Plan 2007-2012: Building for the Future [http://www.hc-sc.gc.ca/dhp-mps/pubs/md im/mdp_pmm_plan_strat/indexeng. php], (accessed 17March 2011).

39 Health Canada: Recognition and Use of Standards under the Medical Devices Regulations [http://www.hc-sc.gc.ca/dhp-mps/md-im/applic-demande/ guide-ld/md_gd_standards_im_ld_normes-eng.php], (accessed 17 November 2009).

40 Id.

Concept of Corporate Governance and its Significance for the Healthy Running of the Corporation

Kishor Kunal *

ABSTRACT

Any corporate fraud is not only a blot on the name and business of the country but it has also adverse effect on the interests of the stakeholders, particularly the investors. It majorly impacts the stock exchange of the country, having the potential to adversely affect its economy. For example in the aftermath of the Satyam crisis in India, 45,000 employees were left jobless, huge losses were incurred on the investors and creditors of the company, and the stock market collapsed with the Sensex falling by nearly 750 points. Moreover, such adverse impacts have also been witnessed on the existing as well as on the potential foreign investors, whose contribution is significant for the growth of a developing economy like India. In the light of this, the author has analyzed the significance of corporate governance for the healthy running of the Corporation.

Keywords: Corporate, Governance, Shareholders, SEBI

The traditional notion in Anglo American jurisprudence is that shareholders of a company are its owners. The origin of the notion can be traced to the deed of settlement of company of the 18th and early 19th Centuries which was a large partnership and which through the deed or agreement between the partners availed of many of the features of modern registered company. Though the rights of many other stakeholders are now recognized in corporate jurisprudence, still the predominant view is that the shareholders are the owners of the company and the decision making power is vested in them, which they exercise through board of directors. Though shareholders are called owners of the company, their ownership is different from other cases of ownership. They don't own the company in the manner in

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which any person own his 'land', 'house' or 'car'. What they own is the shares in the company, by virtue of which they have a bundle of rights which may be divided into Corporate membership rights and Personal rights.

In the first half of the 20th Century, Berle and Means who made a study of the large corporation of US recognized the factual separation of ownership and control in USA and UK. However, it was Adam Smith who recognized the problem of the separation of ownership and control in 18th century itself. He stated that the directors of joint stock companies often have to step into the shoes of managers of those companies, wherein they deal with the money of the other people and therefore it can't be expected of them to be as vigilant as the owners. Nearly a century later, Berle and Means examined the concept of separation of ownership and control. They stated that with industrialization, the size of company increased and consequently the number of shareholders also increased. It is not possible for shareholders of large companies to manage the affairs of the company due to diversified shareholding pattern. Which result in the separation of ownership and control of corporations? This phenomenon is noticeable in developed countries like USA and UK and hence the need for effective corporate governance regime and investor protection was required[1]. This encourages the diversified shareholder bases.

In the early days of the evolution of corporate law, the shareholders were actively involved in the affairs of the company. Till the beginning of the 20th Century, the well settled legal position in England was that the directors were subordinate to the members in general meeting and subject to the control and supervision of the members and Board of directors was regarded as the primary organ of the company. Most of the corporate bodies in the 19th Century were small corporations and shareholders were able to maintain direct control upon all the managerial personnel of the corporation[2]. Since, they had sufficient knowledge in the affairs of the corporation and the need for shield of law was never felt. Later on, with

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1 *Chris A. Mallin, "Corporate governance", second edition, oxford university press. 2007 at 13.*

2 *In small corporations, the shareholders are often the directors of the company and therefore, can control the affairs of the company. But, the growth in the size of the corporation often leads to the dispersed share ownership. See, David Millon, Theories of Corporation, 1990 (2), Duke Law journal, 1990 at 214.*

the advent of industrialization the size of corporation increased substantially. The technological development during 19th Century resulted in the modern mass production techniques and industrialization which gave rise to the emergence of large industrial corporations. These firms required huge capital investment which was not possible for any single individual or group to supply. Moreover, no prudent investor would like to invest his entire capital in a single risky venture rather he would fragment his capital in several firms to mitigate the potential loss. Therefore, this led to dispersed shareholding in the companies. Another development in this period was the emergence of passive investors[3].

It is not possible for the shareholders of the large public companies to supervise the affairs of the company and effectively control the management. Consequently, the shareholders became *passive investors*[4] and were vested with certain decision-making power in the company over the board of directors and the managers of the corporation[5]. They became passive investors but certain powers were vested in them through legislation to control the Board of directors and Managers of the company.

The shareholders of the company are vested with the power of 'hire and fire' of the Board of directors. This is so, to make the Board accountable to the shareholders of the company. In this regard, the general meeting of the company is considered as an important event where the individual shareholders discuss the way in which the company is being managed by the board[6]. However, due to various factors shareholders do not utilize the forum of annual and other general meetings for majority of members do not attend the general

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[3] *Berle and Means Pointed out that for various reasons it was impossible for the shareholders to manage and control the affairs of the large companies. The shareholders became the passive investors because in large companies it is impossible for the shareholders to manage and control the affairs of the company due to their dispersed nature. Moreover, every shareholder of the corporation was entitled to assert a different understanding of the situation at any time. See, A.A. Berle and Gardiner C. Means, Corporation and the public investor, 20(1), The American Economic Review,1930, pp. 59*

[4] *See, infra n. 7 and 8.*

[5] *Stephen M. Bainbridge,"Corporate governance in theory and practice", Oxford University Press, 2008 at 6.*

[6] Giles Proctor and Lilian Miles, "Corporate governance", Cavendish publishing limited, 2002, at 37.

meetings. Even those who attend are generally passive observers rather than active participants. The prime reason for the passivism is that shareholders have insufficient knowledge, information about the nature and impact of the decision taken by the management. Moreover, they have no incentive to participate in the operations or policy matter of the company[7].

Moreover, Individual shareholders in large companies hold a very small portion of shares. They are not interested in the business operation or in the long-term goals of the company, but are rather interested in the maximization of their profits through either selling their shares or receiving dividends. Generally, they are not associated with any policy or decision making process of the company. They consider that due to small shareholding their votes would probably not count in anyway[8].

Therefore, one of the most significant features of the large public companies of the modern era is the attitude of passivism and non participation by shareholders in the management of the corporation[9]. The non participation of shareholders in operational or policy matters of large companies is very costly due to their dispersed nature of ownership[10]. Moreover, they lack in information, experience, skill and incentives in making sound business decision in the interest of the corporation. They have power to approve or disprove very limited decisions of the board and the real power is vested in the members of the board of directors in respect of important decision making[11].

This resulted into the establishment of a central body for the purpose of transmission of all such information, which could help in the decision-making process of the

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7 *Supra note 6.*

8 *Supra note 6.*

9 *Supra note 2, at 214.*

10 *In large corporations there is a dispersed shareholding pattern because these corporations require a large capital investment. It is not possible for a single or a handful of individuals to provide such a large amount of investment. Moreover, even such a wealthy individual would not invest his entire amount, as any prudent person would diversify his investment in several firms to mitigate risk. This has lead to dispersed shareholding in the large corporations.*

11 *Supra note 5, at7. See also, Section 291 of Companies Act, 1956 (India).*

corporation[12]. For this purpose, shareholders irrevocably delegate decision making authority to some smaller group for the smooth running of the corporation. It leads to a principal- agent relationship and the board of director is obliged to act in the interest of shareholders and has a duty to maximize the shareholder's wealth.

Thus, for practical purpose, the management powers are vested in the Board of Directors, and the general meeting enjoys only very limited powers in administration and management. Its powers in this area are mainly regulatory. Thus there is transformation of shareholders from entrepreneurs into passive investors who transferred their economic interest to professional and skilled managers[13]. The result of this separation of ownership and control is that law imposes fiduciary duties on the directors of the company to ensure that directors do not indulge in self seeking and other activities detrimental to the company or the shareholders.

However, because of the separation of ownership and exercise of powers springing from ownership the agency issues including "agency cost" arises[14]. The essence of *agency costs* is the separation of management and finance. The *Agency costs* includes the cost of formulating contract, the cost of monitoring, structuring, and conflicting interest between the shareholders and the management[15]. The main reason for this agency costs is the conflict

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[12] *Stephen M. Bainbridge, "Shareholder activism and institutional investors", Research paper no.05-20,at 6 available at http://ssrn.com/abstract=796227.*

[13] *Supra note 2, at 215.*

[14] *Agency cost means loss incurred by the shareholders due to the managerial behavior which occur as a result of departure from the main object of maximization of wealth for shareholders plus the cost mechanism engaged to control such behavior. See, Saleem sheikh & William Rees, "Corporate governance & Corporate control", Cavendish publishing Ltd, 1995, pp.81. See also Eugene F. Fama and Michael C. Jeansen, "Separation of Ownership and Control", 26(2), Journal of Law and Economics, pp.304. Agency cost includes the costs of structuring, monitoring, and bonding a set of contracts among agents with conflicting interests.*

[15] *The financiers who invest fund in the company require return on their funds. The manager needs these financier funds for the running of the business of the company. The financiers in order to secure their interest enter into contract with the manager in matters relating to the use of the fund by the manger and also for the division of return between the two. It is not possible for them to incorporate all the future contingencies which are hard to foresee and therefore they enter into another contract in respect of the rights to make decisions in circumstances not fully foreseen by them. Along with other monitoring and structuring cost, this contractual cost adds agency cost. See, Andrei Shleifer and Robert W. Vishny, LII(2), The Journal of Finance, June, 1997, at 740.*

of interest between the shareholders and managers[16]. As residual claimants, shareholder's interest is in the maximization of their benefits whereas it is the directors and managers of the company who had to decide how to spend firm's earning[17]. There is always an element of doubt in the manner of the utilization of the profits by the directors and managers of the company as it is often alleged that such utilization is just to further their own interests rather than the interests of the shareholders[18].

Therefore, it is necessary to mitigate these agency conflicts and to promote harmony between the interest of shareholders and the managers of the corporation. Fema and Jensen have discussed the role of organizational mechanism to control agency conflicts and to promote better alignment between the management and the shareholders. The board of directors performs most important role in the organizational control of the corporation. They are delegated by the shareholders to exercise ultimate control over the top management of the corporation[19]. The board exercises the control and authority to ratify and monitor major policy initiatives and to hire and fire, and set the remuneration of top-level managers whereas it delegates the power of initiation and implementation of the various decisions to the management[20]. This mechanism prevents the management to deviate from the interest of the shareholders. Thus, the Board of director reduces agency conflicts by keeping the

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[16] *The non-holding of substantial portion of the wealth effect of the decision by the management results in the agency problem. Managers have full opportunity and self-serving behavior, like excessive perk consumption, engaging in more risky ventures or non-optimal investment, but the cost bear by them is only in proportion of the ownership hold by them in the company. This led to the agency problem. See, Chenchuraaiah T. Bathala and Ramesh P. Rao, The determinanats of Board Composition: An agency theory perspective, vol. 16, Managerial and Decision Economics, 1995, at 59.*

[17] *Supra note 5, at 6.*

[18] *Id;*

[19] *Chenchuraaiah T. Bathala and Ramesh P. Rao, The determinants of Board Composition: An agency theory perspective, Vol.16, Managerial And Decision Economics, at 59.*

[20] *Id; See also Eugene F. Fama and Michael C. Jeansen, Separation of Ownership and Control, Vol.26(2), Journal of Law and Economics, pp. 301-302. There is separation of decision and risk- bearing functions in the large corporations which is very helpful in the controlling the agency problem.*

management (initiation and implementation) and control (ratification and monitoring) aspects of the decision-making process separate[21].

Another important method to mitigate agency problem is to fix the accountability of the Board of the company through the mechanisms provided by statute under corporate law and corporate governance norms. For example, it is the fiduciary duty of the board of directors to exercise their powers honestly and in the interests of company and the shareholders. They are required to act in good faith. The statute also imposes several duties upon it which protect the interests of other stakeholders of the corporation. In addition to this, the corporate governance norms provide other mechanisms to enable the board to perform the monitoring role more efficiently[22], such as- the provision of existence of independent directors and the audit committees. It must be noted that the above said specific corporate governance mechanisms are mandatory for the listed companies and optional to the unlisted companies.

Corporate governance norms provide a mechanism to ensure adequate management performance and provide protection to all the stakeholders of the corporation. Rachel Kyte[23] has rightly said that good corporate governance practices infuse in companies a capacity to take such decisions which ensure long-term sustainability and encourage the companies to achieve environmental, social and economic value for the society.

However, there is no universal definition of the concept of corporate governance. Various Academicians, Scholars and committees have tried to define the term but one definition varies from another. The OECD convention, the Cadbury committee and the Confederation of Indian Industry have defined the term in their own ways. Because of the lack of uniformity in these definition, there is no clarity about the concept of corporate governance, and instead creates confusion.

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[21] *Supra note 19.*

[22] *V. Umakanth, Corporate governance in India's infrastructure sector: issues and perspectives available at http://ssrn.com/abstract=1962383.*

[23] *He was former Vice President of International Finance Corporation.*

While the debate on the concept and the objectives of corporate governance has been continuing in UK for quite some time, the Cadbury Committee examined these issues exhaustively in 1992, and defined it as a system through which the companies are directed and controlled.[24] The concept ensures proper accountability, honesty and integrity in the conduct of a business organization. It is an observance to generally accepted good standards of practice and control of the corporation[25]. It is primarily concerned with the establishment of a system whereby the directors are entrusted with responsibilities and duties in relation to the direction of a company's affairs. The hallmark of an effective corporate governance system is its ability to provide mechanisms to regulate director's duties in order to restrain them from abusing their powers, and ensuring that they act in the best interest of the company in the broadest sense.[26] These activities, it is argued, are more basic as compared to profitability and performance of companies[27]. Apart from this, corporate governance also includes the wider responsibility and accountability which the directors of the company

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[24] *As per the Cadbury Committee, it is the board of directors who are responsible for the governance of their companies. The shareholder's role in governance is to appoint the directors and the auditors and to satisfy themselves than an appropriate governance structure is in place. See Paras 2.5 and 2.5 of the Cadbury Committee on the Financial Aspects of Corporate Governance. While the Cadbury Committee was specifically concerned with the financial aspects of corporate governance, it is important to note that the Committee did not appreciate the wider aspects of corporate governance, a shift later seen in the Companies Act of 2006. Section 172 of the Companies Act, 2006 brings in the concept of enlightened shareholder value, providing for the directors to act in good faith and in the interests of the company as well as those of its stakeholders.*

[25] *Catherine turner, Corporate governance: A practical guide for accountants, first edition, CIMA Publishing house, 2009, at 1.*

[26] *S. Sheikh and S.K. Chatterjee, Perspectives on Corporate Governance in CORPORATE GOVERNANCE AND CORPORATE CONTROL 5 (S. Sheikh and W. Rees ed., 1995).*

[27] *It was well said by the Executive director of UN global compact, Mr. George Kell that a well governed company has a longer-term view which helps in integrating environmental and social responsibilities in analyzing the risk and discovers opportunities and allocation of capital in the best interest of shareholders. He asserted that there could be no better way than adoption of a good corporate governance practices to build public confidence in both businesses and markets and making a prosperous future. See, Corporate governance : the foundation for coporate citizenship and sustainable businesses, available at www.unglobalcompact.org/docs/issues_doc/Corporate.*

owe to not only to the shareholders, but to the other stakeholders of the corporation as well. Therefore, it has been contended that the process of corporate governance comprises four main principal activities[28]:

1. The aspect of direction which is the formulation of strategic direction for the future of the enterprise in the long run.
2. The aspect of executive action which applies to the aspect of crucial executive decision.
3. The aspect of supervision which involves the monitoring and oversight of the management's performance.
4. The aspect of accountability, which is involved with the recognition of responsibilities towards those making a legitimate demand for accountability.

In other words, it ensures control over the board of directors and management of the company on a regular basis[29]. It also promotes the transparency[30] and efficient markets which are consistent with the existing law and clearly expresses the division of accountability among different supervisory, regulatory and enforcement authorities[31].

In the Indian scenario, the promoter groups have significant representation on the board of the company for they have a large chunk of shares in companies. The Board of directors can effectively monitor the company and its management only when it remains independent

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[28] Id.

[29] *In well governed company, the board oversee the running of a company by its managers and make company's directors accountable to the stakeholders of the company. It means that the accountability of the directors is not only towards the shareholders but also towards the employees, customers, creditors and other stakeholders.*

[30] *It requires disclosure on regular basis to the ultimate beneficiaries about material facts of governance of a corporation which includes the financial position of the corporation. See, Robert A. G Monks, Corporate governance, Fifth edition, John wiley & sons, 2011, pp.434.*

[31] *OECD principles of corporate governance, 2004, pp.17. 'Organization for economic co-operation and development' principles of corporate governance is an international benchmark in corporate governance policy worldwide. It was endorsed by OECD ministers in the year 1999 and provides specific guidance for legislative and regulatory initiative of corporate governance agenda in both OECD and Non-OECD countries.*

and is provided with all the requisite information about the affairs of the company. By reason of having large chunk of shares, promoter groups elect the members of the board and have sufficient control on them. Moreover, due to various reasons retail shareholders are passive investors and are not motivated in discharging the regulatory functions assigned to them by law. The promoter group is able to protect its own interest and in fact dominates the decisions and policies of the company. There is also a chance of expropriation of the interest of minority shareholders, creditors and other stakeholders of the company by this controlling shareholder. Unlike other jurisdictions like UK and US where there is no prominent shareholding by any group in a large public company in India main conflict of interest is not between the shareholders and the management, but between the controlling shareholders and the minority shareholders. Here it is the minority shareholders and other stakeholders of the company which require protection from the controlling shareholders in India.

1.2 NEEDS AND OBJECTIVES OF CORPORATE GOVERNANCE:

For the industrial and economic growth of our country it is imperative for the Indian corporate bodies to have the access to the global capital and there is need to attract and retain the best human resource across the world. The corporation is required to make collaboration and live in harmony with the local community. For all these purposes, the corporation is required to demonstrate ethical conduct and values. There is need of being fair and transparent towards the stakeholders of the corporation. Corporate governance is known for this ethical conduct and values.

A robust corporate governance framework attracts the investors worldwide and helps in the growth of the capital market of the country[32]. More than the fulfillment of legal requirements the prime objective of corporate governance shall be the commitment and

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[32] *An effective corporate governance in any company provides confidence which is necessary for the proper functioning of a market economy. The result of which is that it reduces the cost of capital and companies are encouraged to use the resources more efficiently which helps in overall growth of the company. See, OECD Principles of corporate governance, 2004 at 13.*

determination of the board in managing the affairs of the company in a transparent manner for maximizing the interest of long-term shareholders[33].

Good corporate governance envisages that shareholders receive maximum benefit on their investment and at the same time there is no compromise with the interest of other stakeholders. It is very essential for maintaining the stability and future health of a company. In practice, the growth of the corporation depends upon the cooperation of other stakeholders; a well-managed company gets good response from the market and the investors. Therefore, good corporate governance increases the efficiency of the business enterprise and helps in the development of the country's economy.

But it is very difficult to regulate corporate governance through law. The statutory provisions just lay down a common framework i.e. a standard norm to be followed by the corporation but it is the mindset of the management which is important to follow the term in practice in its true sense.[34] The growth of the corporation depends upon the cooperation of other stakeholders as well. Therefore, the corporation is required to adhere to the best corporate practices.

Corporate governance is very important for the business's prosperity and to fix accountability on the corporation. Hampel committee in its report asserted that good corporate governance ensures the protection of the interest of its stakeholder and make significant contribution in the prevention of malpractice and fraud. However, it is not possible to prevent the malpractice and fraud absolutely.

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[33] *See Narayan Murthy committee report, para 6.4. The researcher would submit that the legitimate expectations of other stakeholders also shall be in the agenda of corporate management concerned about good corporate governance practices.*

[34] *Hampel committee in its report mentioned that good corporate governance does not mean the prescription of particular corporate structures and incorporation of a long list of rules and regulations. Because it is not possible to codify all the matters under the legislation, there should be flexibility and discretion to apply common senses to the varying circumstances of individual companies. That is why, it is said corporate governance is beyond the realm of law. See, Hampel committee Report-1998, para 1.11.*

1.3 CORPORATE GOVERNANCE IN INDIA: AN OVERVIEW

The concept of corporate governance has been existent in the developed countries for more than half a century. It came into existence in Indian business context only in late 1990s and was adopted as a matter of law only in 2000[35]. There has been a paradigm shift in Indian financial sector with the advent of liberalization and globalization. Large Indian firms have been permitted to raise capital from the international market through commercial borrowings and depository receipts[36]. This led to the expansion of concept of corporate governance. Since then, efforts are being made by the regulators and the government to strengthen the corporate governance regime in India. The fundamental reason for the development of corporate governance in India was to hold company's manager accountable towards the capital providers of the company.

The initiative of corporate governance in India began with the publication of Desirable Code of Corporate governance[37] by CII in 1998. The primary object was to prepare and promote a code of corporate governance for the Indian companies to ensure more fairness in business. The second important step in the field of Indian corporate governance scenario was the constitution of Kumar Magalam Birla committee by SEBI in 2000. It was constituted to promote and raise the standard of corporate governance in respect of listed companies. Based on the recommendations made by the committee for, incorporated a new clause viz clause 49 in the Stock Exchange Listing Agreement[38].

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[35] *Umakanth Varottil, A Cautionary tale of the transplant effect of Indian corporate governance, 21(1) Nat. L. Sch. Ind. Rev. 1, 2009 at 3.*

[36] *P.L Beena, Fiancing pattern of Indian corporate sector under liberalization: With focus on acquiring firms abroad, working paper 440, 2011, pp. 5, available at www.cds.edu.*

[37] *It is a voluntary code published by confederation of Indian Industries (CII)*

[38] *The key recommendations of the Kumar Mangalam Birla committee were- i. minimum 50% of the Board consisted of non-executive directors, ii. In case of non-executive chairman, at least one-third of the board should consist of independent directors and in case of an executive chairman, at least half of the board should consist independent directors, iii. Minimum four times board meeting in a year, iv. a provision of appointment of nominee directors by the financial institutions, v. provision for the establishment of audit committee etc. available at www.sebi.gov.in/cms/sebi_data/attachdocs/1293094958536.pdf.*

The Enron debacle of 2001 gave alarm bells to the regulators and corporate world of the danger of hand-in-glove relationships of auditor and management of the company. The Scam was followed by the enactment of Sarbanes Oxley Act in the USA. In the wake of Enron debacle the Indian government appointed Naresh Chandra Committee in the year 2002 to examine and recommend on the auditor-client relationship and the role of the independent director. The committee made several important recommendations to ensure healthy corporate governance[39].

Another major milestone in the history of corporate governance in India was the constitution of a committee under the chairmanship of Mr. N R Narayana Murthy in 2002. It was on the recommendations of this committee that clause 49 of the Listing Agreement was revised by the SEBI via a circular in October, 2004.

Dr. J J Irani Expert Committee was constituted by the Government of India under the chairmanship of Dr. J.J Irani for advising the government on the proposed revision of the Companies Act, 1956. The key recommendation of the committee was to specify the role, the qualifications, the liability and the manner of appointment along with fixing the criteria of the independence of the Independent directors. The Committee also made various other significant recommendations[40].

Further, after the examination of several reports and suggestions from various stakeholders on issues related to corporate governance, the ministry of corporate affairs issued 'Corporate Governance Voluntary Guidelines, 2009'. The significant feature of these guidelines was

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[39] *The committee recommended for the rotation of partners of audit firms in every five year but it did not approve the rotation of audit firm, the management of the company were recommended to provide a clear description in plain English writing about the material debt, risk and liabilities of the company, the committee prohibited the non-audit services to be provided by the auditors. There are also several others recommendation of the committee on the relation of audit firm and the management of the company. Available at www.sebi.gov.in/cms/sebi_data/attachdocs/1293094958536.pdf*

[40] *Such as – the manner and composition of various committees like Audit committee, Stakeholder relationship committee, remuneration committee; the ground for disqualification of directors; use of postal ballot at the annual general meeting, provision for independent directors, etc. available at www.primedirectors.com/pdf/JJ%20**Irani**%20**Report**-MCA.pdf.*

that it provided a set of good corporate governance practices to be adopted voluntarily by the public companies and private companies. Thus, it has recommendatory value and not the value of a law.

The recent, Companies Bill 2011 is pending before the Parliament also addresses issues relating to corporate governance. The Bill defines the term 'Independent Director' and specifies the role, qualifications, liability and manner of appointment along with the fixing of the criteria for determininig the independence of Independent directors. The Bill also contains provision for the establishment of credit committee and Class action suit[41].

However, it must be admitted at this stage that one of the reasons for the development of corporate governance in India since 1991 was to attract overseas capital in Indian market and therefore, the concept of corporate governance was blindly borrowed from the jurisdictions of US and UK[42], without adverting to the ground realities in India.

Despite the passage of ten years since the initial effort on corporate governance structure in India and a wide-ranging suggestion, recommendations and discussions, the Satyam computers scam raises several questions on the existing corporate governance norms and structures. Therefore, there is demand of time to review the entire structure of corporate governance in India and making compliance of existing law possible rather than legislating hundreds of more laws.

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[41] The Bill was introduced in the Lok Sabha on December 14, 2011. However, it could not be passed and the government sent it back for the consideration to the Standing committee on Finance. *The main opposition party Bhartiya Janta party opposed the bill and demanded to send it back to the standing committee. The main argument of the BJP was that since the government consulted with the other stakeholders after the submission of report by standing committee, it should be sent back to the standing committee again. This is the main reason for delay. available at* http://articles.economictimes.indiatimes.com/2011-12-22/news/30546669_1_companies-bill-development-authority-bill-bjp-leaders visited on 06-05-12.

[42] *Supra note 35, at 10.*

Space Law and Space Policy in India

Ipsita Das *

ABSTRACT

Indian Space law and Space policy have tremendous changes since the past days and its development have a great impact in India. Space law is a course of the law subject now a day's having its national and international impact relating to outer space. The objectives driving space endeavors in India are highly focused on her needs for social and economic development. India is a party to all space treaties developed by the United Nations. India currently ranks 6th in the world in budget allocation for space activities. The Indian Space Research Organization (ISRO) is preparing for Mangalyaan, an orbiter mission to Mars to be launched in November 2013. Currently, there is no codified law governing licensing of communications satellite operators in India, but certain Articles of Indian constitution deal with space activities. ISRO is the only organisation and Union Cabinet has approved implementation of communication satellite services in India and ISRO has publicized the Procedures for SatCom Policy Implementation.

Keywords: ISRO, Space law, Outer space, space mission, aerospace, SatCom policy.

Introduction :

Space law is an area of the law that encompasses national and international law governing activities in outer space.[1] International lawyers have been unable to agree on an uniform definition of the term outer space although most lawyers agree that outer space generally

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1 http://www.iislweb.org/ visited on 15.9.2012 at 3:18 pm

begins at the lowest altitude above sea level at which objects can orbit the earth, approximately 100km.[2]

India is steadily establishing its distinct identity in international space regime and has emerged as an important destination for domestic and international space activities and applications.[3] The Memorandum of Understanding (MOU) entered for this project with National Aeronautics and Space Agency (NASA) of the USA, European Space Agency (ESA) for Europe and Bulgaria, besides several other co-operative agreements with other countries / agencies in space field, necessitates immediate attention for development of a National Space Policy and Space Law by India.

The India Space Research Organization (ISRO) is the primary body of space research under the control of the government of India, and one of the leading space research organizations in the world and established in 1969.[4] National economic development has been the primary goal of India's space program. The commercial arm of ISRO, Antrix, is also successful, and brought in more than $500 million in 2006 – which is over half the operating budget of the entire ISRO.[5]

History of space law

Modern Space science had its beginnings around 1946 when scientists started the deployment of instruments to the outer fringes of the earth's atmosphere using balloons and rockets to study radiations from outer space as well as geophysical phenomena. The launch of Sputnik in 1957 marked the beginning of space age. Yuri Gagarin became the first man in space on 12th April 1961, and within a decade Neil Armstrong and Edwin Aldrin landed on the Moon on 16th July 1969.

Development of many regulations and overall framework of law was taken up in 1958 through an ad-hoc Committee on Peaceful Uses of Outer Space, under the aegis of the

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2 K C Joshi,Internatinal law and Human Rights, ed.2006, pg. 333

3 V. Balakista Reddy, Recent trends in International Space law,ed.2007, p.153

4 www.wikipedia.org visited on 19.10.2009 at 1:53pm

5 http://timesofindia.indiatimes.com/articlesshow/1730115.cms visited in 6.9.2009 at 12:33pm.

United Nations. The ad-hoc committee was subsequently replaced by a permanent body called the UN Committee on Peaceful Uses of Outer Space (UNCOPUOS).

This was later metamorphosed into a fundamental treaty, popularly known as the Outer Space Treaty (OST) in 1967. India, after its independence in 1947, focused on development of indigenous technology in construction, launch and operation of satellites. In 1961, space activities started under the Department of Atomic Energy (DAE) and continued under Indian National Committee for Space Research (INCOSPAR), constituted in 1962, with the launch of sounding rockets from Thumba Equatorial Rocket Launching Station (TERLS). The Indian Space Research Organization (ISRO) was created in 1969, continues under the Space Commission (SC) and is currently under the Department of Space (DOS), created in 1972.

International cooperation of Indian Space Law

After the launch of Sputnik, the necessity of outer space law to regulate outer space activities developed within the United Nations (UN) and India always attached utmost importance to every international approach associated with peaceful uses of outer space. In 1958, India became a member of the ad hoc committee to play an active role in UN Committee on the Peaceful Uses of Outer Space (COPUOS) and its Subcommittees, the only international forum for the development of international space law. The five international treaties and agreements, associated with international space law, adopted by General Assembly for which India is a party / signatory are:

- "Outer Space Treaty", 1967,
- "Rescue Agreement", 1968,
- "Liability Convention", 1972,
- "Registration Convention", 1976,
- "Moon Agreement", 1984.

India is also a party to the other international agreements relating to activities in outer space India has space co-operative agreements with different countries.[6]

[6] works.bepress.com/cgi/viewcontent.cgi?article=1004&context visited on 23.9.2009 at 11:09 pm

Development of Space Law and policy

India is a party to all space treaties developed by the United Nations. However, in case of Moon agreement, India has signed it, but not ratified. ANTRIX Corporation is the commercial wing of the DOS established to promote the commercial use of satellite services across the globe.[7]

- **Need for National Space Policy in India**

The matters related to space activities of the Indian Government are under the overall responsibility of the Space Commission (SC), which formulates guidelines and policies to promote the development and application of space science and technology. There is an immediate need for a codified National Space Policy (NSP) for making its activities more focused and resourceful, as space has become a place that is increasingly used by a host of nations, consortia, businesses, and entrepreneurs, and as space business operate beyond the sovereignty of national borders.

- **Need for development of Space Law in India**

The UN treaties did not contemplate private businesses or individuals claiming space as their own domain for living, working and playing.[8] A well-defined space law shall enable better capitalization and optimization of existing infrastructure and resources by:[9]

(i) Promoting orderly and organized growth of space business by providing recognition and legitimacy to ongoing space programs;

(ii) Providing opportunity to potential space operators, domestic and international;

(iii) Promoting development of indigenous technology matching international standards;

(iv) Providing mechanism for enforcement and prevention of misuse of space activities; and

(v) Providing stringent punishment for violators of space law.

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7 http://www.isro.org/commercial.htm visited on 14.10.2009 at 11:23 pm

8 http://www.gisdevelopment.net/news/viewn.asp?id=GIS:N_gkljezqyit visited on 9.10.2009 at 5:09 pm

9 http://www.zsrlaw.com/publications/articles/rbt980611.htm visited on 5.8.2011 at 10:00 am

Space Commission (SC) is currently working on comprehensive legal document on issues related to outer space on internal security matters due to private players like Google Earth gaining easy accessibility to satellite data.

Space mission of India

Satellites like Aryabhata, Bhaskara, IRS and INSAT I and II series have paid the country rich dividends by providing an insight into several unknown phenomena of climatic behaviour, patterns of monsoons, solar gamma irradiation, soil and crop patterns by enabling discovery of new water resources and expansion of communication facilities. APPLE was the first experimental geostationary communication satellite built by India.

The Government has approved a comprehensive Remote Sensing Data Policy (RSDP) for the acquisition and distribution of satellite remote sensing data from Indian and foreign satellites for civilian users in India.

India has planned its future space mission systematically in phases up to the year 2025 with the propose of sending a man on a space voyage in 2015. A second unmanned mission to moon in 2012 will be send to be followed by a similar mission to Mars in 2013 and sent a man on space voyage in 2015. ISRO has also drafted Indian Space Mission-2025[10] and this mission put India into a very exclusive club of only five international space agencies that had sent missions to the Moon before (NASA, JAXA, ESA, ROSCOSMOS and the CNSA).[11] The most important challenge for space law today is the protection of outer space environment.[12]

PSLV-C16 launched on April 20, 2011 carried Resourcesat-2 and 2 auxiliary satellites namely Youthsat (Indian Mini satellite -2) and XSAR (developed by the Nanyang Technological University, Singapore). PSLV-C17 was carrying an exclusive communication satellite GSAT-12, launched successfully on July 15, 2011. PSLV C-18 in its recent flight on 12th October, 2011, carried MeghaTropiques satellite which is an INDO-FRENCH

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[10] Ibid.

[11] www.indianspace.in/.../img/Space%20law%20for%20NALSAR.doc visited on 7.9.2009 at 1:59am

[12] www.ias.ac.in/currsci/dec252007/1823.pdf visited on 7.8.2009 at 4:08 pm

collaborative programme. The co-passengers are SRMSAT (SRM University), JUGNU (IIT Kanpur) and VESSELSAT-1 (LUX Space, Luexmbourg).[13]

With 19 consecutive successful launches so far, PSLV has repeatedly proved itself as a reliable, versatile and cost-effective launch vehicle of ISRO. The work on the fourth launch of PSLV in the current year is in progress.

Legal Aspects of Indian Space Activities

Currently, there is no codified law governing licensing of communications satellite operators in India. ISRO is the only organization associated with satellite operations in India and Antrix Corporation, its wholly owned commercial wing, markets the space products and services. The SATCOM policy section of National Telecom Policy (NTP) 1999 provides for users to lease capacity from both domestic and foreign satellites, subject to consultation with Department of Space (DOS). Currently, DOS through ISRO or Antrix, leases the transponder capacity from foreign satellite operators and then allocates it to the domestic VSAT operators. Telecom Regulatory Authority of India (TRAI) established under TRAI Act, 1997, for regulation of Telecommunications in India and also implementation of National Telecom Policy (NTP) 1999 and the Broadband Policy, 2004 targeting a subscriber base of 20 millions by 2010, has recommended adoption of 'Open Sky' Policy for all satellite users and the government has not yet adopted its recommendation.

The constitutional provisions relating to general international law are also relevant to the aero-space law. The Articles like Art 51, Art 73, and Art 245 of Indian constitution are related to space law.[14]

Article - 51 of the constitution imposes on the state the obligation to strive for promotion of international peace and security, including maintaining just and honourable relations between nations, respect for international law and treaty obligations, and settlement of international disputes by arbitration. Article 51 in the Constitution directs the Executive to (promote)

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[13] http://www.isro.org/pdf/Outcome-Budget-2012-13.pdf visited on 14.9.2012 at 2:53 pm

[14] www.thehindu.com/thehindu/2000/03/09/.../08090008.htm visited on 6.9.2011 at 9:00 am

international peace as India's objective in the international sphere and provides the basis for the domestic implementing international treaty obligations[15]

It becomes essential to understand rules established by the four Exceptions that restrict the general application of Article 51 of the Constitution. These rules have a direct bearing on the present state practice in respect to international space law conventions and show the way for development of Indian national space laws for the future. The Exceptions must be understood in light of the fact that Article 51 does not lay down that international treaties or agreements entered into by India have force of municipal law without appropriate legislation. This position was conclusively decided by the Supreme Court of India in Varghese v.

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[15] Constitution of India: Part IV: Directive Principles of State Policy

"Article 51: Promotion of international peace.

1. This Article embodies the object of India in the international sphere. But it does not lay down that international treaties or agreements entered into by India shall have the force of municipal law without appropriate legislation.
2. In order to be binding on municipal Courts, legislation [see under Schedule VII, List I(14),post] would be required if a treaty –
   (a) provides for payment to a foreign power, which must be withdrawn from the Consolidated Fund of India; or
   (b) affects the justiciable rights of a citizen
   (c) requires the taking of private property [Art.31(1), taking of life or liberty [Art.21], such as extradition or imposition of a tax[Art.265], which under the Constitution can be done only by legislation; or
   (d) modifies the laws of the State
3. Even an amendment of the Constitution would be required where the implementation of a treaty would involve cession of Indian territory to a foreign power but nothing is required here it merely involves the settlement of a boundary dispute not involving 'cession'.
4. Outside the foregoing specified matters, legislation or constitutional amendment would not be required, and a treaty may be implemented by exercise of executive power under Article 53.
5. In the absence of contrary legislation, municipal Courts in India would respect rules of International law, but if there is any express legislation contrary to a rule of International law, Indian Courts are bound to give effect to the Indian law.

Thus, Rules of International law as to immunity of a foreign state from being sued in India has been modified by the provisions of the Code of Civil Procedure, e.g. Section 86.

But in interpreting a statute, the Court would so construe it, if possible, as will not violate any established principle of International law."

Bank of Cochin[16] and Civil Rights Committee v.Union of India[17]. Furthermore, although municipal courts in India do respect rules of international law in the absence of contrary legislation, Indian Courts are bound to give effect to the Indian law if there is an express legislation contrary to a rule of international law, although in so doing they are directed to interpret law in such a way, if possible, as will not violate any established principle of international law. The below listed Exceptions to Article 51 describe specific conditions attendant to international treaty obligations which can be discharged by the Government of India only through specific national law binding on municipal courts. Thus specific national law is necessary when an international treaty:

(1) Provides for payment to a foreign power, which must be withdrawn from the Consolidated Fund of India[18] ; or

(2) Affects the justiciable rights of a citizen[19];

(3) Requires the taking of private property [Art.31(1), taking of life or liberty [Art.21], such as extradition or imposition of a tax [Art.265], which under the Constitution can be done only by legislation[20] ; or

(4) Modifies the laws of the State[21].

Under Article - 73 the executive power of the Union extends to the exercise of such rights, authority, and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

Article – 245 empowers Parliament and State legislatures to enact laws.

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16 A 1980 S.C.470

17 A 1983 Kant.85(Para 18)

18 Issue decided by the Allahbad High Court in *Moti Lal v. U.P.*, 1951 All.257 F.B

19 Issue was decided by the Supreme Court of India in Maganbhai v.Union of India,A.1969 SC783 (789,807) and in Beubari Union, in re.,A 1960 SC 845

20 Issue in reference to extradition was decided by the Supreme Court of India in Ali Akbar v. U.A.R,A1966,S.C.230 (para 30)

21 Issue has been decided by the Supreme Court of India in State of W.B. v Jugal, A 1969 SC 1171(para 6)

Article – 253 empowers Parliament to make any law for the whole or part of the territory of India for implementing treaties, international agreements and conventions. It enables the Government of India to implement all international obligations and commitments. Following the commonwealth practice treaties are not required to be ratified by Parliament in India. They are, however, not self-executory. Parliamentary legislation is necessary for implementing the provisions of a treaty within the country. Parliament has passed many Acts to implement international treaties and conventions (including environment civil aviation etc.) but not in outer space activities.

The Air Act, 1986 were enacted to give effect to the decisions of the United Nations Conference on the Human Environment held at Stockholm in 1972.

India is a party to all important space treaties which form the main body of international space law namely, the Space Treaty of 1967, the Rescue Agreement of 1968, the Liability Convention of 1972, the Registration Convention of 1975 and the Moon Agreement of 1979.

The "space" as a subject is not mentioned in the Union List. The reason was that the Constitution was adopted in 1950, but the space activities started in India in the early Sixties; a number of items on the Union list related to the aerospace activities in India.[22]

The India space programme has been encouraging transfer of technologies to Indian industry to support various space projects, to promote space applications and market development, and for disseminating spin-offs from space technologies to diverse economic sectors. Space insurance problems are generally tackled in accordance with national insurance regulations.

Up to now, there is no comprehensive or specific law dealing with space activities in India. However, with the rapid development of activities in space, there is a growing need for enacting a new domestic space law, and integrating divergent regulations dealing with space and space-related matters. Such a law should define the role of the DOS and different governmental and non-governmental agencies in space matters, the procedure for adoption and implementation of space programmes, and regulations on the safety of launch and space flight, the question of transit of foreign space objects through national airspace flight,

[22] www.thehindu.com/thehindu/2000/03/09/.../08090008.htm

questions of liability and insurance, protection of intellectual property rights, spin-off benefits, and above all, implementation of international obligations under the various treaties. Further, it should also formally incorporate the objectives of Indian space policy, reiterating country's commitment to the peaceful uses of outer space and to international co-operation in carrying on all legitimate activities in space.

Present and Future Perspectives in India

It is acknowledged that at present, India "has the world's largest constellation of civilian remote sensing satellites." This constellation includes IRS-1B, IRS-P2, IRS-1C, IRS-P3, IRS-1D, Oceansat-1, Resourcesat-1, Cartosat-1, Cartosat-2 and Technology Experiment Satellite (TES) remote sensing satellites that "provide data in a variety of spatial, spectral and temporal resolutions," meeting India's needs for many applications. [23]

Recently, under its National Microgravity Research Program, ISRO took an important step by developing and successfully testing the Space Capsule Recovery Experiment (SRE-I) with microgravity experiments in space. This success has been heralded as "a new research platform for microgravity research and has opened up opportunities for microgravity research." ISRO has declared the possibility of establishing and implementing such a program by 2014.[24]

However, India still remains dependent on international partners for various requirements, including space-qualified electronic parts and components for its advanced satellite systems and launch vehicles, radar remote-sensing data and advanced processing of such data, and long-duration microgravity research in space.[25] India is planning to launch Chandrayaan-2 in the year 2014 after the success of Chandrayaan -1 on October,8 20008. India further proposed for launching of Chandrayaan-3 in 2015 and in 2020 the proposal is given by ISRO for the manned missions. Hope, the future proposal of India is successful and bring prosperity to the nation.

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[23] http://www.ias.ac.in/currsci/aug102000/mg1.pdf visited on 7.10.2012 at 7:06 pm.

[24] http://www.turbogadgets.com/2007/01/11/re-entry-vehicle-technology-launched/ visited on 5.9.2009 at 8:09pm.

[25] www.asiapacific.ca/files/Analysis/Indianspaceresearch.pdf visited on 7.9.2009 at 5:07pm

Conclusion

India has done well in space exploration and has an impressive record in space applications. The new vision of rural development is helped by space monitoring with remote sensing and space communication. Other space application is for agriculture, health care, education, navigation, weather forecast, water and wasteland management, disaster management etc. India's programmers for landing on the Moon will further help scientific exploration and uses of outer space for peaceful purposes.

Up to now, there is no comprehensive or specific law dealing with space activities in India. However, with the rapid development of activities in space, there is a growing need for enacting a new domestic space law, and integrating divergent regulations dealing with space and space-related matters.

The objectives of India's space policy, reiterating the country's commitment to the peaceful uses of outer space and to international cooperation in carrying on all legitimate activities in space. The launching of INSAT – I series from INSAT- IA to ID, IRS-IA and first and second developmental launches of ASLV are the major achievements of eighties. And, now India is one of the six countries in the world with its home made satellites in orbit.[26]

In essence, India's space policy and activities have been and are guided by its efforts to use space to extend socio-economic benefits to society, to attain and maintain independent access to space and self-sufficiency in space capabilities, to rely on international cooperation and to promote international business in the space sector. India can offer launch services at competitive rates, supply satellites, and provide satellite assembly and integration services as well as proven technologies. However, India still remains dependent on international partners for various requirements, including space-qualified electronic parts and components for its advanced satellite systems and launch vehicles, radar remote-sensing data and advanced processing of such data, and long-duration microgravity research in space.[27]

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[26] Supra Note 1, p.2

[27] www.asiapacific.ca/files/Analysis/Indianspaceresearch.pdf

Rehabilitation and Reintegration of Children under Indian Juvenile Justice System with reference to Adoption

Mandira Arnab Aich *

ABSTRACT

The juvenile justice system in America, unlike Europe, permitted greater state interference in the lives of families and parents who could not prevent their children from pauperization and vagrancy. India adopted the American model that gave indirectly the power to control lives of vast sections of poorer children. The Juvenile Justice (Care and Protection of children) Act, 2000 conceptualized juvenile justice system within which both the 'delinquent' as well as 'neglected' children could be covered. This paper analysed the Indian legal regime on rehabilitation and reintegration of child in need of care and protection with reference to adoption.

Keywords: *Adoption;* Juvenile Justice; Juvenile Delinquency, Rehabilitation

Conceptualising Juvenile delinquency

"Juvenile Justice" is a socio-legal term which has got its deep root in another similar one 'juvenile delinquency'. The concept of this Juvenile Delinquency was, perhaps for the first time shoot by an American Committee constituted in the city of New York in early period of the nineteenth century to investigate into the causes of pauperism and vagrancy. The Committee opined about a close co-relationship between this juvenile delinquency and pauperism. This co-existence theory later became the foundational idea for giving a broader import to juvenile delinquency by including within its sweep not only delinquent juveniles

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This paper is the revised version of the Paper presented in the workshop of 'Juvenile Justice System': Contemporary issues chaired by Prof. N. K. Chakrabarti in the 141st Congress of Correction of the American Correctional Association held at Kissimmee, Florida, USA, August, 2011.

but also those who were likely to come in conflict with the law. Such a broader view of juvenile delinquency permitted greater state interference in the lives of families and parents who could not prevent their children from pauperization and vagrancy. In Europe, contrasting to such an American model, juvenile delinquency was limited to those children who could be clearly shown to be in 'conflict with the law'. As a consequence in Europe and UK juvenile delinquency proceedings have been always distinguished from care and welfare proceedings in respect of children. That is the reason for the enactment in the United Kingdom of the two separate sets of legislations like the Children Act 1989 [for care and welfare jurisdiction] and the Criminal Justice and Public Order Act, 1994([for youth justice jurisdiction). The juvenile justice system in the United States is a broad network of juvenile and family courts, state and local youth services agencies, juvenile correctional institutions and detention centres, private social service organizations and other private youth and family programs[1].

In India the idea of juvenile delinquency was originally limited to the criminality of child offenders particularly for the non-grievous offences like theft, and other minor crimes like rioting and ordinary breach peace. Thus, non-criminal children in bad surroundings were excluded from the periphery of juvenile delinquency. However, the enactment of the Apprentice Act, 1850 that gave power to the court to bind over the children of poor and destitute as apprentice in newly established factories indirectly gave to the state the power to control the lives of the vast sections of the poorer children. Such wide power of controlling the lives of the children later became the basis for enacting some of the Provincial Children Acts, the Children Act. 1960 and the Juvenile Justice Act, 1986, that favoured a comprehensive conceptualization of "juvenile delinquency" within which both the 'delinquent' as well as the 'neglected' juvenile could be covered.

The same view seems to have been carried through in the new Juvenile Justice [Care and Protection of Children] Act, 2000, which deals with the 'juveniles in conflict with law' and 'children in need of care and protection' under the umbrella of one law. Though the new Act envisages to keep the basic provisions relating to these two categories of children

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[1] Jeffrey A. Butts and Daniel P. Mears(2001)"Reviving Juvenile Justice In a Get-tough Era"; available at http:// yas.sagepub.com/content/33/2/169.refs.html

under two separate chapters and provides for two diverse kinds of agencies for dealing with them, but in view of the close linkages between the agencies, the similarities of the procedures and the possibilities of the processes relating to 'Juveniles in Conflict with Law' influencing the handling of the other categories of children, ultimately this law also approves a unified concept of juvenile delinquency. Thus, it appears that India has given precedence to the American model over European model. This paper analysed the Indian legal regime on rehabilitation and reintegration of child in need of care and protection with special reference to adoption.

Best interest of the child:

By the power vested on it by our Constitution, The Government of India is fully sensitized and committed to the rights and welfare of children. The Constitution of India under Article 24 of the Chapter on "Fundamental Rights of the Citizens" provides the right against exploitation of the children below 14 years. Article 45 of the Directive Principles of the State Policy in the Indian Constitution envisages for free and compulsory education of children.

At the International level, India has ratified the convention on the Rights of Child and the Hague Convention on inter- country adoption of children. At national level, India has prepared a National Policy for children in 1974 under which Ministry of Social Justice and Empowerment (now known as Ministry of Women and Child Development) has got the mandate to enact laws regarding welfare of children declaring them as our national asset. The Juvenile Justice (Care and Protection of Children) Act 2000 is a landmark in this regard. Not only has this particular Act, in pursuance of its constitutional mandate, the Government of India evolved a National Charter for the Children in the year 2003 which declares it as our supreme responsibility to nurture them in growing up as the robust future citizens. The concept of rehabilitation in juvenile justice was based on the belief that childhood and adolescence are period of growth and development. Because patterns of proper behaviour evolve from nurturing the goal of benign intervention was to serve the best interest s of the child[2].

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[2] Empey, L.(1982). American delinquency: Its meaning and construction". Homewood,IL Dorsey Press. Available at; http:// yaas.sagepub.com/content/25/1/104.ref.html sept.1,1993

Rehabilitation and social reintegration:

The UN Convention on Rights of the Child in Article 18 states the state's obligation to ensure that children who have suffered neglect, maltreatment or exploitation receive appropriate treatment for their recovery and social reintegration. It is true that the family is the central fulcrum around which both mental and physical development of a child is given full opportunity to blossom. Therefore the goal is to do the welfare of most vulnerable category of children, i.e. orphan/abandoned and surrendered children to restore their dignity and self-worth. The 1989 UN Convention on the Right of the Child has established a near global consensus that all children have a right to protection, to participation and to basic material provision[3].Thus, prevention of separation of a child from his/her biological parents/ guardians and long term institutionalization of all adoptable children, child's reintegration with biological parents and/or guardians and family reintegration constitute the most desirable permanent solution. As guiding principles in this regard, international law[4] recognizes that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. With the state assuming the role of parent, formal legal procedures and protection were shunned in favour of an informed decision process[5].

We have an emergent scientific knowledge base that can provide guidance on how to interfere in the lives of juveniles in effective ways[6].

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[3] John Muncie(2004)"The globalization of crime control: the case of youth and juvenile justice: Neo-liberalism, policy coverage and international conventions" in Theoretical Criminology, Vol.99i) 35-64, available at –http://ter.sagepub.com/content/9/1/35. Refs.html.Dec,16, 2004).

[4] Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption

[5] DonMacallair(1993) "Reaffirming Rehabilitation in Juvenile Justice". Youth & society, Vol.25,no.1 104-125

[6] Alex R. Piquno, Cullen, and others (2010) " Never too late: Public Optimism about juvenile rehabilitation" available at- http:// pun.sagepub.com/content/12 /2/87refs.html april 21,2010

Hierarchy of life environments:

As we go further inside the topic, to protect the best interest of the child being our prime concern, we must go through the hierarchy of the life environment. As we know, the family is a way better place for a child to live in. Therefore with all possible equipments of temporary solution of foster care or institutionalization, the state should primarily focus on the permanent solutions: to rehabilitate or return the child to the family of origin, if not, to give in adoption. In case of adoption the primary focus is to intra-national rather than inter-national adoption. Therefore, the hierarchy follows:

- Family solutions (prevention of abandonment and keeping the child in his/her family, returning the child to his/her family of origin, foster care, internal or inter-country adoption) must take precedence over long-term institutionalization.
- Permanent solutions (keeping or reintegrating the child in his/her family of origin, adoption) must take precedence over temporary solutions that perpetuate themselves.
- Temporary solutions (foster care, placement in an institution) must give priority to the reintegration of the child in his/her family of origin, or else to the search for a permanent solution.
- National solutions (family reintegration, internal adoption) must take precedence over international solutions (inter-country adoption).

Procedures of Rehabilitation and Social reintegration:

Therefore, it is the prime concern to make sure that the child gets the full opportunity to develop in its own family; and if, and only if, that is not possible, the questions of instrumental rehabilitation or reintegration arise. In chapter IV of the JJ Act four types of rehabilitation and reintegration of neglected children were envisaged, i.e., Adoption, Foster care, Sponsorship and Aftercare. We will focus the perspectives and procedure of adoption only.

Adoption: concept and principles

As we know, the family is the natural environment for the growth and well being of the children as family environment alone can provide them the best opportunity to fulfil their

potential. Government of India considers adoption as the best non-institutional support for rehabilitation of orphan, abandoned and surrendered children who become homeless and whose separation from their biological parents cannot be avoided for various reasons.

The concept of adoption rests on three major principles:

i) Subsidiarity principle- whereby international adoption may only be considered in the absence of domestic solutions (i.e., only if the child cannot be brought up by his or her own parents, other members of the family or adoptive parents within the country of origin);

ii) Professionalism- Prohibiting improper financial or other gain and requiring that only costs and expenses, including reasonable professional fees be charged;

iii) Best interest principle- the primacy of the child's best interests requiring a central point of contact or central authority in each country to coordinate inter-country adoption policy and practice; to establish legal safeguards to ensure that inter-country adoptions take place in the best interest of the child and with respect to his/her fundamental rights (as recognized in International Law) to ensure and secure in the Contracting States international recognition of adoption, in other words, an adoption made in one country will be recognized in other countries; providing for a system of accreditation for inter-country adoption practitioners; requiring that consent to adopt be informed and freely given; and requiring preservation of medical and other records etc.).

Triad of adoption

Adoption, as we perceive, is seen as a triad - formed by the child, the adoptive parents, and the birth parents – whose three corners are connected by organisations such as adoption agencies and children's homes, to form a complete circle. This process involves "Pre-Adoption counselling" for both the biological and adoptive parent(s) and the preparation of the "Home Study Report". Pre-Adoption Counselling is needed to clarify all the questions and doubts of the biological and the prospective parent(s) regarding the procedure and effect of the adoption and the purpose of the Home Study Report is to provide the Future Adoptive Parent(s) with an opportunity, as prospective adoptive parent(s), to think through

the decision to adopt and to have all their apprehensions and doubts clarified, so that they feel confident of their decision. It is also an assessment of their capacity and emotional readiness to parent a child who is not related to them biologically.

Here, if we consider the socio-legal scenario of India, we may see that even in our recent past, adoption as a legal concept was introduced only in sixties and was available only among the members of the Hindu community under the Hindu Adoption and Maintenance Act and the other communities could only act as legal guardians of the children under the Guardians and Wards Act, which does not provide the child a same right as to a child born in the family. Therefore over the years several attempts were made to formulate a general secular law on adoption. All of these went in vain on account of a number of religious or cultural reasons. Thus an attempt was undertaken by the legislature in the way of the Juvenile Justice (Care and Protection of Children) Act, 2000. This enactment encompasses the concept of secular adoption whereby without any reference to the community or religious persuasions of the parents or the child concerned, a right appears to have been granted to all citizens to adopt and all children to be adopted.

Institutions and Organizations for Adoption

- ***Child Welfare Committee (CWC)***[7]

The Child Welfare Committee has the sole authority to declare the child in need of care and protection who are orphan, abandoned or surrendered free for adoption. CWC shall determine legal status of all orphaned, abandoned and surrendered children. Functions and powers of the Committee, procedure in relation to the Committee, production of child before committee, procedure for inquiry, procedure related to orphan and abandoned children and procedure related to surrendered children shall be governed as laid down in the Juvenile Justice Amendment Act 2006 and its Rules. On clearance from CWC that a particular child is free for adoption, there will be termination of parental right.

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7 Section 29 of The Juvenile Justice Act, 2000

- ***Children Home***[8]

The State Government may establish and maintain either by itself or in association with voluntary organisations, children's homes, in every district or group of districts, as the case may be, for the reception of child in need of care and protection during the pendency of any inquiry and subsequently for their care, treatment, education, training, development and rehabilitation.

- ***Shelter Home***[9]

The State Government under sec. 37 of the same Act recognises reputed and capable voluntary organisations and provides them assistance to set up and administer as many shelter homes for juveniles or children as may be required. These shelter homes function as drop-in-centres for the children in the need of urgent

- ***CARA***[10]

Established on 28th June 1990 CARA is an autonomous body under the Ministry of Women & Child Development, Government of India. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions. CARA is designated as the Central Authority to deal with inter-country adoptions in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by Government of India in 2003. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated /recognised adoption agencies. CARA has issued separate policy guidelines for inter-country and in-country adoptions. The main policy adopted is placement agencies involved in adoption should strictly follow and comply with the guidelines of CARA and register with respective state governments. No Objection Certificate [NOC] from CARA is made mandatory in case of all inter- country adoption, before placement agency process the application in competent Judicial Courts.

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8 Section 34 of The Juvenile Justice Act, 2000

9 Section 37 of The Juvenile Justice Act, 2000

10 Central Adoption Resource Agency

Eligibility for adoption

"Adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship. Therefore to be in the process of adoption, either as parent(s) or as a child needs for a call of eligibility test. Here after we are going to briefly discuss the criterions for an adoption.

Essentials for adoption

Identification of prospective parents

According to CARA guideline, Prospective Adoptive Parents (Indian Nationals residing in India) are required to register with the Recognised or Licensed Placement Agency (RIPA/ LAPA) in India. Prospective Adoptive Parents residing abroad have to move through CARA enlisted foreign agencies/central authorities. CARA provides facility for online registration and status tracking to the parents. A list is to be maintained by all Placement Agencies containing the names, addresses and other relative data of these prospective adoptive parents for reference.

Dissemination of information on adoption to community

This is a necessary step in adoption as often the children given for adoption are orphaned or abandoned. Therefore the requirement of the dissemination of the information is to the point of being sure that there is no person to take care of the children and there is no family or relatives to claim for their guardianship.

Co-ordination among various limbs of the system

Adoption is a stringent and lengthy process requiring co-existence and co-work of various limbs of the system. As it is in many cases the child is taken care of by an agency in one part of the world and the prospective adoptive parent(s) are applying for the adoption in another; it consists of various efforts of red tape and legal actions. CARA being the nodal agency on this regard is primarily responsible for this coordination. According to CARA, all existing child care institutions housing orphan, abandoned and surrendered children are

required to register with the State Government and apply for recognition as Special Adoption Agency(SAA) as per provisions of the JJ Act. After being recognised as SAA, such agencies should register under CARINGS to be part of CARA network. CARINGS would facilitate linkages between agencies to ensure early rehabilitation of the child.

Presently there are 72 RIPA's which undertake both In-Country as well as Inter-Country Adoptions and 254 LAPA's which undertake only In-Country Adoption. The primary goal being the best interest of the child and that to with least affecting the childhood, it requires of extreme coordination among the stakeholders of the process, as time is the essence here.

Pre-adoption counselling of biological parent(s), guardian or prospective adoptive parent(s)

The pre-adoption counselling plays a tremendous role in the whole process of adoption. Though the primary focus of it is on the prospective parent(s); it also has got the effect on the biological parent(s) or the guardian. As we discussed, adoption being an irrevocable procedure, a relinquishment of rights, the biological parent(s), who in many cases young unwed girls; or the guardian may have some questions or concern about the future upbringing of the child. Therefore it is necessary to clarify their doubts and questions as far as possible and also to make them understand the permanent effect of this adoption procedure after signing the "document of surrender". Then, the prospective parent(s) mostly come to adoption agencies with a lot of anxieties, apprehensions and sometimes some misconception about the process of adoption which calls for a positive and assuring counselling. Some of major areas for counselling for adoptive parents consist of the following issues:

- Emotional readiness and acceptance of adoption as an alternative way of achieving parenthood
- Coping with childlessness and infertility issues without any residual sense of guilt, blame, inadequacy or deprivation
- Stability of the marital relationship
- Issues of "Bonding and Attachment" with a child who is not biologically related
- Concerns about the child's social background

- Heredity and environment issues
- Process of selecting the child
- Confidentiality in the adoption process
- Acceptance of the child by family, friends and neighbours.
- Requests for "Secret" adoption
- Anxieties about sharing the fact of adoption with the child in future

Post adoptions follow up

The purpose of the post adoption follow-up is to assess the adjustment of the child in his new home and also the adoptive parent(s)'s adaptation into the new roles as parents. Post-Adoption Counselling focuses on the following issues:

- Coping with parenthood and change of roles
- Feelings of bonding and attachment
- Acceptance of the child by relatives and friends
- Sharing the fact of adoption with the child - Why, When, How
- Issues related to the child's schooling and academic performance
- Child's need to search for "Roots" - Social, Emotional and Legal issues

Domestic adoption

The Supreme Court of India in its series of judgements in *Lakshmi Kant Pandey vs. Union of India*[11]*6* case and the United Nations Declaration of the Rights of the Child adopted by the General Assembly of the United Nations in 1989 as well as the Hague Convention on Inter-country adoption of 1993 clearly lay down that the best interest of the child without a family is served by providing it an opportunity to be placed with a family within its own socio-cultural milieu. Thus, as we have already discussed as the life environment hierarchy, every child has a right to be considered for placement with a family belonging to its own national and cultural background within the country.

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[11] AIR 1984SC469: 1984SCR92)795

According to Sec. 41 (6) of Juvenile Justice (Care & Protection of Children) Act, the following persons are eligible to commit in an in-country adoption:

- A person irrespective of marital status
- Parents to adopt a child of same sex irrespective of the number of living biological sons or daughters
- A childless couple

Foreign adoption:

Foreign adoptions have always been, and to some extend rightly, an extremely complex issue in India. The idea behind all these restrictive approach has been the fact that adoption being an irrevocable compromise of a child's life, the government requires to be as much cautious as possible in introducing abrupt changes in that life, and on the other hand domestic adoption provides with minimal interruption in the social atmosphere of the adoptive child. This dilemma has caused an unbalance in the scenario where too much of children remain un-adopted and so much of international childless couples lack to fulfil their craving for a child. In this situation, the CARA came up with a guideline[12] which says as follows[13]:

- Married couple with 5 years of a stable relationship, age, financial and health status with reasonable income to support the child (which should be evident in the Home Study Report) can adopt a child from India.
- Prospective adoptive parents having composite age of 90 years or less can adopt infants and young children from India. These provisions may be suitably relaxed in exceptional cases, such as older children and children with special needs, for reasons clearly stated in the Home Study Report. However, in no case should the age of any one of the prospective adoptive parents exceed 55 years.
- Single persons (never married, widowed, divorced) up to 45 years can also adopt.
- Age difference of the single adoptive parent and child should be 21 years or more.
- A Foreign Prospective Adoptive Parent in no case should be less than 30 years and more than 55 years.

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[12] Guidelines for Adoption from India, 2006

[13] ibid, Chapter IV: Procedure for Inter-Country Adoption, Clause 4.1

- A second adoption from India will be considered only when the legal adoption of the first child is completed.
- Same sex couples are not eligible to adopt.

Apart from these,

- In case of foreigners who have been living in India for one year or more, the Home Study Report and other connected documents may be prepared by the Recognised Indian Placement Agencies (RIPA) which is processing the application of such foreigners for the guardianship of the child. An undertaking should be given by the concerned Embassy/High Commission that the child will be legally adopted in that country and also mention an agency/organisation who would send the progress reports and take care of the child in case of any disruption as and when the child is taken abroad. However a certificate is required from the competent authority in the country of permanent residence of the FPAP indicating that the child shall be allowed to enter the country and get adopted in due course.[14]

Criteria for eligible children[15]:

- The child must be legally free for adoption. Only if there is no suitable Indian Prospective Adoptive Parent is found within 30 days, a "clearance certificate" is issued for the foreign adoption.
- Clearance from Adoption Coordinating Agency (ACA)/State Government is mandatory for all children except wherever exempted under the Guidelines (e.g. NRI parent(s) holding Indian passport is exempted from this clearance certificate).
- Siblings/twins/triplets cannot be separated except in exceptional cases.
- Two unrelated children cannot be proposed to a foreign family at a time.
- A child may as far as possible be placed in adoption before it reaches the age of 12.
- The consent of the child has to be obtained wherever applicable.

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[14] *ibid* clause 4.4

[15] *ibid* clause 4.2

Foreign adoption procedure:

According to CARA guideline[16] the following procedures are followed in all cases of inter-country adoptions:

Step I)- *Enlisted Foreign Adoption Agency (EFAA)*

- The applicants will have to contact or register with an Enlisted Foreign Adoption Agency (EFAA)/Central Authority/Govt. Department in their country, in which they are resident, which will prepare the Home Study Report (HSR) etc. The validity of "Home Study Report" will be for a period of two years. HSR report prepared before two years will be updated at referral.
- The applicants should obtain the permission of the competent authority for adopting a child from India. Where such Central Authorities or Government departments are not available, then the applications may be sent by the enlisted agency with requisite documents including documentary proof that the applicant is permitted to adopt from India
- The adoption application dossier should contain all documents prescribed in this guideline. All documents are to be notarized. The signature of the notary is either to be attested by the Indian Embassy/High Commission or the appropriate Govt. Department of the receiving country. If the documents are in any language other than English, then the originals must be accompanied by attested translations
- A copy of the application of the prospective adoptive parents along with the copies of the HSR and other documents will have to be forwarded to RIPA by the Enlisted Foreign Adoption Agency (EFAA) or Central Authority of that country.

Step II)- *Role of Recognised Indian Placement Agency (RIPA)*

- On receipt of the documents, the Indian Agency will make efforts to match a child who is legally free for inter-country adoption with the applicant.

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[16] see reference 7

- In case no suitable match is possible within 3 months, the RIPA will inform the EFAA and CARA with the reasons therefore.

Step III)- *Child being declared free for inter-country adoption - Clearance by ACA*

- Before a RIPA proposes to place a child in the Inter country adoption, it must apply to the ACA for assistance for Indian placement.
- The child should be legally free for adoption. ACA will find a suitable Indian prospective adoptive parent within 30 days, failing which it will issue clearance certificate for inter-country adoption.
- ACA will issue clearance for inter-country adoption within 10 days in case of older children above 6 years, siblings or twins and Special Needs Children as per the additional guidelines issued in this regard.
- In case the ACA cannot find suitable Indian parent/parents within 30 days, it will be incumbent upon the ACA to issue a Clearance Certificate on the 31st day.
- If ACA Clearance is not given on 31st day, the clearance of ACA will be assumed unless ACA has sought clarification within the stipulation period of 30 days.
- NRI parent(s) (at least one parent) HOLDING Indian Passport will be exempted from ACA Clearance, but they have to follow all other procedures as per the Guidelines.

Step IV)- *Matching of the Child Study Report with Home Study Report of FPAP by RIPA*

- After a successful matching, the RIPA will forward the complete dossier as per Annexure 3 to CARA for issuance of "No Objection Certificate".

Step V)- *Issue of No Objection Certificate (NOC) by CARA*

- RIPA shall make application for CARA NOC in case of foreign/PIO parents only after ACA Clearance Certificate is obtained.
- CARA will issue the 'NOC' within 15 days from the date of receipt of the adoption dossier if complete in all respect.

- If any query or clarification is sought by CARA, it will be replied to by the RIPA within 10 days.
- No Indian Placement Agency can file an application in the competent court for inter-country adoption without a "No Objection Certificate" from CARA.

Step VI)- *Filing of Petition in the Court*

- On receipt of the NOC from CARA, the RIPA shall file a petition for adoption/ guardianship in the competent court within 15 days.
- The competent court may issue an appropriate order for the placement of the child with FPAP.
- As per the Hon'ble Supreme Court directions, the concerned Court may dispose the case within 2 months.

Step VII)- *Passport and Visa*

- RIPA has to apply in the Regional Passport Office for obtaining an Indian Passport in favour of the child.
- The concerned Regional Passport Officer may issue the Passport within 10 days.
- Thereafter the VISA entry permit may be issued by the Consulate/Embassy/High Commission of the concerned country for the child.

Step VIII)- *Child travels to adoptive country*

- The adoptive parent/parents will have to come to India and accompany the child back to their country.

Future ahead

- In India, Children's program is a prominent part in our national plans for the development of human resources. We must not forget that the principal goal is to find a loving and caring family for every adoptable child and to ensure "best interest of the child" at various stages in their growth process.

- Equal opportunity for development to all children during the period of growth is our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.
- All homeless children including orphan and abandoned children must have access to non-institutional services.
- Every effort shall be made to stop any kind of illegal or unethical practices in the name of such services.
- Placement of children in adoption must be guided by a procedure in a time bound manner at all stages, so that adoptable children find themselves in adoptive families at the earliest possible time. The sooner they are placed with alternate families; it is better for their overall growth and development.
- Child adoption in India clearly needs a conceptual shift from ”parent–centred” adoption to “child–centred” adoption. Intervention strategies at the level of lobbying for a special law on child adoption must focus on the need for a “uniform” adoption rules.
- Inter-country Adoption is to be encouraged as it can provide every child a family to ensure better social and emotional development.

Commercial Surrogacy in India : The need for Regulation

Meenakshi Remesh Kurpad *

ABSTRACT

Since the early 2000s, India has been home to one of the fastest emerging commercial surrogacy markets in the world. At first, it was a mere attraction to foreign couples who could hire surrogates to bear their babies for reasonable monetary compensations sans the onerous legal complications they would be subject to if they had resorted to surrogacy in their home country. However, in light of the ardent push for regulation and legal backing of commercial surrogacy in many parts of the world, many social and ethical concerns have been raised in India and highlighted the need for comprehensive legislation. The primary focus of this essay is to evaluate the legal concerns raised by the advent of the commercial surrogacy market in India and the need for a comprehensive legislative framework for the same.Part I of this essay looks at India's emergence as one of the world's leading commercial surrogate markets due to rigid legislative frameworks in other countries .Further, examines the possibility of abuse and exploitation given the inadequacy of legislation for commercial surrogacy in India.Part II analyses the Israel law on commercial surrogacy as a consummate legislation and seeks to draw vital guidelines for the Indian legislation. Part III begins by looking at Family Law in India with respect to commercial surrogacy and adoption and then goes on to analyse the Baby Manji case which sparked intense debate on commercial surrogacy in India. It also examinesThe Assisted Reproductive Technology Bill of 2008. Finally, the author concludes by calling for the formulation and passing of an effective and comprehensive legislation on commercial surrogacy in India, envisaging both the rights of the surrogate and the intended parents.

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I. Emergence of Commercial Surrogacy In India

Commercial surrogacy is an artificial reproductive process by which a woman unable to bear children on her own enters into a contractual agreement with another woman to bear children on her behalf. Basically, there are two types of surrogacy agreements: traditional surrogacy agreements and gestational surrogacy agreements.[1] Traditional surrogacy agreements are when the woman carrying the fetus is also the genetic mother.[2] On the other hand, gestational surrogacy is when the woman merely carries 'the genetic product' of the intended couple.[3]

Commercial surrogacy in India began in 1999, when a fertility clinic was set up in Anand, a small town in the Indian state of Gujarat by Dr. Patel, a fertility expert. The success of her fertility clinic resulted in her appearing on television shows and giving interviews in the United States.[4] This popularity grew and ultimately led to many American couples travelling to India to enter into commercial surrogacy contracts.[5] A typical commercial surrogacy contract in India would cost around $ 23,000 out of which the surrogate would receive $5000[6]. This amount of money is huge for poor rural women in India, and enables them to be financially independent and buy houses or property and provide their children with a good education.[7] It is also advantageous to couples living in the United States and other Western nations as commercial surrogacy contracts in the United States average from $70,000 to $150,000.[8] Therefore, this financial incentive led to the surge in commercial surrogacy in India.

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1 Alaynaohs, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract,* **29 Hastings Const. L.Q. 339, 339** (2001-2002)

2 *Id.*

3 *Id.*

4 Lisa Ling, *Wombs for Rent: Journey to Parenthood*,(Oct. 15, 2012 2: 56 PM)http://www.oprah.com/world/Wombs-for-Rent/2

5 Oprah.com, *Wombs for Rent: Journey to Parenthood*, http://www.oprah.com/world/Wombs-for-Rent

6 Henry Chu, *Wombs for Rent, Cheap,* **The Los Angeles Times**, 19th April, 2006,available at http://articles.latimes.com/2006/apr/19/world/fg-surrogate19

7 Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation,* 20 **Hastings Women's L.J. 279,279** (2009)

8 udaymahurkar, *Donating a Womb,* India Today, 13th September 2007, available at http://indiatoday.intoday.in/story/Donating+a+womb/1/1174.html

India is currently a top destination for fertility tourism.[9] Medical care in India has improved drastically since 1947, with most of its doctors being trained with international standards of medical education and providing world class medical care. This has also fuelled couples from abroad to enter into commercial surrogacy contracts in India. Furthermore, the only form of legal backing of commercial surrogacy are the National Guidelines for Accreditation, Supervision and Regulations of Assisted Reproductive Technology (ART) clinics in India drafted by the Indian Council of Medical Research (ICMR) with the National Academy of Medical Sciences (NAMS). This lack of legislative regulation made it extremely easy for couples living in countries with rigid legislative frameworks that prohibited surrogacy to have a child via a surrogate in India. However, these are not enforceable in law, thus revealing the lack of legislation regarding commercial surrogacy in the country.[10]

Presently, commercial surrogacy is legal in India and lacks notable government regulation or legislation.[11] The unregulated commercial surrogacy market in India seems to have also caused many problems of abuse and exploitation of surrogates and has brought to the fore many legal concerns.India's legalization of commercial surrogacy has been inadequate as it only promotes the industry by way of medical tourism as envisaged in the ICMR guidelines.[12] There is an absence of a comprehensive and regulatory legislature with regard to commercial surrogacy in the country. This increases the probability of abuse and exploitation of poor rural women and reduces them to being mere "wombs" for the commodification of babies. On the surface, it appears that commercial surrogacy contracts are highly advantageous to both parties, as poor rural women are able to financially benefit from the transaction and

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9 Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India,* **30 U. Pa. J. Int'l L.** 1429, 1430 (2008-2009)

10 Margaret Ryznar, *International Commercial Surrogacy and its Parties,* **43 J Marshall L. Rev.** 1017 (2010)

11 *Id.*

12 'In 2002 the country legalized commercial surrogacy in an effort to promote medical tourism, a sector the Confederation of Indian Industry predicts will generate $2.3 billion annually by 2012. Indian surrogate mothers are readily available and cheap.' See Hilary Brenhouse, *India's Rent-a-Womb Industry Faces New Restrictions,* TIME, June 5th 2010,available at http://www.time.com/time/world/article/0,8599,1993665,00.html

the commissioning couples are able to bring a child into their lives.[13] Regrettably, this would not prevent other surrogacy agencies and medical practioners from employing unethical practices solely to generate profit.[14] If the Government of India continues to be silent on implementing a much needed commercial surrogacy law to protect the welfare of the surrogates, then it may lead to disastrous consequences where constitutional rights can be violated. Furthermore, the potential for exploiting poor women as a form of cheap economic profit is greatly heightened.[15] Thus, it is important to bring in a comprehensive and effective legislative framework for the surrogacy industry in India as an unregulated industry is dangerous, and many legal concerns become pressing.

II. Israeli Law On Commercial Surrogacy: A Consummate Legislation

Israeli legislation on commercial surrogacy has been hailed as an ideal legal structure to regulate commercial surrogacy. It provides a unique model for addressing the legal implications of commercial surrogacy.[16] Unlike other jurisdictions on commercial surrogacy, Israeli lawmakers seem to have taken a pragmatic approach towards formulating an effective commercial surrogacy regulation. One of the major factors thatmakes the legislation as effective is the country's unique traditional position on commercial surrogacy. There are narratives in the Old Testament that illustrate instances of surrogacy. In the Bible, (Genesis 16), 'Sarai, because of her inability to have children, says, "Behold now, the Lord has prevented me from bearing children; Go to Hagar, it may be we shall obtain children from her. And Hagar bore a son, Ishmael.'[17] In another biblical example, (Genesis 30), Rachel who was childless used her slave girl Bilha to bear a child for Jacob.[18] Jewish tradition staunchly believes in marriage and the importance of building a family.[19] It does not limit the

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[13] s*upra* note 8 at 280

[14] *Id.* at 281.

[15] *supra* note 8 at 281

[16] *supra*note 8 at 293.

[17] **Joseph Schenker**, *Legitimizing Surrogacy in Israel: Religious Perspectives*, in **Surrogate Motherhood: International Perspectives** 243 (Rachel Cook, et al. Eds., 2003)

[18] *Id.*

[19] *supra* note 8 at 294

purpose of marriage exclusively to procreation.[20] It takes a natural understanding of human needs.[21] This could be one of possible explanations to the liberal and broad approach that Israel has towards artificial reproductive technologies.

In 1992, the Aloni Commission was established in Israel to examine the social, ethical, legal and religious implications of artificial reproductive technology, in particular *in vitro* fertilization (IVF) in Israel. [22] When the commission submitted their report in 1994, one of their major recommendations was that the State allow IVF but with regulation.[23] The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756-1996 adopted the commission's recommendation, but differs on one large aspect. While the Commission's report recommends that surrogacy be allowed on altruistic basis, the Law makes it invariably commercial.[24] One exceptional feature in this law is its ban on "partial surrogacy"[25] and therefore there are no traditional surrogacy contracts in Israel, but only gestational surrogacy contracts.[26]

The implementation of the commercial surrogacy law in Israel rests mainly with the Approvals Committee, which is very well organised.[27] The Approvals Committee has issued extensive guidelines to the applicants, with details on the documents to be submitted, forms to be filled and conditions that are required to be met within the contract.[28] Some of these guidelines include that there must be a written agreement, the parties are eighteen years or older and

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[20] *supra* note 18 at 252

[21] *supra* note 8 at 294

[22] RHONASCHUZ, *Surrgacy in Israel: An analysis of the Law in Practice,* **SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES** 36 (Rachel Cook et al. Eds., 2003)

[23] *Id.*

[24] s*upra*n. 23 For example, the law does not allow relatives of the intended parents to serve as birth mothers. Additionally, it makes provisions for the birth mother to be reimbursed for financial expenses incurred during the process of surrogacy.

[25] *Id.* Partial surrogacy is an agreement, like in the case of *In re Baby M*, where the surrogate is also the biological mother by virtue of donating her own eggs. .

[26] *Id.*

[27] *supra*note 8 at 296.

[28] *supra*note 23.

are residents of Israel, the intended birth mother is not married and is not a relative of the intended parents.[29] Furthermore, the ova is not of the surrogate.[30] The committee plays an exhaustive role in ensuring that the birth mothers and the intended parents screened are genuine candidates and satisfy all requirements under the law to prevent violation or encroachment of rights of either party.

The law is far-reaching as it includes provisions for ensuring the rights of both the intended parents as well as the birth mother. The rights of the birth mother are envisaged in such a way to safeguard her sustainability after the surrogate contract has been performed. These safeguards on her rights and sustainability are largely based on five parameters, according to RhonaSchuz in *Commercial Surrogacy in Israel*- her suitability, informed and voluntary consent, physical and mental health, protection of right to privacy and financial protection.[31] The committee has meticulously formulated various restrictions and regulations to ensure the birth mother's sustainability by laying down specifics on age[32] and number of pregnancies. The Committee does not ban mothers who have been pregnant before, but limits it by including only those mothers who have been pregnant for not more than five times. [33] The law regarding the contractual element of the surrogacy process is highly procedural to ensure that the birth mother's consent is given voluntarily after being informed of all pros and cons of the agreement. She is required to be examined by a physician, who is to declare her physically fit to bear a child.[34] The Approval Committee does not consider any application until it is satisfied that the birth mother has obtained independent legal advice from a lawyer who is an expert in commercial surrogacy agreements.[35] To respect the privacy of the birth mother, the legislation has an exclusive provision allowing her to refuse

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29 The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756-1996, §2

30 *Id.*

31 *supra*note 23 at 39.

32 The Committee only approves birth mothers between ages 22 and 40.

33 *supra*note 23 at 39.

34 *supra* note 23 at 39

35 *Id.*

any medical procedure or treatment that may violate her dignity and privacy.[36]Thus, the Israeli legislation recognizes and legally enforces the surrogate's right to bodily autonomy as well as her right to privacy, thereby creating protection mechanisms in place for the surrogate against exploitation from the commissioning parents.

The law recognizes the fact that a birth mother may agree to inadequate compensation because of financial difficulties.[37] The committee does not prescribe any maximum or minimum amounts of compensation, but places the onus on the Approvals Committee to approve those agreements that ensure fair terms of monetary compensation to the birth mother.It eliminates those cases where one party is in a position to economically dominate the other, rendering such surrogacy agreements unfair.

Not all countries are as willing to include ART procedures due to the high health insurance costs that follow as a consequence.[38]Israel has extensive health insurance in place, not just for its citizens in general, but also has specific policies for married and single women which cover *in vitro* fertilization treatments. [39] While surrogacy in the United States seems to be limited as it is an option available only to the wealthy, it is quite the opposite in Israel. Here, surrogacy is potentially open to all levels of society, since it is subsidized by the State.[40] This compliments the efficient working of the well-structured commercial surrogacy regulation in Israel. Therefore, Israeli law on commercial surrogacy can be viewed as model legislation for countries as it contains extensive provisions for protection of the rights of the surrogate, has an efficient mechanism to eliminate cases of fraud and helps provide for fair commercial surrogacy treatments by placing the responsibility on the Approvals Committee to ensure fair terms and conditions of contract.

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[36] The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756-1996, §18

[37] *supra*note 23 at 41.

[38] Cara Luckey, *Commercial Surrogacy: Is regulation necessary to manage the industry?***26 Wis. J.L. Gender & Soc'y**213,222 (2011)

[39] *Id.*

[40] ellyteman, *Technological Fragmentation and Women's Empowerment: Surrogate Motherhood in Israel***29 Women's Studies Quarterly 11,**16 (2001)

III. Commercial Surrogacy and Family Law in India

The family as a social unit in India has undergone many structural and social changes since Independence.Family law in India is rigidly heterosexual and largely confirms to traditional nuclear familial structure. There is absolutely no legislation with regard to gay and lesbian marriages or unions, transsexuals, bisexuals and queer people, despite many social activist groups staging protests for the recognition of the rights of people belonging to these groups.In fact, the only law relating to homosexuality is the section penalizing it.[41]When cases concerning commercial surrogacy agreements entered into by homosexual couples come into dispute, this lack of legislation might prove to be dangerous.

Adoption laws in India are themselves in need of reform, as most personal laws (with the exception of Hindu law) do not recognize adoption. The Juvenile Justice Act of 2000 was instrumental in paving the way for modernizing adoption laws[42] but, however, limits itself only to the adoption of children covered under the Juvenile Justice Act and not adoption in general. In addition, inter-country adoption is a tedious process in India, despite the exhaustive guidelines and procedural safeguards laid down by the Supreme Court of India in *Lakshmi Kant v Union of India*[43] . These long procedural delays and expenses at every level could dissuade and discourage many foreign couples from adoption children from India.[44] This would, invariably also create hassles for couples entering into commercial surrogacy contracts, if their last resort measure would be to adopt the child rather than claim the child as their own.

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41 The Indian Penal Code, § 377 (1860) This section, however, was struck down by the Delhi High Court in 2009 as being unconstitutional and violative of Article 21 of the Indian Constitution which guarantees the fundamental right to life. See *Naz Foundation v. Government of NCT, Delhi* 160 DLT 277

42 The Juvenile Justice Act, § 40, 41 and 42 (2000) addresses adoption of juveniles

43 AIR 1984 SC 469

44 **Kusum, Family Law Lectures: Family Law-I**, 344 (2011)

The Baby Manji Case

India recognised the need for a comprehensive and effective legislation on commercial legislation post the famous *Baby Manji Case.*[45]In this case, the custody of Baby Manji who was born to Japanese couple via an Indian surrogate mother was in dispute. In 2007, Japanese doctor couple Dr. Ikufumi Yamada and his wife, Yuki Yamada entered into a commercial surrogacy contract with Dr. Nayna Patel, who was famous for her fertility clinic in Anand, Gujarat. An arrangement was made with Pritiben Mehta and soon she became pregnant with the child by using Yamada's sperm and the egg of an anonymous donor. Unfortunately, soon after, the Yamadas divorced and a month later, Baby Manji was born. Although Ikufumi Yamada wanted to raise the child, his ex-wife did not.[46]Baby Manji had three mothers- the intended mother, Yuki Yamada, who no longer intended to be her mother, the egg donor and the surrogate mother.[47]This raised several legal and diplomatic complications and the baby was not allowed to leave the country.[48] The surrogacy contract failed to cover such a situation and the existing laws did not help to clarify the matter.[49]After several months of tireless campaigning by Dr. Yamada and his elderly mother and the Supreme Court upholding the commercial surrogacy contract, Baby Manjiwas allowed to go back to Japan with her biological father.[50]The case sparked huge media attention both in India and worldwide. Several questions were raised, and there were no clear answers 'as there is no law to regulate or no system even to gauge the extent of surrogacy incidents in the country.'[51] More importantly, it highlighted the need for legislation to regulate commercial surrogacy in India.

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45 A.I.R. 2008 S.C. 1656

46 Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, The Kenan Institute for Ethics, Duke University 2 (2010)

47 *Id.*

48 *India-Japan baby in legal wrangle*, BBC News, Aug. 6, 2008 available at http://news.bbc.co.uk/2/hi/south_asia/7544430.stm

49 *supra*note 47.

50 *Japanese Girl Born to Indian Surrogate Arrives Home,* CNN, Nov.2, 2008, available at http://articles.cnn.com/2008-11-02/world/india.baby_1_indian-law-japanese-girl-jaipur?_s=PM:WORLD

51 dhananjaymahapatra, *Baby Manji's case throws up need for law on surrogacy,* The Times of India, 25th Aug. 2008 available at http://articles.timesofindia.indiatimes.com/2008-08-25/india/27946185_1_surrogacy-agreements-surrogate-mother-surrogate-contract

The Assisted Reproductive Technology (Regulation) Bill, 2008

The highly publicised Baby Manji case sparked intense public debate on commercial surrogacy in India and the ardent need for a legislation. The Guidelines issued by the ICMR, due to their non-enforceability, failed to provide an adequate legal framework for the huge commercial surrogacy market in India. The Law Commission of India, in its 228th Report,called for the need to legislate on assisted reproductive technology.[52]'In the absence of a legal framework, cases of exploitation and extortion are rampant.[53] The Assisted Reproductive Technology (Regulation) Bill and Rules, 2008 (*hereinafter* the 'ART'Bill) makes an attempt in bringing a necessary legal framework towards regulation of commercial surrogacy in India. If the bill is passed, India will be the first nation after Israel to have a regulatory legal framework in place for commercial surrogacy.[54]The bill takes the extremely crucial first step towards regulation of surrogacy in India and has envisaged certain provisions which have been hailed as being forward-thinking. Firstly, the Bill has made the definition of a couple gender-neutral,[55] thus if homosexuality were to be recognised in India, same-sex couples would be covered under this law.[56]It also protects the privacy of the surrogates by placing on onus on the clinics and agencies to keep information about her surrogacy confidential.[57]It allows both married and unmarried couples to have children via surrogacy[58], an outcome which possibly arose from the *Baby Manji*case. However, the Bill has its own shortcomings, elucidated in the next section, which, if overlooked, may create more harm than help towards regulation of commercial surrogacy in India.

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52 Law Commission of India, 228th Report, available at http://lawcommissionofindia.nic.in/reports/report228.pdf

53 paromitramukhopadhyay, *Surrogacy law on the anvil in India,* oneworld South Asia, Oct. 18, 2008, available at http://southasia.oneworld.net/news/surrogacy-law-on-the-anvil-in-india-1

54 *supra* note 10 at 1433

55 ART Bill, 2008 § 2 (e)

56 Dilip Rao, *The Draft ART Bill, 2008,* Law and Other Things (Oct. 12, 2012 1:38 PM),http://lawandotherthings.blogspot.in/2008/10/draft-art-bill-2008.html

57 ART Bill, 2008, § 34 (14)

58 ART Bill 2008 , § 32(1)

Suggestions for Reform

There is no doubt that there exists a dynamic commercial surrogacy market in India which is in ardent need of a regulatory law. A comprehensive legislation encompassing the rights of the surrogate and providing for legal protection of the surrogate woman is essential to prevent economic and social exploitation and abuse. Although the ART bill has been hailed as a step forward towards effective regulation of commercial surrogacy in India, it fails to ensure substantial protection of surrogates within the legislation. It needs to take note of the possible abuses that surrogate may face such as economic exploitation by agencies and exploitation by the commissioning parents to undergo certain medical treatment and procedures. Thus, taking these concerns into consideration, the bill must be formulated accordingly. The bill fails to recognise the surrogate's right to protect her body, as it contains no provisions regarding decisions made during the pregnancy that might affect her body and overall health.

The primary emphasis of the legislation must be on the protection of the surrogate.[59] The surrogate's right to bodily autonomy, or the right to use her body in the way she chooses must not be interfered with. She must not be forced to submit to medical procedures against her will or undertake such activities she feels may harm her body. The gestational mother should neither be prohibited from terminating her pregnancy nor forced to do so.[60] Under the ART bill, Form J[61] fails to recognise this right. Consequently, the surrogate must be free to decide that she does not wish to provide the service without forfeiting her right to compensation for the services she has already provided.[62]Therefore, provisions legally recognising this right and imposing certain contractual limits need to be incorporated so as to ensure that there is no violation of bodily integrity.

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[59] *supra*note 10 at 1461

[60] *Id.* At 1454

[61] *Id.* At 1455.Form J or the 'Agreement for Surrogacy' acknowledges the surrogate's right to terminate the pregnancy at will but it also requires that the surrogate return "all certified and documented expenses incurred on the pregnancy" if she elects to terminate her pregnancy.

[62] *Id.*

Another potential area for abuse and exploitation is the lack of awareness and education in a typical surrogate mother. Most surrogates are poor rural women and are often not as informed as the intended couples and thus may be taken advantage of. The superior educational and economic resources of the commissioning parents virtually guarantee that the negotiation situation will favour them.[63]There must be an onus on the State as well as the clinics and other surrogacy agencies to help educate and create awareness among surrogates about the various intricacies of commercial surrogacy contracts. Provisions envisaging these must be incorporated into the ART bill in order to ensure that the surrogates and the commissioning parents enter into a fair deal. The legislation may also set minimum standards of monetary compensation for the surrogates to avoid economic exploitation.

Surrogates may also be economically exploited by the middle-men and the agencies that exist in the commercial surrogacy market in India. These middle-men and agencies tend to wrongfully take away profits that belong to the surrogates. The fact that commercial surrogacy is presently unregulated enhances the risk of exploitation by middle-men and commercial surrogacy agencies. In order to curb potential exploitation by middle-men, certain legal restrictions such as a maximum rate of commission which these agencies may receive on commercial surrogate agreements. Removal of intermediaries may not be a viable solutionas these intermediaries provide invaluable medical and legal information which neither the commissioning parties nor the surrogate would have been to gather if they did not exist.[64]Thus, the ART bill must recognise the role played by such intermediaries.

India could also adopt the Israeli approach towards commercial surrogacy by putting in place an Approvals committee to approve of surrogacy agreements. By conferring legal recognition of these agreements, it also helps to protect and enforce the rights of the surrogate and the commissioning parents. Further, it would help eliminate cases of fraud and misrepresentation, which could cause potential abuse and exploitation.

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63 *supra*note 10 at 1459

64 *supra* note 10 at 1457

Inter-country adoptions in India are extremely tedious and laden with hassles.[65] Another proposal this paper would like to make while pushing for an effective and comprehensive legislation on commercial surrogacy is to create a mechanism for a smoother inter-country adoption process in India, so that adoption may be considered as a last resort measure for commissioning couples. Furthermore, it may help in encouraging couples to adopt from India, if a smoother inter-country adoption were to be in place.

IV. Conclusion

This paper seeks to touch upon the commercial surrogacy market in India and evaluate the legal considerations surrounding it. Commercial surrogacy is no more an emerging market in India, but an extremely dynamic one. The *Baby Manji* case highlighted the legal and diplomatic complications that might arise if commercial surrogacy were to remain unregulated in India. Moreover, commercial surrogacy unnecessarily warrants for economic and social abuse and exploitation of surrogates, who mostly hail from poor rural areas across India. Drawing from experiences and jurisdictions around the world, the author makes certain provisions for the effective regulation of commercial surrogacy in India. The main argument underlying in this paper is the push for a legislation that effectively addresses commercial surrogacy in India. The paper also suggests measures to incentivise adoption, while backing the proposal for effectual commercial surrogacy regulation.

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[65] *rasiklalchaganlal Mehta v. State of Gujarat* A.I.R 1982 Guj. 193- This case involved a German couple faced many legal hassles while adopted a girl from an orphanage in Rajkot. Similarly, in *javedghorashian v. State of Maharashtra,* A.I.R. 2002 Bom. 1,an Iranian-born American citizen adopted a child from Pune and faced legal and diplomatic hurdles before he could finally take her to the United States.

Taking the Welfare Way out : Domination of Judiciary over the Legislature for the Protection of the Masses of the Country

Mohit Negi *

I. INTRODUCTION

"Judicial independence was not designed as, should not be allowed to become, a shield for judicial misbehavior or incompetence" - David Pannick

Interpreting Legislation for Final Control

The year was 1779, a case was filed against the Raja of Cossijurah who had refused to return the huge amount of debt that he taken from a moneylender. The Supreme Court of Calcutta, as it was then, took the cognizance in its own hands and gave arrest orders against the Rajah. However, the Supreme Council which was the legislative council during the colonial times, comprising of the Governor General and his Council did not like the intervention of the Supreme Court in the matter. The law of the land, or as they claimed, was that it was not within the judicial ambit of the Supreme Court to take such cognizance against the Rajah. However, the Supreme Court dismissing the contention of the Council gave its new interpretation of the law and claimed jurisdiction over the accused and went ahead with its orders.

This was marked by a literal war between the Legislature and the Judiciary where the Sherriff, a judicial servant was asked to follow orders with help of 70 policemen. However, the other side sent the Commander of the Army with a platoon of soldiers to make sure that the order is not followed. The situation was baffling for the Crown back at England where they were astonished to see such an incident take place. However, to resolve the issue and preventing such wars in the future the parliament passed the Act of Settlement, 1781.

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About 250 years have gone by since the Cossijurah Case[1] took place however, nothing much progress have seemed to happen over that long period of time. As the legislature and the judiciary still fight over various interpretations of the acts that has made it a tussle between the two branches of the government.

This paper shall make it very clear that judges are under the constitution and they should always abide by it in all the circumstances. However, it will also lay emphasis that the judiciary is independent, impartial and enjoy vast powers which are provided by numerous constitutional provisions. Even the fundamental rights that are considered supreme were made subject to the courts power to contempt. The judiciary must interpret the constitution but to the extent of preserving the part III and IV of the Indian Constitution based on good conscience.

Part II of the paper will go into the depth of the needs for the Judiciary to interpret the constitution. Part III shall give reasons as to why there have been allegations against the system for their interpretation. Part IV shall discuss as to how this new interpretation has only brought in happiness for the downtrodden and oppressed masses of the country. Part V will explain as to how the literal meaning supported by the legislation loses to the interpretation of the Judiciary with their judicial action upholding the cause of the common people.

II. MISCONDUCT OF LEGISLATURES: HISTORICAL NEED FOR INTERVENTION

The Indian constitution had clearly established independence of the three agencies of the government. The legislature, executive and the judiciary were given the power to function independently without any hindrance from the other two organs of the government. However the same constitution provided for keeping checks and balances over each other so as to prevent from domination of one government agency over the others. The examples below will support that the judiciary with its own powers is merely trying to bring a check with its interpretation.

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[1] Prof. M.P. Jain, *Outlines of Indian Legal and Constitutional History*, Eight Edn., Universal Law Publishing Co.

1. Interpretation For Keeping A Check On Administrative Nuisance

The Indian Law provides that a Chief Minister cannot stay at his post for more than 6 months without being the member of the legislature. A very literal interpretation of this law had made it very easy for non elected people to become chief ministers of different states. The chief minister would stay the head of the government for the 6 months but just a few days before his tenure would get over he would resign from being the Chief Minister. And then would get himself appointed again. By this way, a politician could stay a Chief Minister even without being the member of the Legislative Assembly for the entire time till his government was in power.

The words of the law were being followed and evidently, no law was being broken in the above circumstance. However, this is what makes it necessary for there to be interpretation of the act to find out the essence of the act. The Supreme Court frustrated the attempt of the incumbent chief minister to get himself appointed for another term of six months by resorting to such manipulative methods[2]. This should be considered a great achievement of the judiciary to come up with an approach instead of being challenged as it being partial towards the judges and anti politicians.

2. Wonders of Indira Gandhi: Miscarriage of Justice by Literal Interpretation

Even after the various interpretations that the Judiciary is blamed for, the legislative assembly in the end has all the powers to refuse to accept the interpretation of the constitution. That is the example when the election of Mrs. Gandhi was set aside by the Supreme Court that she has been guilty of committing a corrupt practice under Section 8 read with 123 (2) (7) of the RPA, the act was amended with retrospective effect to change the purport of the corrupt practices alleged.

#1 when there was literal understanding

The Supreme Court recognized that the Parliament has plenary power to change law with retrospective effect if the law as interpreted by the Supreme Court did not meet with its approval. It was on the basis of such retrospective amendments to the RPA that Mrs.

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[2] *S.R. Chaudhury v. State of Punjab,* AIR 2001 SC 2707

Indira Gandhi's election was held valid by the court[3]. Also, the amendment stated that the court shall not have jurisdiction to decide upon the election of MPs but that would be done by a committee formed by the Parliament which was also accepted by the Honorable Supreme Court. That Indira Gandhi even though proven to be guilty of committing corruption to become the Prime Minister of the Country is valid because the literal interpretation of the constitution provides for the same.

#2 when there could be interpretation of the statute

The Indian judiciary enjoys a great independence as there is not much involvement of the legislature with the functioning of the judiciary. There is onus on the judiciary to curb people from using wrong means to enter politics and rejecting the retrospective amendments which legalizes the candidature of the Prime Minister should not have been accepted. Also, the various acts of Indira Gandhi, which were followed after different judgments, made against the judiciary and individual judges would have been prevented.

III. GOING OUTSIDE THE THEIR OWN AMBIT: JUDICIAL INTERPRETATION

There have been a lot many critics of this judicial interpretation over the recent years as the allegations of the critics have claimed that interpretation of various laws have been favoring the judges as individuals and thus the Indian legal system has turned into a *judicial paradise*. However the instances of interpretation of the laws were needed to maintain the conditions of the Indian Law.

1. Maintaining The Final Control Over The Law

Accusation: The court has overused its power to contempt of court to stifle criticism and incurred displeasure of activists who have had a different perspective of development than that put forward by the establishment[4]. This country has been established on democratic grounds and every activity of the government, be it the judiciary should be open to criticism to understand the flaws and ways to better the system. Judiciary on the other hand interprets the criticism as contempt in a way so as to punish people and not appreciate their defects.

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[3] *Indira Gandhi v. Raj Narain,* AIR 1975 SC 2299

[4] *J.R. Parashar v. Prashant Bhushan* (2001) 6 SCC 735; *In re Arundhati Roy* (2002) 3 SCC 343

Reason: An American judge wrote these beautiful lines in a judgment, *'We are not final because we are infallible, but we are infallible only because we are final.*[5]' The presumption was simple that Judiciary is respected because it is the final decision of the matter and there is no one more powerful to take the decision. However, if someone tries to consider himself above the judiciary or its orders and claims this act to be a mere criticism then the judiciary cannot let such an event take place. These events will just merely challenge people's faith on judiciary. Indeed a literal meaning will let such an event pass away, but the actual interpretation of this kind of an act makes it mandatory for the Supreme Court to take actions and punish those people who claim to criticize the judiciary but has actually done nothing short of contempt.

2. Making Sure There Is No Politics Within

Accusation: That the Supreme Court took charge of appointment and transfer of judges of the Supreme Court and High Courts in name of independence of judiciary[6]. Prior to this government played a very decisive role in selection[7]. The present situation on the grounds of the independence of the judiciary supersedes the practice of the Prime Minister as the decisive voice, prevailing for several decades. But they have been overthrown, wrongly, for reasons which have no serious validity. The present process, based on the interpretation of the Supreme Court, by a majority of the Bench, is a collegiums of 3/5 judges of the Supreme Court, contradicting Dr. Ambedkar's emphatic view expressed in the Constituent Assembly.

Reasons: The Judiciary accepted the decision of the ruling government about appointment and selection of the judges for many decades. However, in 1973, Indira Gandhi superseded three positions and appointed Justice Ray as the Chief justice. The reasons for the same was very clear, Justice Shelat and Justice Hegde who were senior to Ray had given anti-government opinion in Kesavananda Bharti v. State of Kerala[8]. However, Justice Ray gave a minority opinion explaining as to how the government has unlimited power. This

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5 *Brown v. Allen*, 344 U.S. 443 (1953), at 540, concurring opinion

6 *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268

7 *S.P. Gupta v. India* (1981) Supp. SCC 87

8 AIR 1973 SC 1461

opinion could not become a law but did definitely earn him a post for the Chief Justice of the country by pleasing the then Prime Minister.

The above example of Justice Ray was not just a single case and the Judiciary was not hasty in jumping to its new interpretation. The judges in A.D.M Jabalpur v. Shiv Kant Shukhla[9], held the draconian reservation imposed by the ruling government on right to life as constitutional, however the dissenting judgment by Justice Khanna was taken with a pinch of salt. He was overlooked for the post of Chief Justice, soon after which he retired from the Indian Judiciary.

The present situation does not involve any political interference but is done by judicial officers who know the importance of a good judge in the system. This is often done with the consultation with bar association as well, and this becomes as close as an opinion of the public. It's a replacement of Executive favoritism by a judicial alternative.

IV. BRINGING PROSPERITY IN THE NATION: RESPONSIBILITY OF THE JUDICIARY

The Indian Judiciary should be credited for various landmark judgments that have transformed the shape of the Indian law in the country from the worse to better. The judiciary has interpreted this constitution and other such provisions for the masses to avail. However, there has instances where fingers were pointed at the judiciary which came out with flying colours.

1. Diluting Locus Standi: Interpretation of Art 32 For Public Interest Litigation

The concept of public interest litigation was a byproduct of the judicial interpretation. There had been various examples as to how the weaker section of the society could not carry on their battle for the protection of their rights due to various circumstances with lack of money and education being few of the reasons. The judiciary diluted the locus standi, the capacity of a person to file a case so as to protect these violated rights of the poor. Article 32 was interpreted in a fashion which allowed maintainability of such petitions which were later popularized as Public Interest Litigation.

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[9] AIR 1976 SC 1207

This led to various petitions in the Supreme Court where people came up with their grievances and instances of violation of fundamental rights. The cases ranged from governments disregard towards environment[10] to asking the Supreme Court for guidelines for storing and transfusion of blood[11], anything and everything under the sun that violated the rights of the people who were never raised due reasons mentioned.

PIL, A nightmare for the oppressor: From there this new concept of public interest litigation changed to becoming a counter majortiarism check on democracy for the support of unpopular causes and the protection of politically powerless minorities. This led to cases such as the Mandal Commission case, where people wanted to nullify the constitutional amendment which allowed reservation in promotion by the Indian Government[12]. Also, public awareness started spreading in the country and people questioned the allotment of petrol pumps[13] that were done to the politicians where as the allotment according to the scheme must be done to the poor and downtrodden so as to provide them with livelihood and not for increasing the pockets of the politicians.

Since all these accusations were made because of the interpretation of Article 32 which allowed public interest litigation in the first place, the judiciary was made a punching bag by the accused. In the process was blamed for having too much power on interpretation of the constitution. However, the judiciary had merely fulfilled its duty of delivering justice and protecting the rights of the people.

2. Taking Side of the General Public

The Indian Judiciary did not stop at allowing the petitions for protection of the rights of the people but took another step by taking sides of the people who were constantly oppressed by the government. Interpretation of different statutes which is beneficial to the general public has now become a cardinal approach of the Indian Courts.

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[10] *M.C. Mehta v. Union of India,* AIR 1987 SC 965

[11] *Common Cause v. Union of India,* (1992) 1 SCC 707

[12] *Indra Sawney v. Union of India*, AIR 1993 SC 477

[13] *Common Cause, A registered Society v Union of India* (1996) 6 SCC 530

Protecting Life and Livelihood:

The government company, which was functioning for a long time, had stopped paying wages to the workers. Government's contention was that companies were registered under the Companies Act 1956, thus non-payment of salaries does not lead to violation of any kind of fundamental rights[14]. The Judiciary as it has always acted as an agent of the general public squashed this approach, allowing the interpretation of Article 12 of the Indian Constitution and accepted a violation of fundamental rights of the people and the government was forced to pay.

Ensuring Good Leaders:

The people of the country started being worried with the ever increasing criminalization of the politicians. They wanted a fair and transparent mode of knowing their politicians and future leaders. The Supreme Court Opined[15] that a voter had right to know the antecedents of candidates who offered herself for election to Parliament or a state legislature. Thus, with the interpretation of the law it mandated the Election Commission to seek information regarding assets, liabilities and criminal records from the contesting politicians.

A new wave of protest of politicians claimed that the Supreme Court was infringing the legislative duties of the Parliament by the interpretation and according to its will. The Supreme Court conceded that it was the parliament's privilege to make such an act and only then an amendment was made in Representation of the People Act (RPA), 1951. Had the Parliament taken such steps itself to curb criminalization of politics the Supreme Court would not have been forced to take such measures.

V. LEGISLATURE v. JUDICIARY: SOLUTION

What may seem very clear to the judiciary seems really unacceptable by the legislature; the way of interpretation that the courts in the country follow for the welfare of the people seems like an infringement of the powers by the other organs of the government. It would not be completely untrue to establish that the court is neither more learned nor more objective

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[14] *Kapila Hingorani v. State of Bihar,* AIR 2005 SC 980

[15] *Union of India v. Association For Democratic Reforms* (2002) 5 SCC 294

than the political branches of the government.[16]' But however, what makes them more valuable in this entire situation is their inherent apolitical nature.

1. Ruling Parties: Till They Stay In Power

The big disadvantage that the legislation faces over judiciary is that the judiciary is not affected by the opinion of the public. It is their duty to give justice, irrespective of the fact whether or not it pleases all the sections of the society. The same however does not apply to the legislature as they have to make constant efforts to stay in power and thus their actions are always politically driven to please some section of the society or the other. Radically changes that may give rise to protests are not initiated with the scare of losing votes in the next general elections.

A very fine example of the same is the Shah Bano Case[17], a very controversial decision that was welcomed by the then Prime Minister, Rajeev Gandhi who celebrated the new interpretation of the court. The judgment allowed a Muslim woman to have maintenance according to the Law of the Country, as it was places above the Muslim personal Laws. Some orthodox Muslims went against the decision and got displeased with the government as well.

The ruling government with the fear of losing support of the Muslims, withdrew its support from the judgment and passed a new law The Muslim Women (Protection of Rights on Divorce) Act 1986, where by a Muslim women was taken out of the purview of section 125 of CPC, thus overruling the final decision of the Supreme Court. The same act was later critically acclaimed to be a deterrent for the growth of the Muslim Woman as the government to fulfill its political motives did not allow for a good law to exist in the society.

2. Inherent Nature to Examine Closely

The Indian Judiciary has always favored the approach that the concept of interpretation of the legislations and acts is inherently given in the constitution by virtue of 13 (2) which

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[16] Thomas Jefferson letter to Judge Spencer Roane of the Virginia Supreme Court, on September 6, 1819

[17] *Mohd Ahmad Khan v. Shah Bano Begum,* AIR 1985 SC 945

provides for striking down laws inconsistent with the fundamental rights[18]. This they claimed urged them to look for the actual meaning of acts and decide whether or not it is violating fundamental right, allowing them the scope of interpretation.

This cannot be called as departing from the well established rules of law followed by courts in England[19]. Laws had always been made by courts and courts have gone beyond the literal meaning and looked for the actual interpretation for deciding a case, only on such grounds was the common law established and has been working for years.

VI. SUPPORTING JUDICIARY AND MAKING IT ACCOUNTABLE: CONCLUSION

'we are all "the common growth of Mother Earth", even those of us who wear long robes.[20]" -Justice Clark

The Indian Judicial System has been working for the welfare of the people for half a century now. They have gone beyond their 'literal ambit' and entered a wide range of new spaces with interpretation. However, it should not be forgotten that the constitution is of 'we the people' and the judiciary must be accountable to the public and not use its power to abuse the law.

Merely because they occupy judicial offices, one cannot forget that they are still humans with frailties and fallibilities. When ministers can go wrong then why can't the judiciary? The judiciary isn't any special class of the government that they can't be criticized. Lord Denning had himself dismissed a petition for contempt by none other than the Attorney General, who has criticized the judge to the extent of calling him an ass. The Indian Judiciary is on the right track but is far from being perfect.

There is scope for innovations in the country's judicial system like the performance commission as started in the US. The transfer and promotion of judges as well as censure

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[18] *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

[19] Green, '*Preventive Detention Act*', 44 Indian Law Review

[20] Hoyt L. Warner, *The Life of Mr. Justice Clarke*, Western Reserve University Press, 1959

the misconduct of judges can be governed by the commission's investigation and recommendation.

However, in this fight the two organs must understand that there is no need for another Cossijurah, we should let it be a part of history, once and for all. There is no need for dominance of power between the two organs, now they should both work together in harmony for the welfare of the people. The real essence being that the conflict doesn't arise between Parliament and the Supreme Court but between the Parliament and the people. The Supreme Court intervenes on behalf of the people, only reason why in this battle we should let the Court dominate.

Political Funding in India : A democracy paid for

Rohit Tiwari *

INTRODUCTION

"The liberties of a people never were, or ever will be, secure when the transactions of their rulers may be concealed from them."[1]

According to the Global Integrity Report published by the IDEA, India ranked 11 globally, well over its South-Asian peers, even China. However, when it came to Government Accountability, the difference between India's score in the 2009 report and the 2011 report is unappreciable. It has remained in the same bracket- that of being 'very poor', even though it scores highly on Judicial Accountability. The reason behind this is its low score when it comes to 'funding of political parties'- a universally accepted determinant of the transparency and integrity of the democratic process.

Political parties are essential for the organization of the modern democratic polity; and are crucial for the expression and manifestation of political pluralism. In order to carry out their core activities, they need appropriate funding. However, with this come the inherent twin fallacies of the undue influence of money on the democratic political process; and the illegitimate enrichment of politicians. Thus, funds play a very important and potentially distorting effect on the democratic process, and are ought to be properly regulated by public law.

The traditional type of party financing, that through membership fee, is not viable in the present day and age. Private funding other than through membership fee- such as

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[1] Patrick Henry- An attorney, planter and politician who became known as an orator during the movement for independence in Virginia in the 1770s. One of the founding fathers of the United States of America.

contributions made by parliamentarians through deductions from their statutory allowance or donations come with their own set of problems. In this context, the mere impression of misuse of funds may in itself be sufficient to erode public confidence in the political system and its political actors. The economic liberalization of 1991, which introduced drastic policy reforms that changed the social and political landscape of the country forever, was expected to bring an end to the corruption that had plagued the country since the 1970s. However, even after two decades of liberalization, an economically resurgent India is still ridden with a crisis of governance- scams and scandals dominate the headlines, providing fodder to detractors of the government and affecting the reputation of the country at the international level.

Through this paper, the author seeks to argue that the widespread and pervasive corruption in India is largely on account of the flawed political party funding and election expenditure laws, which drive parties and politicians to misuse the government's discretionary powers over resource allocation to raise funds for election campaigns and political parties. For the sake of brevity, the paper has been divided into four parts dealing with the subject's historical evolution, the legal framework for political party funding in India, a global comparative analysis and the future of political party funding in India, in that order.

PART - I

THE EVOLUTION OF POLITICAL FUNDING IN INDIA

Any well-functioning democracy requires vibrant political parties and competitive elections. Political parties perform several crucial functions, including: (i) the integration and mobilization of citizens; (ii) the articulation and aggregation of interests; (iii) the formulation of public policy; (iv) the recruitment of political leaders; and (v) the organization of the Parliament and the Government.[2] In order to effectively carry out these functions, the political parties and their candidates need ample financial resources. The evolution of this funding process in India can be broadly divided into two periods.

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[2] S. Bartolini & P.Mair, Challenges to Contemporary Political Partiesin L. Diamond and R. Gunther (eds.) Political Parties and Democracy, 327-344, Johns Hopkins University Press, Baltimore, 2001

1.1 ***Pre-1990 Period***

Traditionally, political parties in India financed themselves through private donations and membership dues.[3] Although corporate contribution was allowed, it was subject to certain restrictions and had to be duly accounted for by the company.[4] A major step towards ensuring compliances was the enactment of the ***Representation of People Act, 1951,*** (hereinafter, "RPA")wherein limits were introduced on the amount that could be spent on election campaigns. Candidates who exceeded these limits stood the risk of getting disqualified and their elections getting annulled.[5] By the 1960s, the phenomenon of black money[6] funding political parties had become an accepted reality. Ample amount of light was thrown on the issue of black money entering the political corridors through the *Santhanam Committee on Prevention of Corruption*[7] and the *Wanchoo Direct Taxes Enquiry Committee.*[8] During this period, there was a marked tendency amongst businesses and individuals to evade corporate and income taxes on account of the highly regulatory and protectionist policy framework in the nascent years of the country's independence.

Later, the Indira Gandhi government, through the placing of a blanket ban on all corporate donations to political parties, sought to prevent large business groups from exercising undue

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3 E. Sridharan, *Electoral Finance Reform: The Relevance of International Experience* in V.K.Chand (ed.) Reinventing Public Service Delivery in India: Selected Case Studies, 371-375, Sage Publications.

4 The cosy relationship between business houses and political parties is not a recent phenomenon. Historically, the Indian National Congress during its pre-independence era was also financed by large business houses. 19 1958, the Tatas contributed Rs. 3,00,000 to the Congress Party coffers- at that time a princely amount.

5 V.S. Ramadevi and S.K. Mendiratta, How India Votes: Election Laws, Practice and Procedure, 378-395, LexisNexis Butterworths, 2000

6 Black Money is the term applied to funds on which taxes have not been paid or to money raised through illegal activities.

7 K Santhanam, Report on Prevention of Corruption, Government of India Press, 1964

8 K.N. Wanchoo, *The Direct Taxes Enquiry Committee*, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&ved=0CDAQFjAC&url=http%3A%2F%2Fcifo.in%2Fuploads%2FBlack%2520money.doc&ei=dodhUNPlCcXLrQe1jIGgAg&usg=AFQjCNF7ZKFEfQ4_fpskzEys-cW9QXBeuw&sig2=Z2v1ldAW8ogxs_SmK9e4Ww, last visited Sep.14, 2012

influence on politics.[9] However, no manner of state funding as a substitute to corporate funds was provided, making the reliance of political parties on black money an unfortunate necessity.

The Judiciary played its part in these early stages too. The Supreme Court, in the case of *Kanwar Lal Gupta v. Amar Nath Chawla*[10] ruled that party spending on behalf of a candidate should be included while calculating that candidate's election expenses in order to determine whether the election expenditure limit has been violated. However, this judgment was effectively nullified by the amendment of the RPA in 1975.[11] Thus, the limit on election expenditure became largely ineffective as though there was a limit on the direct personal expenditure of the candidate; there were no discernible limits on the expenditure of the party or the supporters of the candidate.

The main development in the 1980s was the amendment of the Companies Act in 1985, which through Section 293A, once again allowed corporate donations to political parties under certain conditions, subject to approval by the Board of Directors and appropriate disclosure.

1.2 ***Post-1990 Period***

In 1993, the Indian industry became publicly concerned about the issue of political funding, with the Confederation of Indian Industry (CII) setting up a task force which recommended[12] that corporate contributions be made tax-deductible and that shareholder confirmation of board decisions about political contributions is required. Thereafter, in 1996, the *Common Cause* judgment[13] forced political parties to declare their annual incomes thus bringing

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9 There has, however, been speculation in some circles of the same being done to prevent the funding of the largely free-market oriented Swatantrata Party.

10 AIR 1975 SC 308

11 Explanation 1 to §77(1) of the Representation of People Act, 1951 was amended such that party and supporter expenditures not authorized by the candidate did not count toward the calculation of a candidate's election expenses

12 *Report Of The CII Task Force On Corporate Governance*, http://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf, November 2009, last visited Sep.14, 2012

13 AIR 1996 SC 3081

transparency in party finance; whereas the amendment of the RPA, based on the Goswami Committee recommendations,[14] facilitated cost reduction by reducing the campaign period from 21 to 14 days.

Another major change brought about by the amendment was revising the expenditure limits to Rs. 4,50,000 and Rs. 1,50,000 for Lok Sabha and state assembly constituencies respectively, the figures which in 1997 were further revised to Rs. 15,00,000 and Rs. 7,00,000 respectively. However, in spite of all these changes, the Explanation 1 to Section 77(1) of the RPAwas not amended, thus leaving open the window for black money to infiltrate into the process of political funding.

Thereafter, in 1998 the government provided a partial state subsidy in the form of allocation of free time for seven national and 34 state parties on the state-owned television and radio networks.[15] The *Indrajit Gupta Committee Report*[16]recommended partial state funding in kind and the denial of state funding to parties that failed to maintain and submit audited accounts and income tax returns. The committee also recommended a separate election fund to which the central and state governments would together contribute Rs. 6000 million annually. However, a majority of the state governments expressed their inability to do so. Sadly, even this committee remained non-committal towards Explanation 1 to Section 77 (1) of the RPA.

The true wave of important changes started after the year 1999, especially with regard to more detailed disclosure of candidates. The decision in *Association for Democratic Reforms v. Union of India*[17]made inroads to the Election Commission, directing it to collect data on the criminal record of candidates and to make this information available to public, along with information on educational qualifications, and the assets and liabilities of

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[14] Dinesh Goswami, *Committee on Electoral Reforms,* http://lawmin.nic.in/legislative/ereforms/bgp.doc, last visited Sep.14, 2012

[15] Election Commission of India, Press Note: 15 January 1998

[16] Legislative Department,Ministry of Law and Justice, Report of the Committee on Electoral Reforms (Indrajit Gupta Committee), Government of India, Delhi at 11-56 (1998)

[17] Writ Petition No. 7257 of 1999

the candidates.[18] In spite of challenges, this judgment was reaffirmed on March 13, 2003 and the Election Commission issued an order based on this judgment on March 27, 2003, making such declarations mandatory.[19]

Following this, the most significant development in campaign finance reform was the ***Election and Other Related Laws (Amendment) Act*** in 2003, which brought about, among other changes, the long awaited amendment of Explanation 1 to Section 77(1) of the RPA, redefining the boundaries of candidate expenditure.

PART - II

POLITICAL FUNDING IN INDIA: THE LEGAL FRAMEWORK AND ITS EFFICACY

Over six decades since the legislature took its first step towards a legislation governing the funding of political parties, the situation still presents a sordid state of affairs. To better understand where the system has fallen short, we need to undertake a discussion of the legal framework and the loopholes in the system.

2.1 ***The Representation of People Act, 1951***

Section 29B of the RPA provides that 'subject to the provisions of the Companies Act of 1956, every political party may accept *any amount of contribution voluntarily offered* to it by any person or company other than a government company.' Further, the proviso states that no political party shall be eligible to accept any contribution from any foreign source.[20]

Thus, there are no limits on individual donations to political parties *or* political candidates as per the relevant provision of the Representation of People Act, 1951 stated above. Further, as to the requirement of the disclosure of donations to political parties, the relevant

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[18] Jagdeep S. Chhokar, *Reforming The Electoral System,* Seminar Magazine, No. 521, Jan. 2003, at 61-64

[19] Department of Legislative Affairs, Ministry of Law and Justice, Background Paper on Electoral Reforms, Dec. 2010, at 38

[20] Defined under clause (e) of §2 of the Foreign Contribution (Regulation) Act of 1976 (49 of 1976)

provision- Section 29C,[21] and falls drastically short since it does not require the public disclosure of reports mandated by it.

Under the RPA, and the Conduct of Elections Rules, 1961, the Election Commission of India has limited powers to ask for accounts or information regarding political parties' and candidates' contributions and campaign expenditures. The law provides for ample civil and criminal consequences for violations of financing or accounting norms,[22] but in practicality, they have hardly been put into application.[23]

Lastly, Section 77 of the RPA, read with Rule 90 of the Conduct of Election Rules, 1961 prescribes the maximum expenditure that can be incurred by a candidate that has to be accounted for as per procedure. By an amendment of the rule in 2011, the limits have been increased further, depending upon the size of the states and the Union Territories.

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[21] **Declaration of donation received by political parties-**(1) The treasurer of a political party or any other person authorized by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely:-

(a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year;

(b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year.

(2) The report under sub-section (1) shall be in such form as may be prescribed.

(3) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorized by the political party in this behalf before the due date for furnishing a return of its income of that financial year under section 139 of the Income-tax Act, 1961, to the Election Commission.

(4) Where the treasurer of any political party or any other person authorized by the political party in this behalf fails to submit a report under sub-section (3) then, notwithstanding anything contained in the Income-tax Act, 1961, such political party shall not be entitled to any tax relief under the Act

[22] **§7** (b), 8A, 10A, 123 of the Representation of People Act, 1951; **§**89 of Conduction of Election Rules of 1961; and Section 171 of Indian Penal Code, 1860

[23] Raju Narayana Swamy, *Analysis of the current initiatives in monitoring of election related expenditure*, Volume 4, Issue II, Indian Law Journal, April-June 2011

2.2 ***The Companies Act, 1956***

Section 293(1)(e) of the Companies Act, 1956, empowers the board of directors of a company to contribute *"to charitable and other funds not directly relating to the business of the company;"* sums not exceeding Rs. 25,000 or 5% of the average net profits of three financial years whichever is greater. The High Courts of Bombay and Calcutta have taken the view that donations to political parties are covered by this provision and that companies could lawfully make donations to political parties if such a power was conferred by the objects clause in the Memorandum of Association.

In ***Jayantilal Ranchdass Koticha v. Tata Iron & Steel Co. Ltd.,***[24] Chagla, C.J. observed:

"We think it our duty to draw the attention of Parliament to the great danger inherent in permitting companies to make contributions to the funds of political parties. It is a danger which may grow apace and which may ultimately overwhelm and even throttle democracy in the country."

Similar views were also expressed by the Calcutta High Court in ***Indian Iron and Steel Co. Ltd., In re.***[25]

In its report[26] published in 1957, the Companies (Amendment) Act Committee referred to both these judgments and recommended that full information relating to such contributions should be incorporated in the accounts. Resultantly, Section 293A was inserted imposing limits to the amount which could be donated in any financial year.[27]

However, the issue concerning donations to political parties by corporations continued to be a matter of debate even after the incorporation of Section 293A. By the Companies (Amendment) Bill, 1968, donations to political parties were banned altogether. However,

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[24] [1957] 27 Com. Cas 604 (Bom)

[25] [1957] 27 Com. Cas 361 (Cal)

[26] Report of the Company Law Amendment Committee (known as the Shastri report), 1957

[27] Sub section (2) also requires the company to give particulars in its profit and loss account of the amounts donated and the names of the political party or persons who were the recipients of these donations

by the Companies (Amendment) Act, 1985, a new section 293A was enacted replacing the old section to permit political donations. Now the maximum amount that can be donated cannot exceed 5% of its average net profits.[28]

2.3 ***The Income Tax Act, 1961***

Section 80 GGB of the **Income Tax Act, 1961** permits deductions for contributions by any person[29] to a political party[30] in the computation of total income of such person. No limit has been prescribed regarding the amount that can be contributed as in the case of companies. Tax incentives like giving deduction for contributions produce the same financial strain on government as direct spending. However, direct expenditure has the merit that it is identifiable, whereas the same cannot be said for expenditure in the form of tax reduction. Tax economists[31] consider spending through incentives, exemptions and deductions as unreasonable as it goes against the concept of neutrality in a tax system distorting the concept of ability to pay.

Also, the giving tax benefit to political parties suffers from the following loopholes:[32]

a) No direct nexus with the carrying on of a business or profession;

b) The political parties may put pressure and threats on business houses for making contributions;

c) Permission accorded for political donations has not, in any manner, helped in advancing the cause of democracy; and

d) This makes it difficult for small or independent parties to contest the elections.

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[28] Determined in accordance with the provisions of Sections 349 and 350 during the three immediately preceding financial years

[29] Except local authorities and artificial juridical persons wholly or partly funded by the government

[30] For the purposes of section 80GGB and 80GGC, "political party" has been defined to mean a political party registered under section 29A of the Representation of People Act, 1951

[31] Dr. Vijay Kelkar's Committee, Jaswant Singh budget speech 2003-04 para 143

[32] T.N. Pandey, *Tax Benefit for Funding of Political Parties- A Critical Appraisal,* available at http://www.manupatra.com, Last visited Sep. 17, 2012

2.4 ***The Election and Other Related Laws (Amendment) Bill 2003 (Funding Reform Bill)***

This was a crucial change proposed in the Indian electoral process. It stipulated full tax exemption to individuals and corporate on all contributions to political parties. There was an effective repeal of Explanation 1 under Section 77 of the RPA- expenditure by third parties and political parties now came under ceiling limits and only travel expenditure of leaders of parties was exempt. The act further stipulated equitable sharing of time by the recognized political parties on the cable television network and other electronic media.

Thus, the new act made sure that there was an increase with respect to transparency of funding. It also helped in providing raising resources for legitimate campaign expenditure. However, even this act suffered from deficiencies. No penalties were mandated for donor for non-disclosure of funding. The provision in an earlier draft for auditing by a chartered accountant from a panel approved by the CAG was deleted. Furthermore, even this act did not provide for any form of direct public funding to candidates or parties.

PART - III

POLITICAL PARTY AND ELECTION FINANCE REGULATIONS: A GLOBAL PERSPECTIVE

India is one of the fastest growing economies of the world, and going by the rate of growth of the last one decade, is touted to become a global superpower in the next decade. However, this image is tarnished at the international level by the rampant corruption and policy paralysis that successive governments are accused of suffering from.[33] It is thus imperative that we take a holistic view of global best practices in every aspect of policy making, political funding no exception.

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[33] Kenneth Rapoza,In India, Doubts Grow On Economy, Forbes 400, available at http://www.forbes.com/sites/kenrapoza/2012/09/11/in-india-doubts-grow-on-economy , Accessed on 16/09/2012

3.1 ***Australia***

The Australian political finance regime is largely open and unregulated. There is no ban on donations from foreign interests[34] or on corporate donations.[35]When it comes to anonymous donations, there is no blanket ban as such, but there is a specific limit on donations exceeding $ 5000. [36] There are also no limits prescribed to the limit on the amount which a donor can contribute to a political party or a candidate.[37] There are specific bans on vote buying [38] and state resources being used in favor or against a political party or candidate.[39] However, there are no limits on expenditure. Both parties and individuals have to report regularly on their finances and this information is to be made public. There is a separate institution-titled the Commonwealth Director of Public Prosecutions, which has a formal role in political finance oversight. There are sanctions in the form of fines and imprisonment for political finance infarctions.

3.2 ***France***

In France, public subsidies for parties and candidates were introduced from 1988, and corporate donations were banned from 1995.[40] There is also a ban on donations from foreign interests.[41] Public subsidies were over 50% of party income in 1998 and 90% of headquarters income for small parties. There are both contribution limits and spending limits for both parties and candidates. Tax deductions are available up to 40% of individual donations and party membership dues. Parties have freedom and autonomy despite public

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[34] Anthony Gray and Nicky Jones, *To Give and To Receive: The Australian Government's Proposed Electoral Finance Reform*, 2010, http://eprints.usq.edu.au/6141/2/Gray_Jones_PV.pdf. Last visited 12th Sep. 2012

[35] Caroline Dub, Political Donations by Companies: A Corporate Law Perspective (2007)

[36] Australian Electoral Commission (2011) Funding and Disclosure Guide 2010-2011 for Political Parties

[37] *Library of Congress (2011) Campaign Finance: Comparative Summary*, http://loc.gov/law/help/campaign-finance/comparative -summary.php, Apr. 4, 2011, last visited Sep. 16, 2012

[38] Commonwealth Electoral Act, 1918, Article 326,

[39] Australian Public Service Commission (2009) APS Values and Code of Conduct in practice

[40] GRECO (2009) Evaluation Report on France, Transparency of Party Funding (Theme II), GRECO

[41] Code Electoral, Article 52.8

subsidy but have to disclose all contributions received. [42] The sanctions for political funding infarctions are fines, imprisonment, loss of public funding and loss of elected office.[43]

3.3 ***Germany***

In Germany, tax deductions for small donations and party membership dues have existed alongside public funding since 1959. Since 1992 tax deductions for corporate donations have been removed. Public funding exists on a matching grant basis in which the ceiling for public subsidies is the income obtained by parties from private sources.[44] Public funding is for parties with no earmarking for elections or other activities. There are no expenditure or contribution limits and disclosure of donor identities and amounts is limited to big donors. Over time this system has led to the bulk of party income from private sources coming from individuals other than corporations. [45]

3.4 ***United Kingdom***

The Political funding regime in the United Kingdom shows a marked difference from the other European democracies as there is an absence of direct or indirect state subsidies.[46] The regime otherwise is tightly regulated on account of the ***Political Parties, Elections and Referendums Act, 2000.*** Thus, there is a ban on donations from foreign interests. On the other hand, there is no ban on corporate donations of any kind. Even anonymous donations are not banned entirely, but are restricted. [47]There are expenditure limits for both parties and independent candidates. There are disclosure norms stipulated for the reporting of campaign financing for both political parties and candidates. The sanctions

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[42] Code Electoral, Article 52.12

[43] Code Electoral, Article 106

[44] Political Parties Act, 2004, §18.

[45] Karl-Heinz Nassmacher, *The Funding of Party Competition,* Political Finance in 25 Democracies. Nomos, http://books.google.co.in/books/about/The_Funding_of_Party_Competition.html?id=zYxUPgAACAAJ&redir_esc=y, last visited Sep. 12, 2012

[46] The Electoral Commission (2011) Public funding for parties.http://www.electoralcommission.org.uk/party-finance/public_funding, last visited Sep. 18, 2012

[47] Representation of the People Act, 1983

imposed for political finance infarctions include fines, imprisonment, forfeiture and deregistration of parties.[48]

3.5 ***United States of America***

The U.S. system does have limits on contributions but not on expenditure, unlike India. The Supreme Court's decisions in ***Buckley v. Valeo***[49]and more recently, ***Citizens United v. FEC***[50]have firmly laid down the policy framework for political funding. There is a ban on donations from foreign interests[51] and on corporate donations to political parties and candidates. Tax relief is available as an indirect public funding source.[52] Vote buying is banned[53]and limits are placed on the expenditure by political parties and candidates.[54]

PART - IV

THE WAY AHEAD : PROMISES AND REALITIES

As elucidated previously, the deficiencies in the system of political financing are increasing in magnitude and diversity. As such, it is important to understand the most pressing issues concerning the regime in India today.

4.1 ***What the nation thinks is the present scenario***

In 2011,[55] the Chief Election Commissioner, S.Y. Quraishi called for corporate funding and donations being made subject to audit and disclosure so as to deduce the nexus

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48 The Electoral Commission (2011) Sanctions. Available at http://www.electoralcommission.org.uk/party-finance/enforcement/sanctions, last visited Sep.18, 2012

49 424 U.S. 1 (1976)

50 558 U.S. 310 (2010)

51 2 U.S.C §441e..

52 26 U.S.C § 527.

53 18 U.S.C § 597.

54 Colorado Republic Federal Campaign Commission v. FEC, 533 U.S. 431 (2001)

55 *Audit Corporate Funding to Political Parties:CEC*, The Hindu, Jun. 12, 2012

between the party and a corporate[56] In a report published in Economic Times on January 10, 2012[57] it was observed that the Aditya Birla Group increased its contribution to political parties about fourfold to Rs. 30.5 crore in 2009-10 while the Bharti Group cut it from Rs. 17 crore to zero. A general trend that has been observed is that a majority of companies do not want to lean towards any one party and that politicians, even of a national stature, openly demand black money.[58]

In news reports as late as August 2012,[59] it was reported that in the past five years, Indian companies have donated over Rs. 4400 crore to six major political parties,[60]averaging over 870 crore per year. A similar observation was made in a recent report published by the Association of Democratic Reforms (hereinafter, "ADR").[61] Notably, donations from named contributors formed a very small percentage of the total income. In a report dated September 25, 2012,[62] the two major political parties refused to divulge the details of contributions made to them in the previous year.

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[56] Similar observations were made by Mr. Amarjit Chopra, president of the Accounting Regulator ICAI, stating that corporate funding to political parties should be treated as expenditure and that the Companies Bill, 2011 should incorporate this provision, from Business Line, Treat Corporate Funding to Political Parties as Expenditure: ICAI, available at http://www.thehindubusinessline.com /industry-and-economy/economy/ article1126862.ece, last visited Sep. 15, 2012

[57] Naren Karunakaran ,*India Inc plays safe; prefers lawful funding of political parties*, The Economic Times, Jan. 10, 2012.

[58] Vishnubhai Haribhakti, chairman of audit firm Haribhakti & Co. and trustee of the General Electoral Trust of the Aditya Birla Group

[59] *Corporate Funds to Parties should be Transparent,* Rediff.com, http://www.rediff.com/business/ slide-show/slide-show-1-column-corporate-funds-to-parties-should-be-transparent/20120814.htm

[60] Bharatiya Janata Party, Bahujan Samaj Party, Communist Party of India-Marxist, Samajwadi Party and Nationalist Congress Party

[61] *Circumventing law, political parties earn crores*, The Tribune, Sep. 10, 2012

[62] *RTI Questions parties' source of funds: BJP, Congress refuse to oblige*, http://ibnlive.in.com/news / congress-bjp-refuse-to-name-donors-in-rti-reply/ 294903-37.html, Sep. 25, 2012, last visited Sep. 25, 2012

4.2 ***The Winds of Change: Proposed Legislations and their Impact***

In a recent position[63] espoused by ASSOCHAM, one of their key demands is that both spending and expenditure during elections should be without any caps to the flow of donations. In contrast, the pending Companies Bill, 2011[64] has provisions stipulating that corporate funding to political parties must increase from 5% to 7.5%[65] of the average net profits earned by a company during the three immediately preceding financial years. A novel step here has been suggested by ADR by drafting the ***Political Parties (Registration and Regulation of Affairs, etc.) Bill, 2011,***[66] under the chairmanship of Justice M.N. Venkatachaliah.

The bill makes a plethora of suggestions for the regulation of the constitution, functioning, accounts, audit, and other affairs of and concerning political parties participating in elections. Chapter III of the draft, relating to finances, stipulates disclosure and donation limits and requirements.[67] It also empowers the Registrar to specify any other sources from which donations may not be accepted by political parties or candidates. Further, upon the enquiry of the Registrar into any infarction, sanctions such as penalties, imprisonment and non-entitlement to tax benefits have been envisaged.[68]

A FINAL WORD

"Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary."[69]

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63 *Assocham Views on Election Funding*,http://www.assocham.org/docs/ASSOCHAM_Election_Funding_Suggestion.pdf, Accessedlast visited Sep. 17, 2012

64 The Companies Bill 2011, available at http://www.mca.gov.in/Ministry/pdf/The_Companies_Bill_2011.pdf

65 Clause 182, The Companies Bill, 2011

66 Available at http://www.adrindia.org/sites/default/files/Bill%20on%20pol%20parties.pdf

67 Political Parties (Registration and Regulation of Affairs, etc.) Bill, 2011§11

68 Political Parties (Registration and Regulation of Affairs, etc.) Bill, 2011 ,§ 12

69 Justice Felix Frankfurter

It is not impossible to pin-point a multifaceted problem of this magnitude, nor is it feasible to suggest blanket measures concerning reform. However, let us take into consideration the consequences that flow from the discussion hereinabove.

Firstly, the expenditure ceilings appear to invite evasion. The low expenditure limit tends to induce dishonesty, a profoundly unhealthy development for any democracy. *Second*, the absence of public funding means that parties and candidates must raise and spend money on their own for each election. This has exacerbated the dependence on black money and institutionalized corruption. *Third*, the lack of any effective system of internal transparency and accountability within parties reinforces corrupt fund-raising practices. *Fourth*, the limit on corporate contributions to parties, even though proposed to be increased, can be increased even further so as to reduce the reliance on black money. *Fifth,* contributions to individual candidates is not allowed, which forces them to raise funds through illicit means. *Lastly*, under the current system, party leadership has no incentive to raise funds through grass-root funding.

As already stated in a previous section of this essay, the solution to these problems lies in taking a holistic view of the global best practices when it comes to political funding mechanisms. Every long standing democracy of the world has something to offer and inculcate. The practice of public funding of political parties and grass-root funding prevalent in Western European democracies should be given careful a consideration as a viable way of the future. Individually, practices from countries such as internal political party regulation from Germany can be adopted. In terms of disclosure and transparency norms, the U.S. political funding practices represent a benchmark that is worth emulating. From the U.K., the stellar practice of taking shareholder approval before making corporate donations can be incorporated.

Additionally, the practice of electoral trusts carried out by the Tata and Birla conglomerates is an innovation that can be adopted on a larger scale by other corporate groups. Electoral trusts fund all political parties above a certain level, including independents and local candidates, which provide a certain degree of transparency to the process. Even futuristic practices such as creating an electoral fund out of the donations of the net taxpayer base of a country can be taken into consideration for providing a wholesome remedy to the loopholes existing in the political funding regime.

Analysing the Right to Parental Leave as a Social Security Measure

Vineet Bhalla

ABSTRACT

According to the International Labour Office, at present 173 countries across the world offer some form of parental leave protection to their workforce. This paper shall delve into the issue of parental leave, explaining why it is a vital and indispensable aspect of basic social security in any welfare State. With special focus on the provisions for parental leave in India, along with a general world view, this article shall explain the pros and cons of policies that provide for parental leave, explaining whether such policies should be encouraged or not, and what, if any, reforms are needed in the same.

Keywords: Social security, welfare state, parental leave, child care.

Introduction :

According to the International Labour Office, at present 173 countries across the world offer some form of parental leave protection to their workforce. In most countries it is simply in the form of mandatory maternity leave but a number of countries also offer forms of paternity leave, albeit of a much more limited nature, or a comprehensive parental leave provision, leaving it up to the couple to decide on the distribution of the leave and paid benefits, if any, as per their convenience. While the standards of social protection continues to improve resulting from the perceived benefits to the labour markets and rising recognition and implementation of labour rights, not everyone agrees that such measures are the best course of action for national economies.

The basic objective of this paper is to understand need for such a social security measure and the effects such measures have on the employment/labour market across the world economies. In pursuance of this objective, the paper is divided into 3 parts: the first part of the paper attempts to trace the origins, justifications and development of parental leave as a social security measure. The second part of the paper then seeks to study the current standards of protection afforded in India and across the world. And finally, the paper goes on to analyse the effects resulting from improved and extended parental leave schemes (and still in the case of some countries, maternity leave schemes) on the labour markets, as well as on infant health and general family well being, along with the inherent limitations of such policies.

Origins and Development of Parental Leave Measures

Parental leave laws are found to provide social security protection in two complementary ways: the most usual form is by offering job-protected leave and additionally in most countries, though not all, the employment protection is complemented by some measure of financial support during the leave period.

The first international instrument to contemplate protection for working women before and after childbirth was the ILO Maternity Protection Convention of 1919 which provided that a woman should not be permitted to work for a minimum period of six weeks following child birth and should be paid sufficient benefits by the state during that period[1]. This requirement was revised in 1952 to 12 weeks of paid leave[2], and subsequently in the year 2000 to 14 weeks[3] of leave along with cash benefits.[4]

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1 Yusuf Emre Akgunduz & Janneke Plantenga, *Labour Market Effects on Parental Leave: A European Perspective,* available online at *igitur-archive.library.uu.nl/USE/2012-0104-200435/11-09.pdf*

2 Article 3, ILO Maternity Protection Convention (Revised), 1952.

3 Article 4, ILO Maternity Protection Convention (Revised),2000.

4 Article 6 of the ILO maternity Protection Convention of 2000 also mentions in that the cash benefits should be in accordance with national laws and regulations and at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living, which according to the ILO should not be at a rate of less than two-thirds of her previous insured earnings, with full health benefits.

Other than the ILO Conventions, Article 10 of the ICESCR expressly provides that *"working mothers should be accorded paid leave or leave with adequate social security benefits"*. The CEDAW also envisages a similar protection by providing that *"In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;"*[5]

Parental leave policies were based on a number of sociological as well as economic justifications. Historically, maternity leave legislation was pssed for paternalistic sociological reasons, namely to protect the health and well-being of mothers and new-born babies.[6] The need of mothers to recover their health and bond with their newborns prior to returning to the productive labour markets was a primary consideration.[7] Moreover, it was a reflection of the growing international and national interest in the promotion of the health and well-being of infants and young children as well as society's recognition that the first months and years of a child's life require substantial and sustained attention from parents.

However, even beyond sociological justifications, the granting of maternity or parental leave was based on certain basic economic reasons. The first and foremost of these was to encourage increased participation of women in the labour force of the economy by offering them employment protection and allowing them to return to the labour force post childbirth.[8] Besides this, certain countries (specially the Nordic countries such as Sweden, Norway, Denmark, etc) were also facing a falling birth rate crisis causing two opposing concerns to come into conflict - female contribution to work force and economy as

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5 Art.11, para 2(b), Convention on the Elimination of Discrimination Against Women.

6 Yusuf Emre Akgunduz & Janneke Plantenga, *Labour Market Effects on Parental Leave: A European Perspective,* available online at *igitur-archive.library.uu.nl/USE/2012-0104-200435/11-09.pdf*

7 Rosemary J. Owens, *Taking Leave: Work and Family in Australian Law and Policy,* in *Labour Law, Work and Family*, ed. Joanne Conaghan & Kerry Rittich, p. 240, OUP, 2007.

8 Clare McGlynn, *Work, Family and Parenthood: The European Union Agenda,* in *Labour Law, Work and Family*, ed. Joanne Conaghan & Kerry Rittich, p.218, OUP, 2007.

opposed to encouraging women to bear children. This encouraged the policy makers to adopt policies which sought to reconcile work and family life through an appropriate social policy.[9] Additionally, in some countries, where workers are offered substantially extended leave periods for at least one parent, parental leave policies were also introduced as part of job rotation policy since such extended periods of leave result in employment posts to be temporarily made available.[10]

Feminists however, started to argue that the structure of maternity leave coupled with the traditional gender roles that involve women as 'caregivers' and men as 'providers', as well as the typically lower earnings of mothers (relative to fathers) in the labour market, created strong incentives for women to reduce their employment and take on a large majority of child care responsibilities. The most obvious problems associated with such outcomes are that women bear a disproportionate burden of child care responsibilities and pay both a short - and a long-term penalty in the labour market. On the flip side it was also felt that these traditional gender roles and maternity leave policies worked together to deprive men of the opportunity to actively participate in the lives of their children. [11]

Therefore, some countries (particularly European countries), in order to address the unequal division of labour and caring between the sexes, started to adopt an alternative system of leave which would provide direct financial incentives for fathers, in addition to those provided to mothers, to assume half (or at least some portion) of the infant-care responsibilities. The EU adopted the Parental Leave Directive in 1996 which expressed the desire that *"men should be encouraged to assume an equal share of family responsibilities"* and provided for a twelve week period of leave for mothers and fathers. Further in 2000 the Council adopted another resolution[12] which stated that both *'men*

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9 Patrick Bolle, *Parental Leave,* in *Women, Gender & Work – What is Equality and How Do We Get There?,* ed. Martha Fetherolf Loutfi, p. 357, Rawat Publications, 2002

10 Ibid. pp.358-359.

11 Rebecca Ray, et. al, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Centre for Economic and Policy Research, September 2008, available online at http://www.cepr.net/documents/publications/parental_2008_09.pdf

12 Resolution of the Council and of the Ministers for Employment and Social Policy of 6th June 2000 on the Balanced Participation of Women and Men in Family and Working Life.

and women, without discrimination on the grounds of sex, have a right to reconcile family and working life'.[13] Moreover, the ILO also came up with a recommendation[14] which considered that *"either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with rights resulting from employment being safeguarded."*

Therefore, some nations now have parental leave policies which give a right for both mothers and fathers to share leave entitlements after the birth of a child so that either may care for the child, as per their convenience. The distinctive features of any parental leave policy is that it is considered separate from maternity leave, it may be taken by either parent and it is primarily aimed at the care and upbringing of young children by making both parents responsible.[15]

Current Standards Of Protection In India And Across The World

The Constitution of India, under the Directive Principles of State Policy, has directed the State to make "*provisions for securing just and humane conditions of work and maternity benefits"*[16]. In pursuance to this, parental leave protection in the country is provided under the Maternity Benefit Act, 1961, which covers women workers in establishments where ten or more persons are employed or were employed on any day of the preceding year[17]; and who have been in the employment of such an establishment for not less than 160 days in the 12 months immediately preceding the expected date of confinement[18]. The Act provides for a total of 12 weeks of leave, six weeks of which has to be compulsorily utilised after giving birth or in the event of a miscarriage[19].

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13 Clare McGlynn, *Work, Family and Parenthood: The European Union Agenda,* in *Labour Law, Work and Family*, ed. Joanne Conaghan & Kerry Rittich, p.225, OUP, 2007

14 Workers with Family Responsibilities Recommendation 1981 (No.165)

15 Patrick Bolle, *Parental Leave,* in *Women, Gender & Work – What is Equality and How Do We Get There?,* ed. Martha Fetherolf Loutfi, p. 354, Rawat Publications, 2002.

16 Article 42, Constitution of India.

17 Section 2, Maternity Benefit Act, 1961.

18 Ibid, S.5(2)

19 Ibid, S.4(1) and 4(2).

However, this leave period can be extended by one month in case of illness that is medically certified as arising out of pregnancy, confinement, premature birth or miscarriage[20]. During this period, the women are entitled to cash benefits equivalent their average daily wage or the daily minimum wage fixed by the Government under the Minimum Wages Act, whichever is higher[21]. However, women who are qualified to claim benefit under the ESI Act, are not entitled to any cash benefits under the Maternity Benefit Act.[22]

As evident from the title of the Act, statutory parental leave in India is granted only to women, though a number of organisations are nowadays allowing paternity leave on the basisof negotiated contracts or specific company policy. In fact, since 1999, the Central Government allows the provision of paternity leave to its male employees for a period of 15 days to take care of his wife and new born child. This leave can be availed of 15 da ys prior to delivery of child or anytime within 6 months immediately succeeding the date of delivery. Moreover, during this period, the employee would also be entitled to leave salary equal to the pay last drawn immediately before proceeding on leave.[23]

Inspite of the fact that parental leave provisions in India may seem generous, the provided leave period is in fact quite modest when compared to some of the other countries in the world. Sweden is particularly liberal in its parental leave allowances. Workers who have been in the service of an employer for at least the preceding six months are entitled to leave of up to 18 months, partly in the form of full-time leave, which they can avail of till the child reaches 3 years of age, and partly in the form of a reduction in working hours. During the leave period they are also entitled to 90 percent earning for 30 days for each parent, as well as a guaranteed level of cash benefits from the public insurance fund, provided they have been registered under the insurance fund for at least 180 consecutive days preceding the birth of the child. Moreover, these leave entitlements are also applicable in case of

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20 Ibid, S.10

21 Ibid. S.5(1)

22 Ibid. S.5A

23 Central Civil Services (Leave) Rule 551 (A)

adoption ofchildren[24]. Also, to encourage a greater role of fathers in child care, there is a requirement that the "minority" parent—usually the father—takes a minimum of two months of leave out of the provided 18 months[25]. The United Kingdom too is quite generous in its parental leave entitlements. At present, female employees are statutorily entitled to 52 weeks of leave, the first six weeks of which are at 90 per cent of full pay and the remainder at a fixed rate of payment according to service period[26]. In New Zealand, the Parental Leave and Employment Protection Act covers male and female employees in all industries and sectors of the economy and allows a minimum period of 52 weeks for maternity leave and two weeks of paternity leave. In cases of adoption (of children upto 5 years of age), the Act provides for 14 weeks of leave for mothers and two weeks of leave for fathers. However, all leaves under the Act are unpaid and the laws have no allowances for any cash benefits to supplement the employment protection provisions[27].

On the other side of the spectrum is the United States, which though allowing for the ILO prescribed minimum of 12 weeks of maternity leave through the Family Medical Leave Act, is one of only three countries (the others being Papua New Guinea, Swaziland) not offering paid leave at the national level (only the states of California and New Jersey offer paid maternity leave under their respective state legislations). Moreover, 40% of U.S. workers are not even eligible for the FMLA leave since employees of small enterprises (with fewer than 50 employees) and short-term workers (who have not been with the employer for a minimum of 1 year) are not covered under the Act.[28]

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[24] International Labour Organisation, *Condition of Work Digest 1994: Women and Work,* available online at http://ilo-mirror.library.cornell.edu/public/english/protection/condtrav/htmldocs/maternity_publ1.htm

[25] Women Watch China, *The Double-edged Sword of Women's Labor Rights*, available online at http://www.womenwatch-china.org/en/newsdetail.aspx?id=9883

[26] Ibid.

[27] Supra note 24

[28] Rebecca Ray, et. al, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Centre for Economic and Policy Research, September 2008, available online at http://www.cepr.net/documents/publications/parental_2008_09.pdf

Effects of Parental Leave legislations

When it comes to impact on the labour markets, the studies are quite varied. Positive impacts can be observed in that leave mandates are shown to increase female employment rates and increase firm-specific human capital by reducing the need for women to change jobs. Moreover, Job protected leave, by providing women an opportunity to return to the pre-birth employer, enables them to achieve career continuity in spite of longer leave breaks.[29] However, the effects of leave legislations on the labour market cannot be said to be universally positive. Maternity leave policies have the unintended effect of raising the cost to firms of hiring women[30]. Restrictions on the period of work along with compulsory maternity benefits, when financed by the employers themselves, act as a tax on the employment of women, in response to which the firms may lower women's wages or substitute away from female labour[31]. Moreover, wages are also seen to drop since time out of work deteriorates the leave-takers' human capital and productivity[32]. Additionally, maternity leave entitlements that allow substantial time off work also cause employers to limit women to jobs where their absences are least costly, thereby increasing occupational segregation and reducing employment options available to women[33]. Employers are also more likely to lay off the re- entered women

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[29] Michael Baker and Kevin Milligan, *How does job-protected maternity leave affect mothers' employment?,* available online at http://www.nber.org/papers/w11135

[30] Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, The Quarterly Journal of Economics, Vol. 113(1): 285-317, available online at http://ideas.repec.org/a/tpr/qjecon/v113y1998i1p285-317.html

[31] Yana van der Meulen Rodgers*, Protecting Women and Promoting Equality in the Labor Market: Theory and Evidence*, available online at http://siteresources.worldbank.org/INTGENDER/Resources/laborrodgers.pdf

[32] Yusuf Emre Akgunduz & Janneke Plantenga, *Labour Market Effects on Parental Leave: A European Perspective,* available online at *igitur-archive.library.uu.nl/USE/2012-0104-200435/11-09.p*

[33] Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, The Quarterly Journal of Economics, Vol. 113(1): 285-317, available online at http://ideas.repec.org/a/tpr/qjecon/v113y1998i1p285-317.html

who demonstrate a higher probability of more children as soon as the job protection period upon re-entry has run out.[34]

From a sociological perspective, with regard to countries which only provide for mandatory maternity leave, these legislations can actually be said to contribute to reinforcement gender stereotyping of women as caregivers and men as providers[35]. Even in countries that provide for shared parental leave, in most cases the compulsory period of leave for men are quite limited (if any), and given the differences of wage rates between the genders, it is usually the females who choose to stay at home while the mean earn the living.[36] Moreover, some studies also suggest that men are on an average reluctant to take leave as many fear that doing so would hurt their careers in the long run.[37]

Nonetheless, parental leave legislations have been observed to have had very cognisable positive impacts on child health and development across countries. Cross-national studies have shown that when parental leave entitlements are extended, infant mortality rates are lower[38]. There is also considerable evidence that child developmental outcomes are generally better if mothers do not work, or do not work full-time, in the first year of life. One of the primary reasons for this, according to the studies, is that women who take maternity leave and return to work later are more likely to initiate breastfeeding (which contributes to healthier development of newborns) and to continue breastfeeding

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[34] Rafael Lalive and Josef Zweimuller, *Estimating the Effect of Maximum Parental Leave Duration on Mothers' Subsequent Labor Market Careers,* available online at http://www.ifn.se/BinaryLoader.axd?OwnerID=ccb4a1cb-c722-49b8-a1ea-f4bd8b5e293a&OwnerType=0&PropertyName=File1&FileName=LAlive.pdf

[35] Kook Hee Lee, *Gender Equality in Reconciling Work and Childcare in South Korea,* Cornell Law School Inter-University Graduate Student Conference Papers, 2009, available online at http://scholarship.law.cornell.edu/lps_clacp/17/

[36] Clare McGlynn, *Work, Family and Parenthood: The European Union Agenda,* in *Labour Law, Work and Family*, ed. Joanne Conaghan & Kerry Rittich, OUP, 2007.

[37] Wen-Jui Han, et. al., *Parental Leave Policies and Parents' Employment and Leave-Taking,* IZA Discussion Papers, No. 3244, available online at http://hdl.handle.net/10419/34940

[38] ibid

for longer periods of time than women returning to work more quickly[39]. Additionally, women who are home on a regular basis are also in a better position to monitor their children's health which is most vulnerable in the periods post birth and upto the age of five years.[40] Conversely, studies in the United States have also shown adverse effects on the cognitive development or behavioural problems in children with working mothers in the first year of their lives.[41]

Conclusion

The parental leave legislations (both maternity leave and paternity leave), while no doubt addressing sociological concerns as well as issues within the labour market with regards to women's participation in the labour force and a more equal distribution in employment structures, are nonetheless found to suffer from certain inherent limitations. The most prominent of these limitations is that all parental leave benefits across the world are generally restricted to the formal sector, that too to relatively large enterprises (such as in the U.S where only those organisations with over 50 employees are covered), which represent only a small proportion of labour force of a country. This is especially true for maternity benefits since in most countries around the world women are largely employed in the informal sectors of the economy. While there is a trend worldwide to improve and extend maternity protection, given the large segments of population living and working outside the formal economy, this still remains a major challenge.[42] Moreover, in countries where the cash benefits which supplement the employment protected leave are funded by

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[39] Lawrence M. Berger, et. al, *Maternity Leave, Early Maternal Employment And Child Health And Development In The US*, available online at http://www.sfu.ca/~mfs2/SUMMER%202010/SA%20101/ASSIGNMENT%202/BergerHillStudy-Feb05.pdf

[40] Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, The Quarterly Journal of Economics, Vol. 113(1): 285-317, available online at http://ideas.repec.org/a/tpr/qjecon/v113y1998i1p285-317.html

[41] Lawrence M. Berger, et. al, *Maternity Leave, Early Maternal Employment And Child Health And Development In The US*, available online at http://www.sfu.ca/~mfs2/SUMMER%202010/SA%20101/ASSIGNMENT%202/BergerHillStudy-Feb05.pdf

[42] Marie-Claire Seguret*, Maternity Protection In Legislation,* available online at http://www.ilo.org/safework_bookshelf/english?content&nd=857170093

the State, only those employees who are registered under such schemes/funds are eligible to claim the statutorily provided benefits.

Analysing the impact of these legislations, though they have had a cognisable positive impact from the perspective of health issues and long term child development concerns, this positive impact is not quite so apparent with regard to gender inequality issues or the labour market effects. While female employment and participation to population ratios have no doubt improved, the positive participation effect, nonetheless, comes at a cost, as women become less likely to work in high level occupations and receive lower wages when they do so. Therefore, the debate as to whether statutory mandated parental leave legislations are a boon or not, is still far from any definitive conclusion.

Analysis of the Unorganised Workers' Social Security Act, 2008

*Monalisa Kosaria**

ABSTRACT

The purpose of this paper work is to bring out the gist of The Unorganised Workers' Social Security Act, 2008 in a lucid, precise and orderly manner. Strenuous effort has been made to give a comprehensive treatment to the subject 'Analysis of the Unorganised Workers' Social Security Act of 2008' which is of considerable importance as the majority of the workforce in India comprise of unorganised groups and these have been excluded from various social support systems in the country for long years.

Keywords: Unorganised workers, social security, constitution, right to equality

One of the basic underlying fundamentals of any labour legislation is the principle of social justice. In J. Gajendragadkar's words *"The concept of social justice is a living concept of revolutionary import, it gives sustenance to the rule of law and meaning and significance to the idea of welfare state"*[1]. Comprehensively, social justice would imply equitable distribution of benefits (and profits) and protection of workmen class.[2]

With the advance of industrialization advancing, workers were increasingly alienated from previous socio-cultural world and faced various insecurities with regard to income and unemployment in addition to the natural ones (i.e. sickness, maternity, old age and death).

* West Bengal National University of Juridical Sciences (WBNUJS)

1 State of Mysore v. Workers of Gold Mines, AIR1958SC923. *See also,* Muir Mills Ltd. v. Sui Mill Mazdoor Union, (1955)1LLJ1(SC): *"The concept of social justice does not emanate from the fanciful notions of any particular adjudication but must be founded on more solid foundations."*

2 *See,* S. N. Mishra, Labour & Industrial Laws, 24th Edn. (2008), p.8.

These insecurities initiated a quest for social security against undue hardships. Various efforts in the form of community services, individual efforts, organisations' help, national legislations, national and local policies etc have been started in number of nations in order to achieve a lesser worrisome life period of those who need to socially secure themselves and their dependants.

India has also extended its help in various forms to socially secure peoples' life. The Constitution of India itself embodies the essence of need for social security.[3] India has also enacted a number of social security legislations. India being a signatory to the ILO Convention[4] of 1962 further reflects India's pro-social security outlook. Though India has tried to fulfil its mandate under Constitution as well as its obligations under ILO Convention by enacting a number of social security legislations[5], however, these social security schemes cover only a small segment of the total workforce, which mostly constitute the organized sector.

More than 85% of the workforce in India is in unorganized sector and this chunk is largely not covered under labour laws,[6] including those related to social security. Therefore, parliament enacted *The Unorganised Workers' Social Security Act, 2008* (hereinafter called the 2008 Act) to 'provide for the social security and welfare or unorganised workers and for matters connected therewith or incidental thereto'[7].

This paper argues that the 2008 Act is a substantially hollow legislation, which fails to further the objective of ensuring social security to the excluded mass of workmen population.

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3 Matters relating to Social Security are listed in the Directive Principles of State Policies (under Art. 41 and 42) and the Subjects in Concurrent List (Subject No. 23 and 24 of List III in Seventh Schedule). As available at <http://labour.nic.in/ss/acts.html> (last visited on 11 March, 2012).

4 *Refer,* Equality of Treatment (Social Security) Convention (1962), International Labour Organisation Convention No. 118, (Ratified by India on 19.08.1964).

5 These principal legislations include The Employees' State Insurance Act of 1948, The Employees' Provident Fund and Miscellaneous Provisions Act of 1952, The Workmen's Compensation Act of 1923, The Maternity Benefit Act of 1961 and The Payment of Gratuity Act of 1972. *See generally,* Amarchand & Mangaldas & Suresh A. Shroff & Co., Report on Labour Laws in India, 2009.

6 *See,* Kamala Sankaran, Labour Laws and the World of Work, page 1.

7 Long title of the 2008 Act.

Further, the paper recommends few positive actions, in light of the principles and recommendations forwarded by the ILO. In this process, the paper brings about lacunae in the 2008 Act, both in administrative and substantive spheres.

This research paper begins with a descriptive know-how of the concepts of 'social security' laws and 'unorganized sector' and the interplay between the two in part I. In part II, the substantive and the administrative parts of the 2008 Act are scrutinized and examined against the yardstick of the 2005 Bill proposed by NCEUS. Subsequently part III recommends few amendments to formulate a right- based social security law for the unorganized workmen and for effective implementation of the same.

I. INTERPLAY BETWEEN UNORGANIZED SECTOR AND SOCIAL SECURITY RIGHT

In 1944 ILC recognised that "the solemn obligation of the ILO is to further among the nations of the world, programmes which will achieve...the extension of social security measures to provide a basic income to all in need of such protection."[8] Subsequently, international community recognised the right to social security in the UDHR.[9] ICESCR also furthers the recognition of the said right under Art.9.[10] Thus the right to social security has been strongly affirmed in international law and India being a state- party, is obliged to guarantee and uphold these rights.

Social security has been embedded into the constitutional framework of India as a part of fundamentals in the governance of the country. Guiding principles for governance have been incorporated under DPSPs, which appreciate and acknowledge the need for social security in principles set out in Art. 41, 42 and 43.

It flows from the above international and national provisions that the "right to social security encompasses right to access and maintain benefits, whether in cash or kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income

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8 Declaration concerning the Aims and Purposes of International Labour Organisation, Adopted at the 26th session of the International Labour Organisation, Philadelphia, 10 May 1994.

9 *Refer,* Universal Declaration of Human Rights, United Nation General Assembly, 1948, Article 22.

10 *Refer,* International Covenant on Economic, Social and Cultural Rights, United Nation General Assembly, Came into force in 1976.

caused by sickness, disability, maternity, employment injury, unemployment, old age or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents."[11]

Starting from the scratch, 'social security in India was traditionally the responsibility of family/ community in general. With gradual process of industrialization/ urbanization, break-up of the joint family set-up and weakening of family bondage, the need for institutionalised and State-cum-society regulated social security arrangement to address the problem in a planned manner in a wider social/ economic interest has been felt necessary.'[12] With the advent of the need of institutionalised social security schemes, numbers of legislations were enacted to this effect.[13]

In India three principal mechanisms have been used for ensuring social support- *first,* legislation and statutory schemes, which primarily is extended to workers from organised sector; *second,* social assistance is extended through targeted programmes for vulnerable and disadvantageous sections and *third,* self-financing mechanisms have been established by different agencies and groups.[14] Though, the last two modes of social support apply to unorganised sectors, yet they are limited in its reach due to specificity (with respect to area as well as group of people) in its application. Thus the need arose for a widespread system at a national level.

Indian enactments on social security are majorly beneficial for the organised sector and exclude the magnificent percentage of unorganised workforce of India.[15] The reason for

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[11] Committee on Economic, Social and Cultural Rights, General Comment No.19 on The Right to Social Security (Art.9), Adopted on 23 Nov 2007, Economic and Social Council, United Nation, page 2. Social security schemes can either be preventive or promotional. *See generally,* N. Nagarajan, Economic Growth and Social Security, Economic & Political Weekly, 23 August 2003, page 3555. *See also,* Ehtisham Ahmad, Jean Dreze, John Hills and Amartya Sen, Social Security in Developing Countries, 1999, page 3.

[12] Report on Social Security for the Tenth Five Year Plan 2002-2007 (October 2001), forwarded by the Working Group under Chairmanship of Shri. Vinod Vaish, Planning Commission, Government of India, page 17.

[13] *Supra* note 5.

[14] Wouter Van Ginneken, Social Security for the excluded majority- Case studies of developing countries, International Labour Office, Geneva, page 37.

omission from statutory protection of social security emanates from structure of unorganised sector.[16] The framework of unorganised sector in India induces conceptual issues with regard to the formulation and implementation of social security schemes.[17] Reasons for such low coverage include in most of the cases, inability to pay for financing social security benefits by workers with minimal pay wage; also, unwillingness to pay when these benefits don not meet their priority needs and mostly, difficulty in collecting contributions and unfamiliarity with the schemes.[18]

With the objective of overcoming the disparity between organised and unorganised sectors on social security benefits, the Indian parliament enacted *The Unorganised Workers' Social Security Act, 2008.*

II. ANALYSIS OF THE UNORGANISED WORKERS' SOCIAL SECURITY ACT

"Social security is not a dole or a device for giving everybody something for nothing. True social security must consist of rights which are earned rights- guaranteed by the law of land"

-Harry S. Truman

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[15] S. Sakthivel and Pinaki Joddar, Unorganised Sector Workforce in India- Trends, Patterns and Social Security Coverage, Economic & Political Weekly, 27 May 2006, 2107: *"India's workforce comprises nearly 92 percent in the unorganised segment."* The Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector (National Commission for Enterprises in the Unorganised Sector, 2007) made it clear that the organised-unorganised dichotomy in Indian usage is the same as formal-informal distinction in international context (As cited in Dipak Mazumdar, Dissecting India's Unorganized Sector, Economic & Political Weekly, 9 Feb 2008, page 27). *See also,* Madhura Swaminathan, Understanding the informal sector: A survey, WIDER (United Nations University), Working Paper 95 (Dec 1991), page 9: "ILO specified a set of characteristics of informal enterprise. These were: small scale operation; family ownership; reliance on indigenous resources; labour intensive activity, technology adapted to local condition; skills acquired outside the formal school system; ease of entry into the activity; and operation in unregulated, competitive markets...The emphasis appears to have been placed on the organisational structure of the unit of production rather than its technology."

[16] There are explicit legal exclusions as well, in addition to structural barriers.

[17] *See generally,* Ramgopal Agarwala, Nagesh Kumar and Michelle Riboud, Reforms, Labour Markets and Social Security in India, Oxford University Press, 2004.

[18] *See,* International Labour Office, Social Security- A new Consensus, 2001, page 57.

The importance of the 2008 Act lies in the fact that it is an umbrella legislation, enacted with the objective to apply for over 90 percent of the workforce in India. In spite of the long fought battle for such an enactment, the end result appears to be unsatisfactory. For all practical purposes, it can be said that the Act fails to establish a right-based approach (that is, establishing social security as a right of individuals and not merely a benefit given at the mercy of policy-makers) towards social security. Further, the Act provides for supervisory instrumentalities, which superficially appear to have definite powers but in fact, these bodies are deprived of any power of implementation, rendering the whole system futile.

- ***Examination of the Substantive component of the Act***

The NCL, in its *Report,* concluded that right to social security is one of the inalienable rights of the workers, which should be well-defined and included in any system of labour laws and labour policies for both organised and unorganised sector.[19]

Earlier than the 2008 Act was passed, the National Commission for Enterprises in the Unorganised Sector (hereinafter called 'NCEUS') proposed *The Unorganised Sector Workers Social Security Bill, 2005* (hereinafter referred as 2005 Bill). This Bill had various positive features, some of which were given no regard at all but few of the important ones were included in the 2008 Act. A comparison between the NCEUS Bill and the 2008 Act has been made in the next few paragraphs to highlight the positives and the negatives in the present piece of enactment.

To start with, the 2005 Bill imposed a positive mandate on the Central govt. to formulate National Social Security Scheme for unorganised sector.[20] Likewise, sec. 3(1) of the 2008 Act also compels the Central govt. to formulate welfare schemes for unorganised sector. However, no legal mechanism has been put into effect to check the non-compliance with the provisions of the Act.

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[19] *See,* The Second National Commission on Labour Report (2002), Summary- Conclusions and Recommendations, Vol. II, para.6.9, 6.37.

[20] National Commission for Enterprises in the Unorganised Sector, Unorganised Sector Workers Social Security Bill, 2005, sec. 4(1).

The NCEUS Bill provided for mandate on the part of the State govt. to constitute a 'Dispute Resolution Council in each district for resolution of disputes relating to non-observance of provisions of this Act'[21]. There is no such legally stipulated guarantee for a uniform statutory dispute resolution forum in the 2008 Act. Rather, the Act has come with impractical provision that every scheme notified by Central Govt. shall include its own mechanism of grievance redressal.[22] This, in effect, practically renders social security a status of non-justiciable right under the Act.[23]

The efficient working of any scheme/ policy requires adequate financial assistance. The NCEUS Bill provided for constitution of National as well as State Social Security Fund as a matter of necessity under the Act.[24] However, the 2008 Act lacks any financial backbone structure to carry out the necessary welfare schemes.

Looking at the positive feature of the Act, it is praiseworthy that considerable effort has been made to include self-employed workers, home-based workers and wage-workers within the definition of 'unorganised worker'[25].

The conclusion would be nothing other than that the Act does not give rights to unorganised sector workers at par with the workers in organised sector, but rather confines their status as beneficiaries of government schemes.[26]

- ***Analysis of the administrative system under the Act***

Administrative machinery is the firmest pillar of any legislation. The Act has made considerable advancements towards effective administration of the schemes provided therein.

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21 *Supra* note 20, sec, 30.

22 The Unorganised Workers' Social Security Act, 2008, sec. 4(2)(v).

23 *See,* Mecanzy Dabre, Unorganised Workers' Social Security Act 2008 and the National Policy on Urban Street Vendors, International Collective in Support of Fishworkers, Women in Fisheries India Workshop, page 35: *"The Social Security Schemes included are given in a Schedule (appendix), which essentially means that schemes can be changed at any point of time, denying workers the benefit of consistency and justiciability."*

24 *Supra* note 20*,* sec. 5(1), 16(1).

25 *Supra* note 22, sec. 2(m).

26 Paromita Goswami, A Critique of the Unorganised Workers' Social Security Act, Economic & Political Weekly, 14 March 2009, Vol. XLIV, No.11, page 18.

The most applauded provision is the one related to building of an official identity for recognition of workers of the unorganised sector.[27] Sec. 10(3) of the Act provides for issuance of smart identity card by the District Administration. This card shall carry a unique identification number and shall be portable. This is supplementary to another positive feature of the Act, that is, Registration under sec.10. Together, these provisions will be helpful in maintaining the data of the unorganised workforce at very grass-root level.

The 2008 Act provides for the establishment of the National and State Social Security Board under Chapter III and IV of the Act respectively. However, it is apparent from the functions listed out for the Social Security Boards that these are mere advisory bodies, with no power of implementation.[28]

Another important feature of the Act is given in sec. 8, wherein the record keeping function has been entrusted to the District Administration. Though, it is a step forward for information gathering at the lower strata of polity, a need for co-operation among these administrative bodies by a higher authority is required to prevent incoherent functioning of the said agencies.

From the above discussion, it is evident that the Act has made significant contributions in terms of evolving mechanisms for administration of welfare schemes from the ground to the national level. This has been done via provisions for identity cards, registration of workers, and National and State Boards. However, further additions need to be made and modifications need to be implemented in these machineries (concerning number, nature and functions of these agencies).

III. IMPROVISING PILL FOR THE ACT

Following the above comparison and the deduction therefrom, it is clear that the 2008 enactment does not meet up the demands posed by the unorganised workforce of the country and it fails in its purpose of protecting them against social calamities. To improve the present legislation, changes have to be incorporated within the Act so as to empower the workers to demand the rights in case of denial. Also, the loopholes in the vertical as well as horizontal structure of administration need to be filled.

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[27] *See,* Renana Jhabvala, Unorganised Workers Bill- In Aid of the Informal Worker, Economic & Political Weekly, 28 May-4 June 2005, page 2230.

[28] *Supra* note 22, sec. 5(8), 6(8).

A right has no meaning unless it is enforceable. To this effect, the social security right under the Act is also a mere figurative expression. To give purposeful value to this right, amendment has to be made within the Act and machinery needs to be set for enforcing these rights in case on non-compliance. Thus, an easy accessible dispute resolution forum should be established at every district. To complement this redressal mechanism, penal provisions for non-compliance should also be imbibed in the Act.

Further, to ensure continuous financial assistance for the welfare schemes, National and State Funds should be constituted, wherein contributions from the Centre/ State (as the case may be), employers and beneficiaries can be deposited. The National and State Boards, as formed under the Act, should be here-then authorized to manage and allocate these funds.

As regards the shortcomings in the administration, principles of good governance should be executed to fill in the spaces in the system. Performance, as a principle of good governance, has two characteristics: responsiveness and effectiveness.[29] To ensure good performance, *modus operandi* of the existing system needs to be decentralized. For this, the Act should exploit the full potential of Workers Facilitation Centres (WFC) and Panchayati Raj institutions.[30] WFC should be established at sub-districts or block levels and it should be entrusted with the task of Registration, which at present is handled by the District Administration. Gram panchayats should be given similar function of registration at village level. Also, the gram panchayats should be empowered to keep records of contractors who come to the village to procure labourers and the details of the labourers who are taken for work outside the area – either in the same district or state or as interstate migrant workers.[31] Additionally, these institutions can help in overcoming the problem of collecting contributions from the targeted group. Thus, both these agencies would ensure convenient approachability and will 'act as the delivery point for providing welfare measures for the workers who become part of welfare funds'[32].

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[29] *See generally,* John Graham, Bruce Amos and Tim Plumptre, Principles of Good Governance in the 21st Century, Policy Brief No.15, 2003, Institute on Governance, As available at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/11092/1/Principles%20for%20Good%20Governance%20in%20the%2021st%20Century.pdf?1> (last visited on 10 March, 2012).

[30] *Supra* note 26, page 18.

[31] *Ibid*.

[32] *Supra* note 27, page 2228.

IV. CONCLUSION

The aim of social security is to provide assistance, financial or otherwise, in the event of loss or reduction of income. Social security also serves a broad economic purpose that is redistribution of income.[33]What is most important, however, is that a country's social protection programme should be considered as a whole, from the outset, and the pace of development should have full regard to the ability of the country, and its institutions, to organize and administer the programme effectively and efficiently.[34] Thus, an integrated approach needs to be development such that various spheres of work aim towards a common achievement of a welfare state, for example the records maintained by the lower level institutions can be used to prepare data as to number of workmen with below minimum level of wages and the records of migrant workers can also help in reduction of their torture and exploitation by employers. Similarly, UID (Unique Identification) issued by Unique Identification Authority of India (UIDAI), Planning Commission can be used to keep a tab of unorganised workers in India.

Although the need to provide social security is crucial for the poor and other vulnerable sections of population, even after over half a century of development policies, there does not appear to be any effort to ensure this for large sections of the working force.[35] Therefore, to ensure social security to the unorganised majority, necessary amendments, as proposed, need to be made in the present legislations to make it more effective in its application.

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[33] Social Security Principles, Vol. I, International Labour Office, page 90: *"Under social security, income is redistributed in two ways: horizontal and vertical redistribution. Horizontal redistribution means that taxes or contributions paid on a regular and continuous basis are then transferred to those for whom the system provides. Vertical redistribution is effected by transferring money from higher-income groups to those with smaller incomes, something which is done almost as a matter of course by governments."*

[34] *Ibid,* page 37.

[35] EDITORIALS, A Half- Step Forward, Economic & Political Weekly, 3 January 2009.

The Law of Land Acquisition in India

Sushand Naushad* & Prerna Khandewal**

ABSTRACT

Right to property always remains controversial since the enforcement of the Indian Constitution. Population is increasing at a rapid pace whereas the area of land remains the same. To facilitate industrial growth, job opportunity and other basic amenities for the public life it is somehow inevitable for the Government to acquire land owned by private individuals. In the recent past this land acquisition by the Government becomes a burning issue sometimes resulting to gross violence between law enforcing authorities and the masses. In this backdrop discusses the various issues of land acquisition and the emerging problem thereon.

Keywords: Land acquisition, industrialization, Violence, Rehabilitation, Resettlement and Compensation

Land acquisition in India has gained the reputation of being one of the most agonizing metaphors of social injustice.[1] Names like Singur, Nandigram, Kalinganagar, Jaitapur and Bhatta Parsaul come to mind in this regard.[2] Over the years, this issue has gained political significance. Elections have been won and lost on the basis of this. The campaign against land acquisitions in Singur and Nandigram is seen by many as the reason for the impressive surge of Trinamool Congress chief Mamata Banerjee in West Bengal.[3]

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1 Maitreesh Ghatak and Parikshit Ghosh, *The Land Acquisition Bill: A Critique and a Proposal*, Economic And Political Weekly, Vol XLVI No 41, (Oct. 8, 2011), http://econ.lse.ac.uk/staff/mghatak/GG.pdf

2 *Ibid*

3 *Assembly election 2011 West Bengal: Trinamool Congress rises like phoenix*, The Economic Times, (May 13, 2011), http://articles.economictimes.indiatimes.com/ 2011-05-13/news/29539868_1_trinamool-congress-assembly-elections-mamata-banerjee http://www. financialexpress.com /news/urbanisation-must-get-top-priority-land-use-reforms-critical-dlf-chief/912661/

Urbanisation and industrialisation is on the rise. There is stress on better infrastructure, urban development and resource extraction.[4] Land is a prerequisite for all of the above. The Government also acquires land for a range of public purposes. However, this acquisition of land must not take place against the interests of the landowners and of those who are dependent on the acquired land for their living. Every year, in the guise of development, land is acquired by the mighty and powerful from poor hapless farmers, who are left with nothing to survive on. Finding a balance between economic growth and human rights has become the greatest challenge for our democracy.

Under the Constitution of India, land falls within the domain of the State, however land acquisition is a Concurrent subject and both central and state governments can legislate upon it. The Land Acquisition Act, 1894 is the central legislation that governs the process of land acquisition in our country. It has been amended several times, however, it still remains astonishingly archaic and feudal.[5] This Act has wrought havoc on India's villages and tribal communities bringing repeated displacement and dispossession at the hands of the State.[6] It does not take into account the emotions/sentiments of the landowners and the fact that the livelihood of many people is attached to the land. The compensation provided for them is nowhere near the actual price that the owners would have received for that piece of land.[7]

The Act been criticized by one and all. Mamata Banerjee, chief of Trinamool Congress, has called it a draconian law.[8] Even the Supreme Court, frowning at the increasing incidents

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4 Rajat Guha and Rishi Raj, *Urbanisation Must Get Top Priority, Land Use Reforms Critical*, The Financial Express, (June 15, 2012), http://www.financialexpress.com/news/urbanisation-must-get-top-priority-land-use-reforms-critical-dlf-chief/912661/ ; Maitreesh Ghatak and Parikshit Ghosh, *The Land Acquisition Bill: A Critique and a Proposal*, Economic And Political Weekly, Vol XLVI No 41, (Oct. 8, 2011), http://econ.lse.ac.uk/staff/mghatak/GG.pdf

5 Gargi Parsai, *Amended Bill Even Worse, Says Farmer*, The Hindu, (July 30, 2011), http://www.thehindu.com/news/national/article2306344.ece

6 M.P. Varghese, The Law of Land Acquisition and Compensation: A Criticism, 116-128, (1999)

7 *Ibid*

8 Mamta Banerjee, *Regarding Scrapping of Land Acquisition Act, 1894*, Lok Sabha Debates, (May 15, 2007), http://indiankanoon.org/doc/1041690/

of forcible acquisition of land by the government, has stated that the act is a "fraud" and devised by "sick people"[9].

In response to recent high-profile land-related hitches and heightened public concern on land acquisition issues in India, the Land Acquisition, Rehabilitation & Resettlement Bill 2011 (hereinafter referred to as Bill) was introduced in Lok Sabha in India on September 7, 2011.[10] This Bill seeks to repeal and replace the Land Acquisition Act, 1894. It will cover under its purview all land acquisition, whether done by the central government of India, or any state government of India, except the state of Jammu & Kashmir. It has received cabinet approval[11] and is now before a Standing Committee of Parliament. Jairam Ramesh is trying hard to get it passed in the winter session of Parliament.[12]

Key Features of the Bill[13]:

This Bill will enjoy primacy over 18 other laws that provide safeguards for land acquisition. This Bill seeks to harmonize economic development and industrialization in the country with the rights of the landowners and farmers whose lands are being acquired.

Rehabilitation, Resettlement and Compensation:

The proposed law makes Rehabilitation & Resettlement compulsory for acquisition of land by private companies in excess of 100 acres (in rural areas) and 50 acres (in urban areas) with a host of benefits for both the landowners and livelihood losers. These benefits include annuities, transportation allowance, land for land, a portion of capital gains from

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9 Land Acquisition Act is a fraud: Ought to be Scrapped, The Indian Express, (June 11, 2012), http://www.indianexpress.com/news/land-acquisition-act-is-a-fraud-ought-to-be-scrapped-sc/827232/2

10 *Bill on Land Acquisition Introduced in Lok Sabha*, Deccan Herald, (June 15, 2012), http://www.deccanherald.com/content/189147/land-acquisition-bill-introduced-lok.html

11 *Cabinet Clears Land Bill Despite Protests*, NDTV, (Sept.6, 2011), http://www.ndtv.com/article/array/cabinet-clears-land-acquisition-and-rehabilitation-bill-131514

12 *Ibid*

13 *The Land Acquisition, Rehabilitation, and Resettlement Bill*, 2011, available at http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf ; K. Balchand, *New NAC Bill Combines Land Acquisition, Rehabilitation & Resettlement*, The Hindu, (July 29, 2011), http://www.thehindu.com/news/national/article2305745.ece

resale, and the construction of alternative housing and communal amenities in the event of loss of homestead. The resettlement area is required to possess at least 25 basic infrastructural amenities including schools and playgrounds, health centres, roads and electric connections, assured sources of safe drinking water for each family, panchayat ghars, fair-price shops and seed-cum-fertilizer storage facilities, places of worship and burial and cremation grounds.

The landowners and livelihood losers will be paid compensation, which will be six times the market value of the land (in rural areas) and at least twice the market value (in urban areas). Separately, the landowners will also be entitled to a subsistence allowance of Rs.3, 000 per month for 12 years and Rs.2, 000 as annuity for 20 years, with an appropriate index for inflation.

No intervention of State Government:

The law states that different State governments cannot take part in the acquisition of land, unless petitioned by the private companies for acquisition that would benefit the general public.

Bar on private companies from acquisition:

There is also a bar on private companies from acquiring any multi-cropped irrigated land for 'public purposes'.

Safeguards against arbitrary acquisitions:

The Bill has put in certain provisions to guard against arbitrary acquisitions. Under the proposed act, the States are required to set up a committee, headed by the Chief Secretary, which will certify that the acquisition of land is indeed for "public purpose" and will also carry out the social impact assessment for the given land. Other procedural safeguards like adequate notification and consent of at least 80% of the affected community have also been incorporated.

If the land acquired is not put to use within five years of the acquisition, it would be reverted back to the original owner. Gram Sabhas also need to be consulted before land acquisition.

Land acquired for urbanization:

In cases where land is acquired for the purpose of urbanisation, 20 percent of the developed land would be reserved and offered to the landowners in proportion to the acquired land. Apart from this, every affected family would be entitled to one job, or Rs.2 lakh. People who lose their houses due to the acquisition will be provided a constructed house (plinth area of 150 square meters, and 50 square meters in urban areas), along with a one-time resettlement allowance of Rs.50, 000. People whose livelihood will be affected by the acquisition will be entitled to a subsistence allowance of Rs.3, 000 per month per family for 12 months and Rs.2, 000 per month for 20 years as annuity, taking into consideration the inflation.

Acquiring land in scheduled areas:

Families of affected scheduled castes and scheduled tribes will get one acre of land in every project. Those who are settled outside the district will get additional 25 per cent of Rehabilitation and Resettlement benefits. The Bill also lays down the provision of one-third advance payment of the compensation amount to Scheduled tribes. They will also get additional benefits like preference in relocation and resettlement in an area in the same compact block and free land for community and social gatherings. The STs and SCs would also be entitled to the same reservations and other benefits in the settlement area they were entitled to in the displaced area.

In the event of displacement of 100 or more ST families, a Tribal Displacement Plan would have to be put in place. This plan will include settling land rights and restoring titles on alienated land and development of alternate fuel, fodder and non-timber forest produce.

The diagnosis:

Infrastructure is necessary for the development and land is needed for the same. Vast pieces of land are consumed in expansion projects. Development projects cannot always be carried out on the land already available with the state. It can also not be carried out in any remote area, as development projects have to be accessible to the general population. Keeping such factors in mind, the only way left is to acquire the required or proposed land.

Acquisition of land by private companies:

The Bill provides that land may be acquired for use by the government for its own use, control; or for the purpose of use by private companies; or for public private partnerships and also private companies for the use of public purpose.[14] It provides that the provisions relating to rehabilitation and resettlement shall be applicable in case of acquisition for private companies and for PPPs.[15] However, most private companies invest in projects solely to earn profits. They seldom think about promoting public welfare.[16] Any industrial activity will only incidentally deliver goods for public use. Therefore, it is strongly urged that Public Private Partnerships and private companies should acquire land for use only when there is a strong and clear public purpose, not otherwise. No company, set up to earn profits, should be allowed to acquire land. Also, in exceptional cases, if the company acquires land to build a government hospital or a school, the land so acquired from the owner should be taken to be on a long lease with rent equal to the prevalent market value rent in the area, calculated also taking into consideration the potential future value of the land.[17]

Public purpose:

Now, coming to the term "public purpose" in the Bill, it includes provision of land for-

(a) Strategic defense purposes, national security and safety of the people,
(b) Construction of roads, railways, highways, ports, power and irrigation channel by government and public sector enterprises,
(c) Project affected people,

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[14] *Clause 2(1)(a) & (b), The Land Acquisition, Rehabilitation, and Resettlement Bill*, 2011, available at http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf

[15] *Comparison of the Bill with the Recommendations of the Standing Committee*, PRS Legislative research, (May 17, 2012), http://www.prsindia.org/uploads/media/Land%20and %20R%20and%20R/Comparaision%20of%20Standing%20Committee%20 and%20Bill%20-%20LARR%20-%20FINAL.pdf ; *The Land Acquisition, Rehabilitation, and Resettlement Bill*, 2011, available at http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf

[16] EAS Sarma, *Money Doesn't Make the Landowner Fonder*, Tehelka, (Aug 6, 2011), http://www.tehelka.com/story_main50.asp?filename=Ws060811Money.asp

[17] *Ibid*

(d) Planned development or improvement of villages, and

(e) Residential purposes for the poor and landless. Public purpose includes other government projects, which benefit the public as well as provision of public goods and services by private companies or PPPs; these require the consent of 80 per cent of project-affected people.[18]

This definition of public purpose provided by the Bill is open-ended and even more draconian than the definition provided in the old Act. This definition empowers the state to include within its purview any profitable private land acquisition proposal, thus rendering the concept of right to property envisaged in Article 300A dysfunctional.[19] Therefore, the scope of this definition should be narrowed down, in order to prevent indiscriminate land acquisitions by influential private players in nexus with bureaucrats and politicians.

Infrastructural projects:

In the same vein, the definition of "infrastructure projects" in the Bill include projects related to the generation of electricity, telecommunication services, roads and highways, water supply, and any other project that may be notified in this regard by the central government.[20] This open-ended definition gives wide discretionary powers to the government, and opens up avenues for corruption by high-rung players.[21] Therefore, this definition should be narrowed down.

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[18] *Clause 3 (za)(i) to (vi)(A), The Land Acquisition, Rehabilitation, and Resettlement Bill*, 2011, available at http://rural.nic.in/sites/downloads/general/LS%20Version%20of %20LARR%20%20Bill.pdf

[19] EAS Sarma, *Money Doesn't Make the Landowner Fonder*, TEHELKA, (Aug 6, 2011), http://www.tehelka.com/story_main50.asp?filename=Ws060811Money.asp

[20] *3 (o) (v), The Land Acquisition, Rehabilitation, and Resettlement Bill*, 2011, available at http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf

[21] *Comparison of the Bill with the Recommendations of the Standing Committee*, PRS LEGISLATIVE RESEARCH, (May 17, 2012), http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/Comparaision%20of%20Standing%20Committee%20and%20Bill%20-%20LARR%20-%20FINAL.pdf

Compensation:

Acquiring land is not an easy phenomenon. The most uncomplicated way to acquire is to buy it from the owners. This way is unproblematic since the owner has been paid the price of the land, and he can go and buy another land with the same money. But this rarely happens in the real world. If that had been the situation, then no one would have yelled about it. No question of valuation method would have arisen. The predicament is that after selling one, another land is not available in the close proximity at the same price.[22] Therefore, the issue that we have before us is regarding the determination of compensation to be paid to the landowners whose lands are acquired by the government in the name of development project. What should the ideal compensation be?

It is very easy to criticize that the compensation paid was not adequate in a particular case. When we compute the adequate compensation for a given land, we take into account a variety of factors. Soil richness, irrigation facilities, and other earning opportunities help in determining the compensation, but how much weightage should be given to which factor is difficult to ascertain. Soil richness can be a big consideration for a farmer but not be the same for a person who has nothing to do with the land fertility, although both are the owners.[23] It is not viable to find out or calculate the appropriate compensation for each case separately but what is needed is a proper scheme that can apply to all cases without prejudicing the interests of the landowners.[24] Such a scheme would also be useful as – it will provide the exact idea to the land owners as to how much they can ask for as compensation, it will provide uniformity nationwide regarding the payment of compensation in such cases, state also will have an idea due to the established mechanism to come up with the right plan regarding any particular area and project and will not be able to beguile the poor farmers by paying them any compensatory amount on the other hand charging high from the corporate ending up earning huge amount at the cost of the land owners.[25]

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[22] Maitreesh Ghatak and Parikshit Ghosh, *The Land Acquisition Bill: A Critique and a Proposal*, Economic And Political Weekly, Vol XLVI No 41, (Oct. 8, 2011), http://econ.lse.ac.uk/staff/mghatak/GG.pdf

[23] *Ibid*

[24] *Ibid*

[25] *Ibid*

Now, if we analyze the market scenario it is observed that whenever any transaction takes place it is because the owner of something values it less than the other who is ready to take rights on it. In such a situation price is fixed where owner finds it profitable to sell and buyer finds it worth buying. But this entire process would not happen if there were any compulsions to sell, infringing one's freedom to decide when and at what price to sell. Selling something at market price might be the good option for the one who is willing to sell but what about the one whose land is grabbed from him and the market price is given. Even after the unnecessary sale of the land if the person wants to buy the similar land that would not be possible. He would have to pay more and might be at some different location, which puts him in an unequal position, compared to the previous one.[26]

Different owners would evaluate their land differently. Land has many values attached to it. It can act as a security against any transaction, it earns bread to the family, and it also has an array of sentiments attached to it. The Bill provides that the compensation for the land acquired shall based on the higher of (a) the minimum land value, specified in the Indian Stamp Act, 1899 for the registration of sale deeds; and (b) the average sale price of the higher priced 50% of all sale deeds registered in the previous 3 years for similar type of land situated in the vicinity. This amount is further doubled in case of rural areas. The value of the assets (trees, plants, buildings etc.) attached to the land being acquired will be added to this amount. To get the final compensation amount, we will then multiply this total amount by two. In case of the urgency Clause, there is an additional 75 per cent compensation[27].

Even if we keep all the considerations aside, it is inane to rely on the prices that existed at some point of time in the past to determine the compensation for present as provided under the Bill. Prices are soaring high today and they might not be even near the price that

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[26] *Ibid*

[27] *Clauses 26-29, Comparison of the Bill with the Recommendations of the Standing Committee*, PRS Legislative research, (May 17, 2012), http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/Comparaision%20of%20Standing%20Committee%20and%20Bill%20-%20LARR%20-%20FINAL.pdf ; *The Land Acquisition, Rehabilitation, and Resettlement Bill*, 2011, available at http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf

existed 2 years ago.[28] Therefore, it is urged that the appropriate government should set up a multi- member land pricing committee to decide the compensation state wise/area wise. This will ensure that the landowners and livelihood losers get rightful compensation, so that they are not left in the lurch. Also, the term "minimum value" in 26(1)(a) should be replaced with "market value".[29]

Urgency clause:

The Bill also stipulates in clause 38 the special powers of the government to acquire land in cases of urgency. In cases of urgency, an additional 75 percent of the compensation is provided. Clause 9 exempts the government from conducting Social Impact Assessment (SIA) in cases of urgency.[30] However, the government should keep in mind that the urgency clause should not be invoked unless is a genuine need. The urgency provisions should be invoked only if a delay of few weeks or months will render the public purpose for which the land is acquired, futile. Invoking the urgency clause casually, and not giving a fair hearing to the landowners would amount to deprivation of the citizen's fundamental right guaranteed under the Constitution.[31]

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[28] Maitreesh Ghatak and Parikshit Ghosh, *The Land Acquisition Bill: A Critique and a Proposal*, Economic And Political Weekly, Vol XLVI No 41, (Oct. 8, 2011), http://econ.lse.ac.uk/staff/mghatak/GG.pdf

[29] *Comparison of the Bill with the Recommendations of the Standing Committee*, PRS Legislative research, (May 17, 2012), http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/Comparaision%20of%20Standing%20Committee%20and%20Bill%20-%20LARR%20-%20FINAL.pdf

[30] *The Land Acquisition, Rehabilitation, and Resettlement Bill*, 2011, available at http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf

[31] *Urgency Plea for Land Acquisition Can't be Done Casually: Supreme Court*, Economic Times, (Apr. 1, 2012), http://articles.economictimes.indiatimes.com/2012-04-01/news/31270341_1_urgency-clause-land-acquisition-act-land-owners ; *Land Acquisition Under Urgency Clause Cannot be Casual, says SC*, India Today,(Jan. 5, 2012), http://indiatoday.intoday.in/story/land-acquisition-under-urgency-clause-cannot-be-casual-says-supreme-court/1/167385.html

Land acquisition in scheduled areas:

With respect to acquisition of land in scheduled areas, it is urged that acquisition of land belonging to tribals in all Scheduled Areas should be avoided, as this will lead to deprivation them of their basic rights. Moreover, decision-making with respect to developmental project in the Scheduled Areas should lie with the tribal Gram Sabhas, Panchayats and Tribal Advisory Councils. Therefore, in unavoidable circumstances, even if such a project is set up, it should be wholly owned and controlled by the tribals.[32]

Conclusion:

The Land Acquisition, Rehabilitation & Resettlement Bill 2011 is a well-intentioned bill but it suffers from serious dodges.[33] The land markets in India are bridled with inadequacies. There is a huge gap, both in terms of influence and information, between those wanting to acquire the land and the owners of that land. Therefore it becomes crucial for the government to secure a transparent and flexible set of rules, and ensure its enforcement.

Land Acquisition and Rehabilitation and Resettlement are two aspects that essentially should be seen as two sides of the same coin. Rehabilitation & Resettlement must always follow upon acquisition of land.[34]

The wide definitions provided under the bill leave a big room for malpractices. Any land can be acquired under the name of 'public purpose'. This is definitely against the interests of the landowners as this will lead to indiscriminate acquisitions.

Further, the shrewdness of bureaucrats is not hidden. They can effortlessly show that there exists a case of urgency and land is urgently needs to be acquired, thereby avoiding the social impact assessment process in the absence of which landowners might not be

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[32] EAS Sarma, *Money Doesn't Make the Landowner Fonder*, Tehelka, (Aug 6, 2011), http://www.tehelka.com/story_main50.asp?filename=Ws060811Money.asp

[33] Ramaswamy R. Iyer, *A Good Bill that Disappoints*, The Hindu, (Aug. 18, 2011), http://www.thehindu.com/opinion/lead/article2366476.ece

[34] *Ibid*

provided with the compensation and benefits they are entitled to under this act. Throwing landowners out of their land without following the process provided or caring about the impact they might face is more menacing.

Unarguably, acquisition of land affects the lives of many people. Even if someone is not the owner of the land, but his livelihood depends on the people who have been resettled at some other place, then it will have a direct impact on his earnings that will go unnoticed in the entire process of land acquisition. Also, providing the landowner with one job does not put him in the same position or even near to the previous one. Under the name of rehabilitation, shifting landowners to some other place and providing them with some other menial job which they might not even want to do but will have to take up to run the household is as ridiculous as expecting them to leave their current occupation and take up the job which the state finds suitable.

The Constitution of India provides for equality, equal opportunities, freedom to enjoy one's property etc. However, even after 64 years of independence, there are still some sections of the society who do not have access to such rights. Rights, wishes and needs of such people are not considered significant against the wishes of powerful people. It seems that the rural population is paying the cost of urbanization. The issue of land acquisition in India has to be addressed affectively as it severely affects the basic rights of the poor. If this Bill is to replace the old act, then the loopholes have to be filled. Therefore, the current Bill should not be passed without amending the flawed provisions.

"Abandoned" : The Plight of Indian Women Divorced Overseas

*Natasha Roy**

ABSTRACT

The phenomenon of wives abandoned by their NRI husbands has been growing invisibly for more than a decade. Nearly every Indian state has women deserted by NRI men who live in various foreign countries including Canada, UK, European and Middle Eastern countries, and the USA. While the fundamental motivation of such behaviour in men might be to dissolve an unwanted conjugal relationship, in all cases the main purpose of abandonment is to deliberately deprive women of financial and legal recourses to pursue justice. In India, family law allows one party of a married couple to contest divorce petitions even after receiving the divorce notice. A woman or her attorney may not comprehend that by refusing to receive or respond to a divorce notice from the US courts, she allows the divorce to be concluded by default and ex-parté after the required time has elapsed. Furthermore, used to the slow moving Indian legal system, many attorneys do not anticipate the fast pace of the US courts. As women fail to respond, appear in court, seek adjournment, or secure legal representation, they lose out on receiving maintenance, child support, rehabilitation support, and an equitable share of marital property.

The main aim of this paper is to explore the problems of desertion of married women by non-resident Indians overseas and to suggest suitable strategies to provide justice to the "victims of desertion", besides suggesting measures to control the "fraudulent marriages".

Keywords: Fraudulent marriage, NRI, divorce, conjugal rights, desertion

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Introduction: increase in the number of abandoned women across the country

The phenomenon of wives abandoned by their NRI husbands has been growing invisibly for more than a decade. Nearly every Indian state has women deserted by NRI men who live in various foreign countries including Canada, UK, European and Middle Eastern countries, and the USA.[1] The pattern of NRI wife abandonment falls broadly into three types:

a) A woman who is residing with her husband in a foreign country suddenly finds her husband has disappeared leaving her in the lurch;

b) A woman who has been residing abroad with her husband is either deceptively and/or coercively taken back to India and left there without her passport, visa and money and thus without any way of rejoining her husband;

c) A woman who is married before her husband migrates to a foreign country but is never sent sponsorship for a visa to join him. Alternatively a man who is already abroad may return to India to marry and then leave with promise to send for his bride. However the visa papers never arrive.[2]

Since a large number of such marriages take place hurriedly, mostly when men come back to India for a visit, the women have been popularly labeled "holiday bride", while the fundamental motivation of such behaviors in men might be to dissolve an unwanted conjugal relationship, in all cases the main purpose of abandonment is to deliberately deprive women of financial and legal recourse to pursue justice. Desertion of women is atrocious and can be extremely traumatic for the affected.[3]

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1 National institute of Public Cooperation and Child Development, *A study on desertion of married women by non resident Indians in Punjab and Andhra Pradesh,* accessed at http://nipccd.nic.in/reports/desertion.pdf on 25th September 2012

2 Shamita Das Dasgupta, *abandoned and divorced: The NRI pattern,* Infochange Women News and Features accessed at http://infochangeindia.org/women/features/abandoned-and-divorced-the-nri-pattern.html on 28th September 2012

3 Id

Conflict of laws regarding divorce in India and countries overseas

The issue of split jurisdiction becomes even more pronounced when the courts in the two countries involved have disparate laws and pass conflicting judgments. For instance, an abandoned wife in India may seek legal remedy by filing for the "restitution of conjugal rights". The 'Restitution of Conjugal Rights" law in India stipulates that when one spouse withdraws from the marriage without 'reasonable' excuse, the aggrieved party may petition in court to restore the marital relationship under Section 9 of the Hindu Marriage Act of 1955. The expectation is that the couple must give the marriage another try by living together in their matrimonial homes.[4] The burden of proof that that withdrawal from marriage was reasonable rests with the party who withdrew from it in the first place.[5] Indian courts have interpreted withdrawal from marriage as cessation of cohabitation by a married couple and provide for periodic payments by the withdrawing spouse to the holder of the conjugal rights petitioner if the decree is disobeyed; thereby, ensuring some degree of financial support for the abandoned spouse. However, in cases of transnational abandonment, an abandoned wife may file for restitution of conjugal rights in India and receive a decision in her favor, while a US court may concurrently grant an ex-parte divorce in response to the US resident husband's petition. In the US case the wife may end up without any monetary award and maintenance based on her non-participation in the proceedings. Case laws from the Indian High Court further highlight this conflict of jurisdiction.[6]

In *Harmeeta Singh v Rajat Taneja*[7], the Indian High Court passed an order of restraint against the husband to stop him from continuing with divorce proceedings in the US while

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4 Id

5 *When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court for restitution of conjugal rights land the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly*

6 Urjasi Rudra and Shamita Das Dasgupta, *Transnational Abandonment of South Asian Women- a new violence faced against women,* Manavi Occasional paper no.6, 2011, New Jersey, accessed at http://www.manavi.org/Transnational%20Abandonment%20of%20South%20Asian%20women-%20Final%20Version.pdf on 28th September 2012

7 (102 (2003) DLT 822)

a maintenance case was going on in India filed by the abandoned wife. The High Court asked the husband to present a copy of this order to the US court and observed that if he still obtained a divorce from the US courts, such a divorce would not be recognized in India. Since under Section 44A of the Indian Civil Procedure Code (CPC) the United States was not a "reciprocating territory", orders issued by a US court would not be automatically recognized by the Indian court. As per CPC, foreign decrees from non-reciprocating countries must be filed in Indian District courts to seek recognition and enforcement.[8]

The judgment in *Neeraja Saraph v Jayant Saraph*[9] was passed in the following facts- the appellant wife who got married to a software engineer employed in United States was still trying to get her visa to join her husband who had gone back after the marriage, when she received the petition for annulment of marriage filed by her NRI husband in the US court. She filed a suit for damages in such circumstances as she had suffered not just emotionally and mentally but had also given up her job in anticipation of her departure to the US. The trial court passed a decree of Rs. 22 Lakhs. The High Court in appeal stayed the operation of the decree pending final disposal on the condition of deposit of Rs. 1 Lakh with court. On appeal by the wife the Supreme Court modified the High Court's order in favour of the wife by enhancing the deposit amount to Rs. 3 Lakh. Even though the order was on a limited ground in an interim application, this case shows the feasibility of suit for damages by wife in such cases. It is also pertinent that the court passed some obiter observations, which were as follows:

"Feasibility of a legislation safeguarding interest of women may be examined by incorporating such provisions as –

1) No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court

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[8] Civil Procedure Code, Section 44A, 1908, *provides for execution of decreespassed by courts in a reciprocating territory . it lays down that where a certificate copy of decree of any of the superior courts of any reciprocating territory has been filed in a district Court, the decree may be executed in India as it has been passed by the District court. Government of India has notified Singapore, Malaysia, UK, New Zealand, Hong Kong and Fiji as reciprocating territories.*

[9] (1994) 6 SCC 461

2) Provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad

3) The decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreements like Section 44-A of the Civil Procedure Code which makes a foreign decree executable as it would be have been a decree passed by that court."[10]

Also, in India family law allows one party of a married couple to contest divorce petitions even after receiving the divorce notice. A woman or her attorney may not comprehend that by refusing to receive or respond to a divorce notice from the US courts, she allows the divorce to be concluded by default and ex-parte after the required time elapsed. Furthermore, used to the slow moving Indian legal system, many attorneys do not anticipate the fast pace of the US courts.[11] As women fail to respond, appear to court, seek adjournment, or secure legal representation, they lose out on receiving maintenance, child support, rehabilitation support and an equitable share of marital property. Even when an abandoned woman has lodged legal complaints in India either before or in response to her husband's legal case, courts in the us may be ignorant of or oblivious to such proceedings, thus allowing men to get away scot-free with an ex-parte divorce. Such jurisdictional disagreements and legal contradictions often jeopardize the financial and social rights of women who are not in a position to protect them in the first place. However, if there are no legal contradictions or split jurisdiction the Supreme Court of India has shown willingness to accept divorce judgments passed in a foreign country (Pashaura Singh v state of Punjab, November 13, 2009). It is not clear if the US courts will reciprocate.[12]

South Asian courts are cognizant of this social condition and are usually responsive to the needs of abandoned wives who request legal intervention to obtain maintenance from their reneging husbands. Conversely, the US courts tend to typically grant spousal support

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[10] Vakil no.1, *Marriages to Non-Resident Indians- A Wake-up call- Legal views,* accessed at http://www.vakilno1.com/LegalViews/marriages-to-non-residents-indians-nri-overseas-a-wakeup-call.html on 3rd October 2012.

[11] Supra Note 6

[12] Supra Note 6

based on age, the length of marital cohabitation and women making a case for their needs. Although there is a concept of rehabilitative alimony for short term marriages in most of the US states, it is not easy to obtain. The person claiming such maintenance must justify the need and explain how the money will be used to enable him/her to become self- sufficient. South Asian wives abandoned in their home countries, living only for short periods with their husbands and powerless to appear in the US courts to plead their interests are likely to be losing out on any sort of financial maintenance or compensation agreements. They are especially disadvantaged in the US legal system unless the courts are fully informed of South Asia's unique cultural perspective and socio-economies realities. Furthermore maintenance decisions made in women's favor in Indian courts are nearly impossible to execute in the US, often because the men have disappeared without a trace and also because the US legal system tends to ignore decisions of Indian courts.[13]

Legal Services provided to women after divorce : comparative study

When abandoned in the US it is possible to find legal representations. Each US state has non-governmental organizations and free legal aid services that facilitate all women's access to the legal system and ultimately, to assert their claims too an equitable financial division of marital property. However women sent back to india and abandoned have far less access to legal recourses and financial resources. Governments, legislators, judiciary and social activists in India and the US are still yet to catch up to the fats changing realities in a global world. The traditional notion that a husband and a wife should reside in the same household and in the same geographical locations is now long gone. Due to increased worker mobility across the globe, families may not only live in different household they may not even inhabit the same continent. To regulate people's conduct and relationships in such conditions, a new set of appropriate private international laws would have to be generated and implemented.[14]

The Hague Conference on Private International Law (popularly known as the Hague Conference) an intergovernmental organization of nearly seventy member states serves as

[13] Id

[14] PILs and Cases, *Women's Justice,* Human Rights Law Network, accessed at http://www.hrln.org/hrln/womens-justice-/pils-a-cases.html?start=10 on 4th October 2012.

one of the primary reference points for multilateral conventions governing international family law dispute. A number of Hague Conventions offer legal remedies that could provide abandoned women in India with financial relief, custody, divorce and ultimately a semblance of justice. However like all international agreements, Hague Conventions are meaningless unless country governments sign and agree to abide by these. India and the US are not signatories to many of these conventions. [15]

Hague Convention abolishing the requirements of legislations for foreign public documents (the Apostille Convention), 1961- India ratified this convention in 2004 to facilitate the circulations of public documents across state boundaries by replacing the formalities for authenticating signatures and seal/ stamps on public documents such as a degree, divorce decree and court judgments with the issuance of an Apostille Certificate by consular or diplomatic agents. [16]

Conventions on the Service Abroad of Judicial and Extra Judicial Documents in civil and commercial matters.- Canada, India, Sri Lanka, UK and the US as well as a host of other countries have ratified the 1965 Convention. India ratified this convention as later as 2006. It provides for channels of transmission of legal and other documents from one contracting state to another. [17]Although it does not cover substantive rules of services, the Convention protects a defendant (read :women) from a default judgment by ensuring that if the defendant cannot appear before the court, judgment is not issued unless the document was served properly. That is the service is valid by a method approved by the laws of the defendant's country or the document is actually delivered to the defendant's residence by another method prescribed by the convention. In addition, proper service entails providing the defendant with sufficient time to respond to the notice. The Convention also protects the defendant after a default judgment is passed by allowing him/her to appeal beyond the permitted period so far as the defendant.

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[15] National Commission for women, *Report on problems relating to NRI marriages-Legal and other interventions on NRI marriages,* accessed at http://ncw.nic.in/PDFFiles/Book-NRI Marriage.pdf on 1st October 2012.

[16] Id

[17] Id

1) Appeals within a reasonable time after the default decision is issued

2) Was not notified properly, and/or

3) Was not allowed sufficient time to respond to the notice[18]

The protection of a defendant's right to a fair trial provisioned by this convention is extremely useful for transnational abandoned south Asian women as they tend to have a very little prior knowledge of the proceedings and / or access to legal services to seek meaningful representation in North American courts. By establishing systematic channels and processes of transmission of judicial and extra judicial documents which include divorce notices and decrees the convention attempts to amend the system that allows ex-parte divorces without properly notifying the defendant spouse in another country. Furthermore by allowing the defendant spouse to appeal even after the permissible time for appeal has expired, the convention provides abandoned women who may remain ignorant of the proceedings and judgment until the case is over with access to justice. Although most states have limited the for such appeals to one year from the date of the judgment the convention still offers hope to deceptively abandoned wives. According to Article 10 of the Convention contracting states have the freedom to send judicial documents through postal channels directly to the defendant if the destination state does not raise objections. However this leniency might be counter-productive as the service documents (such as notice for a divorce proceeding) might not reach the respondent women on time via normal post and stands the chance of being intentionally intercepted. Thus, it is imperative the US and South Asian countries that are signatories to this Convention examine and collaborate on the rules regarding transmissions of service documents. [19]

Transnational abandonment : the policy in India

Transnational abandonment of wives is a particularly challenging issue because of the legal complications it generates, the difficulties in arriving at a just solution and the complexities in dealing with cultural as well as legal expectations of different nations. Unfortunately the

[18] Supra Note 15

[19] Supra Note 15

desertion of wives has grown significantly in the make of increased mobility of Indian workers. As Indian men and women migrate to foreign countries the enjoyment and infringement of their rights occur in transnational spaces- that is, space that extend beyond national boundaries and encompasses psychological, legal, emotional cultural and economic areas spanning different nations. Due to such straddling of boundaries special issues and problems arise for individuals and families who live in transnational domains. Changes in international advocacy, law and policy are required to ensure justice and viable life, especially to women in this situation.[20]

In response to the rising number of abandoned women, the Government of India (GOI) convened several workshops and in 2006, the National Commission for Women released a report on the problem of wives abandoned by NRI grooms. The concern for women left high and dry by NRI men ultimately led the GOI to create a fund that awards $1000 to abandoned Indian wives towards legal and counseling services. The objective of the scheme is to provide some financial assistance to needy women in distress who have been deserted by their overseas Indian spouses for obtaining counseling and legal services. [21] The services were to be provided with the help of women's organizations empanelled with the Indian Missions in the U.S, U.K, Canada, Australia, New Zealand, and the Gulf countries. The eligibility criteria for the assistance were:

1. The women were Indian passport holders;
2. The marriage was held, solemnized and registered in India;
3. The women were deserted in India or within five years of reaching the host country;
4. The divorce proceedings has been initiated within five years of marriage;
5. Ex parte divorce had been obtained within ten years of marriage and a case of alimony and maintenance was to be filed; and
6. There were no criminal charges pending against the woman.[22]

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[20] Supra Note 6

[21] Supra Note 6

[22] Supra Note 15

The total amount of assistance was intended for initial cost of filing and documentation fees. Unfortunately, the amount of individual assistance allocated by the GOI is pitifully insufficient for meaningfully pursuing any legal case in the U.S. Furthermore, the bureaucratic requirements to access the assistance are too complicated for women or NGOs to pursue it successfully. Consequently, the implementation of this scheme has been slow or nonexistent. South Asian women's groups in the U.S have provided feedback to the Indian Consulate on how the scheme could be provided to meet the unique and special needs of abandoned Indian women. In addition to the assistance fund, the GOI has instituted a uniform registration process to record marriages solemnized in India. The registration process is to track overseas grooms who desert their wives and initiate legal proceedings against them.[23]

Lying on the registration form is punishable under the Indian Penal Code. Furthermore, this registration is to be followed up with a database of all marriages to deter habitual offenders. The effectiveness of the registration is yet to be tested. In January 2012, the GOI Ministry of Women and Child Development proposed that Indian women who are married to non- resident Indians would be issued two passports when they leave the country. The second passport would include information about a woman's NRI spouse, serve as her proof of marriage, and be deposited with the India Embassy in the country where she is taken to reside. The move has been contemplated in response to the complaints of women who are abandoned abroad by their husbands. Since NRI husbands often confiscate their wives' travel documents (e.g., passport and visa) when they desert them, making it difficult for the women to return to their home country, this policy is supposed to provide them with some protection. However well meaning, such a change in policy does not come close to effectively addressing the thorny problems raised by women who are transnationally abandoned by their spouses. Issuing dual passport might help Indian women who are abandoned abroad to get back to their families in India, but it does not attend to the difficulties of women who are abandoned in India while their NRI husbands obtain ex parte divorces in the U.S. Neither does it enhance women's abilities to secure legal representation to protect their in U.S. courts. Losing one's passport and visa, although

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[23] Supra Note 14

frightening to the holder when it occurs, is only a temporary inconvenience, as governments can reissue these at the individual's request.[24]

- Ministry of Overseas Indian Affairs has brought out a guidance booklet on "Marriages to Overseas Indians" which contains information on safeguards available to women deserted by their NRI spouses, legal remedies available, authorities that can be approached for redressal of grievances.
- A pamphlet entitled "Thinking of the marriage of your daughter with an NRI?" has also been brought out by the Ministry highlighting the precautions to be taken before entering into marriage alliance.
- Apart from this, National Commission for Women (NCW), the coordinating agency at the National level for dealing with the issues pertaining to NRI marriages has brought out a pamphlet entitled "Problems Relating to NRI Marriages- Dos and Don'ts". It describes the problems related to NRI marriages and suggests precautionary dos and don'ts for Indian women considering marriage to a Non-Resident Indian (NRI) or a person of Indian Origin (PIO).[25]
- NCW has also brought out a report on problems relating to NRI marriages, titled "The 'No where' Brides."[26]

Conclusion and Suggestion.

We must acknowledge that one of the biggest hurdles transnational deserted women face is their inability to access legal resources and resources in a foreign country. The majority of women accept ex parte divorce decisions because of their inability to appear in US courts to plead their interests and to testify on their experiences of personal and social hardships. Even when women are eager to find representation for themselves in court, they tend to fail due to insufficiency of funds available to them for travel, room and board in

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[24] National Commission for women , *Problem relating to NRI marriage, accessed at* http://ncw.in/pdffiles/nridodont.pdf on 2nd October 2012

[25] Initiatives on safeguards of deserted NRI women, accessed at http://iasyes.in/attachments/article/313/Initiatives%20on%20safegiards%20of%20of%Deserted%20NRIWomen.pdf on 2nd October 2012

[26] Id

U.S., and attorney fees. Some of this burden might be eased if women's organizations can collaborate to develop a pool of attorneys who would give their services need to be familiar with local and international laws that might provide abandoned women with justice and a fair legal hearing. U.S. laws differ from state to state, it is virtually impossible for one person in one particular state to deal with legal cases in all 50 states. The allocated funds might be better spent by developing a network of legal experts across the U.S. to assist transnationally abandoned women, supporting judiciary education in different states, and trying to test cases in one or two targeted states to create strong case laws. Such case laws would inform attorneys in different states and might ultimately bring about necessary legal changes to protect women from unjust abandonment. [27]

Suggestions for policy change

As reflected in this paper, there is a clear and urgent need for a comprehensive review of existing national, international human rights instruments, multilateral and bilateral agreements impacting family law. Upon completion of such a thorough review, affected states should consider ratifying bilateral or multilateral agreements that address the issue of transnational abandonment, split jurisdiction and recognition and enforcement of decisions related to divorce, maintenance obligations and so on. Laws that are relevant to marriage, divorce, spousal maintenance and alimony and recognition of judicial decisions originating in foreign courts must also be implemented properly. Setting up cooperative international systems for enforcement of judicial decision related to transnational abandonment and/or divorce, custody and maintenance obligation is also crucial for remedying the sufferings of abandoned women.[28]

Since one of the most important issues for abandoned women accessing legal recourses and representation is financial insolvency, a policy could be set that the person who initiates the court case must pay for the defendant's travel , room and board during the proceedings and attorney fees. [29]This would not allow women to appear in court in person to plead

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[27] Id

[28] Supra Note 14

[29] Supra Note 15

their cases it might discourage men from believing that they can get away with ex parte divorces without any repercussions. Courts could also install a procedure of checking directly with the defendant whether divorce papers and notice of appearances have been properly served. Women often receive these papers too late to respond or these are served improperly. Finally, Consulates could begin a practice of requiring all women who receive to travel to the US to go through a seminar where they are informed of their legal rights and social services available in the US. During this time, they could be given package information to help them in future if something untoward happens. [30]

[30] Supra Note 25

Power to Grant Pardons : Controversies and Contradictions

Neha Tripathi *

ABSTRACT

The power to grant pardon to a person accused/convicted of committing an offence has been a prerogative of the executive (Head of the State) since ancient times. It has existed in various forms in every politico-legal system of the world as a protection against miscarriage of justice. No wonder therefore, that in the era of written constitutions, this prerogative has been incorporated as a part of the constitutional scheme in almost all written constitutions of the world. The Indian Constitution is no exception to this rule. Articles 72 and 161 confer on the President and the Governor respectively, the power to grant pardons, reprieves, respites, commute sentences etc. However, the exercise of this power has been a subject of controversy, more so, in recent times, and has been subjected to scrutiny of courts on numerous occasions. This paper attempts to analyse some of the major controversies surrounding the exercise of this power, in the context of the constitutional and statutory position in India, with reference to the comparative position on the issue, wherever necessary.

Keywords: Pardoning power, Constitution, Executive, Conviction, Supreme court

HISTORY OF THE PARDONING POWER

ANGLO-AMERICAN POSITION

The prerogative of mercy made its debut on the statutory rolls of the Anglo-Saxon monarchs.[1] The power to pardon appeared in the laws of Alfred (871-901), and was later recognized

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[1] William F. Duker. The President's Power to Pardon: A Constitutional History. 18 William and Mary Law Review; Issue 3; (may be accessed at: http://scholarship.law.wm.edu/cgi/viewcontent.cgi?

in the laws of King Edmund (940-946), King Ethelred (978-1016), and Cnut (1017-1035). King Edgar's laws (959-975) brought notorious thieves and even traitors, within the jurisdiction of his prerogative of clemency.[2] The Norman conquest of England[3] saw incorporation of power to grant pardons into the Codes of William the Conqueror (1066-1087). His son Henry I (1100-1135) further enlarged the scope of this power, to facilitate the expeditious administration of justice.[4] In a society with no other means of flexibility, the pardon served as the sole instrument of justice for those who should not be punished.[5] Thus, subjects, which could not be acquitted by the courts, required the King's grace.[6]

The Members of Parliament however, were not satisfied with such a liberal recourse to pardons, and through a series of petitions as well legal measures, they tried to prevail upon the king to exercise his grace more prudently.[7]

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article=2444&context=wmlr&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.in %2Furl%3Fsa%3Dt% 26rct%3Dj%26q%3Dwilliam% 2520and%2520mary% 2520law% 2520review%253B%2520volume%252018% 253B%2520issue%25203%253B%2520article %25203%253B%2520the% 2520president%25E2%2580% 2599s%2520power%2520to%2520pardon%253A%2520a%2520constitutional%2520history.%2520% 26source%3Dweb%26cd%3D1%26ved% 3D0CBsQFjAA%26url% 3Dhttp%253A%25 2F%252F scholarship. law.wm.edu%252Fcgi%252 Fviewcontent.cgi%253Farticle% 253D2444%2526context%253Dwmlr %26ei%3DW3ivTqjuNIbAhAeRxMjwAg%26usg%3DAFQjCNHRj61wN-dbgAiA8zv35Zrhx0rE4A#search=% 22william %20mary%20law%20review%3B%20 volume%2018%3B%20issue%203%3B%20article% 203%3B%20 president%E2%80%99s% 20power%20 pardon%3A%20constitutional%20history.%22. Last visited 21/10/2011]. Also see, Lord Hailsham (ed.) Halsbury Laws of England. Volume 8(2) Butterwoths, London: Fourth Edition (Reissue), 1996; P. 485 (para 426); *U.S v. Wilson [32 U.S. 150 (1833)]*.

2 Id.

3 The Normans conquered England after the Battle of Hastings, in 1066 A.D.

4 *Supra*; note.1.

5 *Supra*; note 1. For instance, in 1249, four year old Katherine Passcavant was imprisoned in the abbot of St. Alban's gaol because, in opening a door, she accidentally pushed a younger child into a vessel of hot water, killing the child.

6 *Supra*; note.1

7 The attempt by the British Parliament to curtail the liberal clemency policy of the Crown started in 1328 in the Statute of Northampton and in 1340, the lawmakers warned that no pardon should be granted by the King in violation of his oath or in violation of the statutes of Parliament. In 1389, the Parliament tried to debase the King into a more prudent posture. Parliament soon realized the futility of the Act, and in 1403 enacted a statute affixing a financial penalty on the intermediary. [*Supra*; note.1].

By the middle of the sixteenth century, the prerogative of the pardon became centralized in the King, and the royal power to pardon covered,

"the authority to pardon or remit any treasons, murders, manslaughters or any kind of felonies…or any outlawries for any such offenses…committed…by or against any person or persons of this Realm."[8]

The King in his discretion could attach conditions to a pardon. As Blackstone summarized,

"*...the King may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend*…."[9]

Thus, prior to the seventeenth century, the Monarch's prerogative to grant pardon was absolute. It was only in the late seventeenth century that limitations on this power appeared and the relative power of the Council of Ministers, on whose advice the King acted, so increased that an enduring limitation on the power was established, which continues to be the case even today.[10]

When England broadened its boundaries to the "New World," the pardoning power followed. The prerogative was delegated by the Crown to the executive authority in the colony, with few limitations on the power.[11] In the United States of America, after the Revolutionary War, and with the commencement of the Constitution making, the debate on whether to have a power to grant pardons and in whom it should vest started.[12] In the

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8 *Supra*; note.1

9 *Supra*; note.1

10 Lord Hailsham (ed.) Halsbury Laws of England. Volume 8(2). Butterwoths, London: Fourth Edition (Reissue), 1996. P. 485(para 826). Also see, *R v. Foster [1984] 2 ALL ER 679, 687, [C.A] (per Watkins LJ)*.

11 *Supra*; note.1. Also see, Vanessa K. Burrows. An Overview of Presidential Pardoning Power [CRS Report for Congress, January 7, 2009] available on http://www.fas.org/sgp/crs/misc/R40128.pdf (Last accessed: 21/10/2011).

12 Vanessa K. Burrows. An Overview of Presidential Pardoning Power [CRS Report for Congress, January 7, 2009] available on http://www.fas.org/sgp/crs/misc/R40128.pdf (Last accessed: 21/10/2011).

Philadelphia Convention (1787)[13] although there was no mention of power to grant pardons, Charles Pinckney, Alexander Hamilton, and John Rutledge fought for and won inclusion of this power. Hamilton explaining the importance of this power, observed,

"The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind."[14]

The U.S. Constitution therefore grants the power to pardon to the President. In keeping with the feeling, expressed in Hamilton's words, the power to pardon is virtually unqualified:

The President ... shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.[15]

POSITION IN INDIA

In India, ancient times, it was the King's duty or dharma to impose proper and just punishment on the wrongdoer to maintain an order on the society, which also included mitigation of punishment if it established peace and did justice.[16] This included grant of pardons, as well. However, '*a pardon may be given in accordance with the opinion furnished by the assembly of persons learned in the Vedas.*'[17]

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13 The Constitution of the United States of America is the outcome of this Convention.

14 *U.S v. Wilson [32 U.S. 150, 155 (1833)]; Ex. Parte Grossman [260 U.S.87, 121(1925)]*

15 U.S. CONST: ARTICLE II, SECTION. 2.

16 M. Rama Jois. Legal and Constitutional History of India; p.616-617. [New Delhi. Universal]; (Reprint),2009.

17 Id.

Before the commencement of the Indian Constitution, the law of pardon in British India was the same as in England since the sovereign of England was the sovereign of India. The Government of India Act, 1935, recognized and saved the Prerogative of the Crown, by delegation to Governor-General to grant pardons, reprieves, respites or remissions of punishment, or to suspend, remit or commute sentences of death.[18] This prerogative was also delegated to the Governor-General by the Letters Patent creating his office, empowering him to grant to any person convicted by any criminal offence in British India, a pardon either free or subject to such conditions as he thought fit.[19]

In India, like the Unites States of America, the power to pardon is a part of the constitutional scheme.[20] The Constitution of India confers the power on the President of India and the Governors of States.[21]

A. NATURE OF POWER

Because of the broad language of Article II, Section 2[22], one has to look at the judicial interpretation, of the provision for a clear understanding of its nature. Although the Constitution confers the pardoning power on the President in general terms, the judiciary has served as the supreme interpreter of the scope of constitutional powers since *Marbury v. Madison*[23]. In *United States v. Wilson*[24], Chief Justice Marshall explaining the nature of the power, observed,

"The Constitution gives to the President, in general terms 'the power to grant reprieves and pardons for offences against the United States. As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into

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18 Government of India Act, 1935; *Section 295.*

19 Seervai, H.M. Constitutional Law. Vol. 2; pp. 2093. [New Delhi. Universal]. 4th Edition (Reprint), 2004

20 Id. Also see *Biddle v Perovich [274 U.S.480, 486 (1927)* (per Holmes, J)].

21 Id.

22 U.S. CONST: ARTICLE II, SECTION. 2.

23 *5 U.S. 137 (1803)*

24 *32 U.S. 150 (1833)*

their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it[25]*...A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempt the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is' intended, and not communicated officially to the court. It is a constituent part of the judicial system that the Judge sees only with Judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially.*[26]

The above observation of Marshall C. J. was followed in a *'Ex parte Wells'*[27], by Wayne J. where the learned Judge examining the historical concept of the power of pardon, stated that at the time the United States separated from Great Britain, they took with them the various forms as may be found in English Law Books and used them to suit the conditions in America.[28]

In *United States* v. *Klein*[29], it was held that the constitution has given separate powers to all the three branches of government, and if legislature makes a statute which limits the power of the executive to pardon a person from an offence committed by him, then it such a case it is infringing upon the power of the executive by the legislature, and thus it would be unconstitutional, meaning therefore, that there can be no legislative control over the pardoning power of the executive.[30]

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[25] *32 U.S. 150,160,161 (1833). Also see, In Re: Maddela Yerra Channugadu; AIR 1954 Mad 911, 917; K.M. Nanavati* v. *State of Bombay*, AIR 1981 SC 112,115,116; *Maru Ram v. Union of India AIR 1980 SC 2147, 2169, 2170; Kehar Singh & Ors v. Lt. Governor of Delhi [(1989) 1 SCC 204, 217];. Narayan Dutt v. State of Punjab[(2011) 4 SCC 353,354,355].*

[26] Id.

[27] *59 U.S. 307, 311 (1855).*

[28] Wayne.J, also referred to Lord Coke C.J's observations- *"A pardon is said to be a work of mercy, whereby the kind, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical"[See, Ex Parte Wells. 59 U.S. 307,(311,312(1855)]*

[29] *80 U.S. 128 (1871)*

[30] *80 U.S. 128,147 (1871)*

In *Balmukand v. King Emperor*[31], the Privy Council stated-

"*The tendering of advice to His Majesty as to the exercise of His* ***prerogative of pardon is a matter for the Executive Government****...*"

The above observations clearly show that tendering of pardon is an executive act.

B. EFFECT OF GRANT OF PARDON

In *United States v. Wilson*[32], Chief Justice Marshall declared that, a pardon

"*exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.*"

The approach of the Court that a pardon merely remits punishment was repudiated during the Reconstruction era. In *Ex Parte Garland*[33], Chief Justice Field, declared that

"a pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."[34]

The issue related to the civil and political rights of the offender was discussed in the case of *Knote* v. *United States*[35]. The court said that once the pardon has been granted to a particular person, then all his civil and political rights are restored, which were

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[31] *(1915) 17 BOMLR 487. The Law Reports- Vol XLII (1914-1915) Indian Appeals(p. 134)*

[32] *32 U.S. 150,159,160 (1833)*

[33] *71 U.S. 333 (1866)*

[34] *71 U.S .333,334 (1866)* . Also see, *In Re: Maddela Yerra Channugadu; AIR 1954 Mad 911, 917.*

[35] *95 U.S. 149 (1877)*

suspended earlier. However, the court said that the person cannot be compensated for the loss he suffered during the time of confinement.[36]

C. ISSUES SURROUNDING THE EXERCISE OF PARDONING POWER

1. WHEN CAN A PARDON BE GRANTED?

It appears as though a pardon can even be granted against the will of the grantee. Originally, however, a pardon could be refused. In the case of *US v. Wilson*[37] the Supreme Court stated that a pardon is like a gift that can be refused, upholding the notion, stated earlier in *Burdick v. US*[38]. However, the reversal of this so-called "acceptance doctrine"[39] started when in *Biddle v. Perovich*[40], the Court held that the commutation of a death sentence to a life sentence could not be refused.[41] Holmes.J, speaking for the Court observed,

"A pardon is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[42]

In *'Ex parte A. H. Garland'*[43] Field J. in delivering the opinion of the Court, after reviewing the facts and circumstances which arose for consideration in that case, makes the following general observation:

"*The Constitution provides that the President 'shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment'.*

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36 *95 U.S. 149, 154,155 (1877).*

37 *32 U.S. 150,161 (1833).*

38 *236 US 79 (1915).* Also see, Sandford Levinson, Akhil Reed Amar (et al). Process of Constitutional Decision Making. P 453-460. [ASPEN, New York]. Fifth ed.2006.

39 See, Vanessa K. Burrows. An Overview of Presidential Pardoning Power [CRS Report for Congress, January 7, 2009] available on http://www.fas.org/sgp/crs/misc/R40128.pdf (Last accessed: 21/10/2011)

40 *274 US 480 (1927)*

41 *274 US 480,486 (1927).*

42 Id.

43 *71 U.S .333 (1866)*

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law"[44]

A most illuminating exposition of the law relating to the exercise of the power of pardon by the President of the United States is contained in the judgment of *Taft, C. J. In 'Ex parte Grossman*[45]*',* where the learned Chief Justice has expressed the opinion that the pardoning power of the President under the United States Constitution extends even to criminal contempt of court.[46] The learned Chief Justice observed,

"Construction of "offences against the United States" in the pardon clause as including criminal contempts accords with the ordinary meaning of the words, and is not inconsistent with other parts of the Constitution where the term "offence" and the narrower terms "crimes" and "criminal prosecutions" appear."[47]

This decision shows the extent of application of the power to grant pardons.

The Madras High Court in *In Re: Maddela Yerra Channugadu and Ors*[48]*,* said,

"In British India the powers of pardon were exercised by the Governor General or the Governor exercised as a delegate from the Sovereign in Great Britain. Therefore, if in England and Scotland the Sovereign can exercise the prerogative of mercy, reprieve or pardon, even before there is a final decision on the guilt or innocence of an accused person, then it follows that the same power can be exercised by the Governor General or Governor."[49]

Relying upon Halsbury's Laws of England and Handbook of American Constitution law, by Rottachaefer, the Court said [50],

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44 *71 U.S .333,334(1866)*

45 *267 U.S. 87 (1925)*

46 *267 U.S. 87,115 (1925)*

47 Id.

48 *AIR 1954 Mad 911, 917.*

49 *AIR 1954 Mad 911, 917.*

50 Id.

"Pardon may, in general be granted either before or after conviction…The pardon power includes not only that of granting absolute and unconditional pardons, but also that of commuting a punishment to one of a different sort than that originally imposed upon a person. It may be exercised at any time after the commission of an offence, either before legal proceedings are begun or during their pendency, and either before or after conviction.[51]

In light of the above reasoning, the Madras High Court held that the power under Article 72 and Article 161 could be exercised either before or after the trial. This decision was later confirmed by the Supreme Court in *K.M. Nanavati* v. *State of Bombay*[52]and *Ramdeo Chauhan* v. *State of Assam*[53].

The researcher would like to submit that the plain and simple reading of the Article 72(1) itself makes it clear that the power can be exercised only when the person has been *convicted* of an offence, however as stated above, the Supreme Court has held that power can be exercised anytime before or after conviction. This, it is submitted, goes against the express words of the Constitution. How can a person be granted a pardon before he has been held guilty or convicted for an offence? The view adopted by the Supreme Court is greatly influenced by the American and the British position, however, it negates the very presence of the express provision in the Constitution. This proposition of the Supreme Court, attempts to override an express limitation on the power, thereby going against the very idea of *Constitutionalism*. Every provision must be interpreted keeping in view the express words employed and the very idea behind incorporating such provisions.

2. POWER TO GRANT PARDONS IN CASES OF DEATH PENALTY

Art. 72 (1) (c) expressly provides that the President's power extends to pardoning sentences in all cases where the sentence is one of death. This provision, read with the proviso contained in Art. 72(3), has raised a question whether the Governors of States also have the power to pardon a sentence of death. In the Constituent Assembly, when Dr. B.R.

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[51] Id.

[52] *K.M. Nanavati* v. *State of Bombay*, AIR 1981 SC 112,115,116

[53] *Ramdeo Chauhan* v. *State of Assam* , (2001) 5 SCC 714, 716,717.

Ambedkar was asked by the members of the Constituent Assembly to explain the powers of President, in terms of Article 72 (Draft Article 59) and the Governor in terms of Article 161 (Draft Article 141); he explained it thus:-

"....the power of commutation of sentence for offences enacted by the Federal Law is vested in the President of the Union. The power to commute sentences for offences enacted by the State Legislatures is vested in the Governors of the State. In the case of sentences of death, whether it is inflicted under any law passed by Parliament or by the law of the States, the power is vested in both, the President as well as the State concerned. This is the scheme."[54]

Eminent jurist, Mr. H.M.Seervai, holds[55], that in order to clearly understand and appreciate the scheme of Article 72, it is to be remembered that the power of Governors to pardon may be statutory or constitutional. A sentence of death may be inflicted for offences under laws, made in respect of matters in Lists I, II and III of Schedule VII, so that if the only power of the President to pardon a sentence of death was to be derived from Art 72(1)(b), he would have no power to pardon a sentence of death passed for an offence against a law made in respect of matters in List II. As it was intended that he should have a power to pardon a sentence of death inflicted under any law in force in India, it became necessary to make an express provision omitting all reference to the executive authority of the Union. Lest it be contended that the conferment of this express power impliedly repealed the statutory powers conferred on Governors to commute, remit and reprieve a sentence of death, e.g. under s. 402, Cr.P.C., Art 72(3) expressly saves such a statutory power.[56] But when the Governor exercises a constitutional, and not a statutory power, his authority is derived from Art. 161 and it enables him to pardon all offences against all laws relating to a matter to which the legislative authority of the State extends. As the Penal Code and the matters contained therein are a subject of concurrent legislation (entry 1, List III) and as the Penal Code is the general law of crimes in India and provides for sentences of death, it is clear that the Governors' power of pardon under Art. 161 extends to pardoning a

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54 Constituent Assembly Debates, Vol. VII; p. 1118-20.

55 Seervai, H.M. Constitutional Law. Vol. 2; P. 2101-2103. [New Delhi. Universal]. 4th Edition (Reprint), 2004

56 Id.

sentence of death.[57] Now, sub-clause (3), of Article 72, embodies in it, the present practice, which is in operation, under which the power of commuting the death sentences is vested both in the Governor as well as in the President. The Drafting Committee has not seen very strong arguments for taking away the power, to pardon sentences of death, from the Governor. This power, concurrently available to a Governor is in fact a safeguard provided. Supposing in the case of a sentence of death the mercy petition is rejected by the Governor, it is always open, under the provisions of this article, for the offender to approach the President with another mercy petition and try his luck there.[58]

The above discussion therefore, shows that reading Article 72(1) (c) and Article 72(3) along with Article 161 clearly lays down the position that theoretically the Governor has concurrent powers to grant pardons in cases where a sentence is one of death. However, in the absence of any judicial dicta on this issue, no conclusive position can be stated. The situation, in practice, as it exists in the country is that all petitions for pardons, in cases of death penalty, have been decided by the President on aid and advice of Council of Ministers.

3. PRESIDENT TO BE BOUND BY THE AID AND ADVICE OF COUNCIL OF MINISTERS

In *Maru Ram v. Union of India*[59], the Court stated that,

"Court having authoritatively laid down the law in Shamsher Singh's case [60] *...that in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the Council of Ministers."*[61]

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[57] Id.

[58] Id.

[59] *AIR 1980 SC 2147, 2169, 2170.*

[60] *AIR 1974 SC 2192, 2209, 2212.*

[61] *AIR 1980 SC 2147, 2169, 2170.*

The researcher respectfully submits that this proposition, which is the result of conjoint reading of *Maru Ram*[62] and *Shamsher Singh*[63] cases, has been a source of major controversies. It, on one hand has lead to wrong persons being granted pardon, on narrow politcal considerations. The best illustrations are *Swaran Singh's case*[64], *Satpal's Case*[65], and *Epuru Sudhakar's*[66] *case.* On the other hand it is a major cause for delay in disposition of mercy petitions, because the Council of Ministers take their own sweet time in tendering any advice to the President, after weighing their political gains and losses. The latest cases of Devinder Pal Singh Bhullar and Afzal Guru, where there was inordinate delay, in the disposal of the mercy petitions, clearly illustrate this point.[67] The very purpose of this power stands defeated in such a scenario.

It is submitted that, this power has effectively being taken away from the President and is now more of a ministerial function, performed on the instructions political party in power. This in turn violates the oath of the President, in the sense that if he acts on the aid and advice of Council of Ministers and grants pardon to a wrong person, his oath to protect and defend the Constitution[68] will be violated and if he acts in disregard of that aid and advice, then also he would be liable for not acting in accordance with the Constitution.

Moreover, the Supreme Court has itself held that any delay in disposition of cases violates Article 21[69]. The researcher also submits that a delay in disposing a mercy petition is also

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62 Id.

63 *AIR 1974 SC 2192, 2209, 2212.*

64 *(1998) 4 SCC 75, 79.*

65 *AIR 2000 SC 1702,1705*

66 *AIR 2006 SC 3385, 3395.* Also see, *Narayan Dutt v. State of Punjab[(2011) 4 SCC 353, 354, 355].*

67 *"Explain delay in deciding Bhullar's mercy plea: Supreme Court to Centre".* [Available at: http://www.thehindu.com/news/national/article2493286.ece [Last accessed: 17/10/11].

68 IND CONST; ARTICLE 60.

69 *T.V.Vatheeswaran v. State of T.N. (1983) 2 SCC 68, 77.* However, a contrary view was taken in *Sher Singh & Ors v. State of Punjab AIR 1983 SC 465,* which was affirmed by a five-judge Constitutional Bench in *Smt. Triveni Ben & Ors v. State of Gujarat AIR 1989 SC 1335.*

a violation of Article 20 (2)[70], as delay in deciding a mercy petition and then its rejection, actually amounts to that person being punished twice for the same offence.

Moreover, it is submitted that the Supreme Court in *Shamsher Singh's case*[71], did not lay down any exhaustive list of powers/functions which the President may perform in his discretion.[72]

4. Judicial Review

In *Kehar Singh's* case[73] Chief Justice Pathak maintained that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram's* case[74], wherein it was held, :-

"It is the pride of our constitutional order that all power, whatever its source, must, in its exercise, anathematise arbitrariness and obey and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power."[75]

However, in *Swaran Singh* v. *State of U.P*[76], the Supreme Court invalidated the remission of sentence by the Governor because some material facts were not brought to the knowledge of the Governor. Similarily, in *Epuru Sudhakar v. Govt of A.P.*[77] the Court, reaffirming *Maru Ram*'s[78] case held that the considerations to be taken into account while granting pardons should be relevant and not arbitrary or capricious. It therefore set aside a remission

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[70] IND CONST: ARTICLE 20 (2)- *"No person shall be prosecuted and punished for the same offence more than once."*

[71] *AIR 1974 SC 2192.*

[72] *AIR 1974 SC 2192, 2212, 2214*

[73] *(1989) 1 SCC 204, 217.*

[74] *AIR 1980 SC 2147, 2169, 2170.*

[75] Id.

[76] *(1998) 4 SCC 75, 79*

[77] *AIR 2006 SC 3385, 3395.*

[78] *AIR 1980 SC 2147, 2169,2170*

by the Governor on irrelevant considerations. However, this proposition does not seem to hold much ground if the President tenders a pardon on political affirmations, a clearly irrelevant consideration, acting on the advice of Council of Ministers. The researcher submits that it is difficult to harmonise the two apparently contradictory positions that the Court appears to have taken.

CONCLUSION

In the light of above discussion the researcher would like to maintain that the nature of the power and the purpose for which it has been bestowed should always be kept in mind and the sanctity be maintained while exercising such power. Moreover, a stringent approach by the Supreme Court needs to be maintained so that with the proper check and balance system in place, effective exercise of power is ensured to meet the ends of justice.

"What's in a name?" - Celebrity Rights : Need for Recognition

Shalini Wunnavu*

ABSTRACT

In today's parlance, the "name" of a celebrity is of great economic value; within celebrity endorsements as the most popular form of advertising in India, the protection of the intellectual property associated to a celebrity has a paramount significance in the field of both Trademark and Copyrights. There is a need for balancing the publicity rights, privacy rights and the merchandising rights of a celebrity. The IP of a Celebrity has reached new dimension with cases like – Elvis Prisley, Daler Mehndi, Tata Group, Steve Irwin, and many more, these not only bring out issues of commercial exploitation of a celebrity, but also, the privacy rights of a celebrity. If persons who are not authorized to use such name appropriate such commercial value associated to a personality/celebrity then shouldn't the personality not be granted the right to sue for such embezzlement? So, the need felt for legislative recognition of Personality Rights in India similar to the jurisdictions like USA Canada, and Germany. Especially after the recognition of the rights of the Performers under the Indian Copyrights Law, the recognition trademark of the Personality's name is equally necessary. A holistic approach needs to be taken toward protection of these rights, because one cannot deny India has world-renowned celebrities such as Amitabh Bachchan and Sachin Tendulkar, whose rights have to be protected and balancing the same.

Keywords: Celebrity Rights, Publicity Rights, Character Merchandising, Privacy Rights, Performers Rights, Elvis Prisley Case, Princess Diana, India, UK, USA, Germany.

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Introduction

The sports and entertainment industry have been in the forefront after the boom in the telecommunication industry over the last decades. These industries have become a lucrative avenue of investment, for both the participants of such industry and other. The advertisement industry also investments to a great extent into the celebrity endorsements, for promotion of products, services, events, etc. Sportsmen and Artists earn their celebrity status after expending time, efforts, skill and money, who are entitled to the fruits of "publicity rights". In Justice Jerome Frank words "personality rights" are a combination of mainly two types of rights; "the right to publicity" and "the right to privacy".[1] This publicity right vests with the celebrity alone, but now, it is a commodity which exploited by agencies who by the way of contract have exclusive right to exploit those publicity right, this aspect is seen in cases of *Percept D'Markr (India) Private Limited v. Zaheer Khan and Another*[2], and many more *Proactive Sports Management Ltd v. Rooney*[3]. In today's Indian trademark law, a celebrity cannot sought protection for these rights directly, but some of these aspects can be protected, like the 'signature of the celebrity', and the images under the Copyright Act, the fictional characters created in the movies or elsewhere can also sought protection under the copyright law. The disparagement of their image can sought protection under the common law of defamation and passing off. When Mann L.J. commented that – *"the impairment is a gradual debasement, dilution or erosion of what is distinctive. The consequences of debasement, dilution or erosion are not demonstrable in figures of lost sales but that they will be incrementally damaging to goodwill is in my opinion inescapable"*[4].

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1 *Haelar Laboratories Inc. v Topps Chewing Gum Inc,* 202 F.2d 866 (2ND CIR.) (1953).

2 [2006] 4 SCC 227.

3 [2012] F.S.R. 16.

4 Derenberg, *"The Problem of Trademark Dilution and the Anti-Dilution Statutes"* (1956) 44 CALIFORNIA LAW REVIEW 439, at 449.

Celebrity rights

The celebrity have bundle of rights vested in them including publicity right, privacy right, merchandising right, and reproduction rights. The celebrity can seek protection under the Copyright and Trademark Law, as well as the Constitution and Contract Law.

Privacy Rights

Today, actors, authors, artists, politicians, models, athletes, musicians, singers, television personalities, well-know business executives, and anyone who seeks to capture the public attention are all celebrities[5]. A celebrity like any other person has a right to protect himself or herself from their lives being in public view at all times. The privacy right of a celebrity has its roots in Warren and Brandeis article of "The Right to Privacy"[6]. The celebrity like any other person has a 'general right of the individual to be let alone'[7]. The four distinct rights that are included under the rubric of the right of privacy are: (1) The right to prevent public disclosure of private rights, (2) Right against intrusion into the solitude of a person and prevent any form of prying into the private affairs of a person, (3) Prevent false light publicity, and (4) Curb misappropriation of a person's name and likeness.[8]

There is a constant tussle between freedom of press and the privacy rights of a celebrity. The constant curiosity of the public to glimpse into the celebrity's life is also a factor had encroaches into their personal lives. In the case of *Cohen v Herbal Concepts Inc*.[9], a picture of the plaintiff with her daughter was used for promotion of cosmetics without the permission. Similarly in the case of *Barber v Times Inc*[10]where the newspaper company had photographed Dorthy Barbra during her labour. In the UK after the Spycatcher Case[11],

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5 Tabrez Ahmad and Satya R. Swain, *Celebrity Right: Protection under IP Law*, 16(1) JIPR 7-16, 7.

6 Warren and Brandeis , *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

7 *Ibid.*

8 T Vidya Kumari, *Celebrity Rights as a Form of Merchandise - Protection under the Intellectual Property Regime,* 9(1) JIPR 120-135

9 63 N.Y.2d 379 (1984).

10 159 S.W.2d 291 (1942).

11 *Attorney General v Guardian Newspapers (No. 2)*, [1990] 1 AC 109

the courts still ask as to whether information can be classified as secret per se. In a series of case in UK celebrities have prevented the use of the picture for promotional purposes, *LNS v Persons unknown (John Terry superinjunction)*[12] where the personal relation of John Terry was being depicted in the newspapers. Similar cases of Ryan Giggs[13], Rio Ferdinand[14], and all, where they have put on 'kill-n-tell' stories against them, which shall have tarnished their public image. The protection is sought under various legislations such as the European Convention on Human Rights, and defamation.

In the US, the people seek protection under for the privacy of persons under the First Amendment of the US Constitution. As early as 1907 in the case of *Edison v Edison Polyform,* the right of privacy should also protect against loss of an economic nature. In India, privacy is considered an essential feature of right to life under Article 21 of the Constitution of India. Celebrities in India can seek injunction on the grounds of invasion of privacy and sought damages in case of defamation. There is protection sought in the cases of non-disclosure agreements for the same.

Personality Rights

Hegel identifies ownership of external, will-less things as necessary for the emergence of human personality.[15] The principles of abstract right secure this condition by ascribing to individual person's property rights in their person and possessions.[16] The in US celebrities who wanted to have monopoly over the commercial value of their image had tried to attain it under the shield of right to privacy, claiming that such unauthorised use of their images for marketing products is creating mental distress and was hence violative of their right to

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12 [2010] EWHC 119 (QB).

13 *Ryan Joseph Giggs (previously known as "CTB") v News Group Newspapers Ltd, Imogen Thomas,* [2012] EWHC 431 (QB).

14 *Rio Ferdinand v MGN Limited,* [2011] EWHC 2454 (QB).

15 Jacob, *Neuhouser's Elucidation of Hegel's Conception of Practical Freedom*, Sep.9, 2009, available at http://www.jacobroundtree.com/2011/09/09/neuhousers-elucidation-of-hegels-conception-of-practical-freedom/.

16 *Ibid.*

privacy.[17] They were of the opinion that a person whose identity was well known, could not have any issue in the further publicizing. "Personal names do not usually allude to non-origin attribute of the good or services. Indeed most personal names are readily taken as denoting the trade source of the goods, e.g. "Laura Ashley", "Harry Ramsden" and "Dorothy Perkins". However, where a famous name is concerned (other than names which are famous as indicators of trade source, as in these examples) there is the possibility that the name will serve to signify not the trade source of the goods/services but merely the subject matter"[18] The English principle enunciated in *Alain Bernadin et Cie v. Pavilion Properties Ltd*.[19], *Spalding & Bros. v. A. W. Gamage Ltd.*[20] particularly in Gamage case was that the good-will or reputation of a trade name or a brand is local in character and divisible i.e. if the business is carried on in several countries a separate good-will attaches[21] to it in each which is another words means that the good-will in that country perishes with it although the business may continue to be carried on in other countries[22]. The reputation which is protectable may extend across international boundaries, as the public are entitled to be protected from deliberate deception of a reputation earned through hard labour and substantial expenses as now-a-days the reputation spreads fast and is entitled to the protection of is name and trademark having monopoly and distinguished logo even though it may not be carrying on business in the country other than its origin[23]. In the manner which Late Mr. Stieve Irwine's name was used by the Research Centre in Kerela, was objected by his wife and Australian Zoo in Queensland, in 2009 was the name was changed.

Commercial aspects of personality are also protected, in a French doctrine "finalité" places restrictions on what the press are able to publish in respect of images of individuals. In the

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17 Manoranjan Ayilyath, *Character merchandising and personality merchandising: the need for protection: an analysis in the light of UK and Indian laws,* 13 Ent. L.R. 43, at 44 (2012)

18 *Executrices of the Estate of Diana, Princess of Wales' Application* [2001] E.T.M.R. 25, § 9.

19 1967 RPC 581.

20 1915 (32) RPC 272.

21 *Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd*., [1979] AC 731.

22 *Playboy Enterprises, Inc v. Bharat Malik and* Another, [2001] PTC 328 (Del).

23 *Playboy Enterprises, Inc v Bharat Malik and Another,* 2001 PTC 328 (Del).

Canadian legal system under the Californian Civil Code § 3344(a)-(b) states that "any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof" and such protection exists for life plus 70 years. This poses a good example of a straightforward right for personality based solely on principles of property law. This is a developed version to protects one image, even a public figure. In India, the images of a person can seek to be copyrighted to the celebrity, and signatures can be trademarked.

Publicity Rights and Merchandising Rights

Now-a-days companies do a great amount of investment towards the advertising and promotion. The most popular form of it is celebrity endorsement, companies encash the celebrity's popularity and goodwill. The right of publicity is generally defined as the right of an individual to control the commercial exploitation of his or her name, likeness and persona, and the right to receive remuneration from that exploitation.[24] In a Calcutta High Court Case *Saurav Ganguly v. Tata Tea Ltd*.[25] the company had tried to encash the popularity of Saurav Ganguly, a Indian Cricketer, by offering the customer of Tata Tea a chance to meet The Cricketer, without his prior consent, the court alloed the Cricketer's contention that the use of his name was misrepresenting his association with the company and the injunction was allowed. The Publicity Right has received its recognition toward a trademarks *per se* as passing off the same would result in there is unfair trade competition, this view of the Indian Courts was seen in the case of *ICC Development (International) Ltd. v. Arvee Enterprises*[26], where under the use of 'Cricket World Cup' was used to boost the sale of Phillip Electronic products. The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of

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[24] R. Penfold, A. Batteson, J. Dickerson, '*How to defend image rights',* M.I.P. [2005] 148 Supp (Brand Management Focus 2005), 19-21.

[25] Civil Suit (CS) 361 of 1997 (Cal HC).

[26] [2003] 26 PTC 245 (Del).

publicity by virtue of his association with an event, sport, movie, etc.[27] No persona can be monopolised.[28] The part of publicity rights is the merchandising rights where the 'name and fame' of a personality is commercially exploited.

In South Africa, in the case of *Mandela v. Investgold CC*[29], the defendant had take out gold coins with picture of Nelson Mandela's head on it and the plaintiff object to the same as it distorted his image on the coin.

Distinguish it from Character Merchandising

Character merchandising involves the exploitation of fictional characters or the fame of celebrities by licensing such famous fictional characters to others.[30] The fictional characters are generally drawings in which copyright subsists, e.g., cartoon and celebrities are living beings who are otherwise very famous in any particular field, e.g.; film stars, sportsmen.[31] It is necessary for character merchandising that the characters to be merchandised must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears. Only then can such character be moved into the area of character merchandising.[32] In the case of *D.M. Entertainment v Baby Gift House*[33], the defendant had started a series of Daler Mandi dolls as gift, which was objected by the composer and his company, as they were unfairly enriching themselves by his popularity.

In *Mirage Studios v. Counter-Feat Clothing Company Limited*[34] the case was of a fictional cartoon character called 'Ninja Turtles'. The plaintiffs had done extensive character merchandising of those cartoon characters with over 150 licenses having been granted to use those characters in respect of a wide range of goods. On facts and evidence on record,

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27 *ICC Development (International) Ltd. v. Arvee Enterprises* [2003] 26 PTC 245 (Del), §14.

28 *Ibid.*

29 Case 32439/04, December 17 2004

30 *Star India Private Limited v Leo Burnett (India) Private Limited*, [2003]27 PTC 81 (Bom).

31 *Ibid.*

32 *Supra n. 29.*

33 Suit No. 893 of 2002 before the High Court of Delhi.

34 1991 FSR 145.

the Court held that the plaintiffs' business was to license the reproduction of the said cartoon characters on goods sold by other, people, which licensing business they had extensively carried on. The public were aware that the characters were connected with the plaintiffs.

Characters are creation of a fiction on the on other hand Celebrity are individuals who have well-know, in the cases of *Elvis Presley*, *Diana, Princess of Wales*, and *Linkin Park* were not given trademark protection in the UK as they are not creation of fiction which a distinct in itself unlike a person. Under Section 2(1) of the Indian Trade Marks Act, 2000, allows registration of any 'sign capable of distinguishing goods and services of one person from another, any word (including personal names), design, numeral and shape of goods or their packaging' as trademark. [35]A celebrity might have a personality which he/she has a right over but does not make him/her inherently distinctive in a manner that can depict the source of the product/service.

Protection In Law

Trademark Law

The celebrity have not succeed in the getting protection under the trademark law as the name cannot have achieve a distinctive character such that one can associate with the source of product. British courts have always been skeptical about creating monopoly rights in nebulous concepts such as names, likenesses or popularity.

In line with this doctrine, protection for other personality features such as likeness, voice, distinctive clothes, etc. or a more general right of publicity has constantly been rejected: first in 1931 in *Tolley v. Fry*[36] then in 1948 in *McCulloch v. May*[37] and more recently in 1999 in *Elvis Presley Enterprises Inc. v. Sid Shaw Elvisly Yours*[38]. By saying that a

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[35] Titus & C Advocates 2008, India guide: Character merchandising in India, http://www.asialaw.com/Article/1970665/Channel/16681/India-Guide-Character-merchandiing-in-India.html (22 September 2012).

[36] [1931] A.C. 333

[37] [1948] 65 R.P.C. 58.

[38] [1999] R.P.C. 567

trade mark of the name of a famous person would be descriptive rather than distinctive for memorabilia sold with the picture or name of that person on it, the Court of Appeal , in UK appeared to remove the possibility of registering a trade mark for a band in connection with those types of goods and services.

In India, a person cannot be given a trademark with the four corners of law, as the Trademark Act may recognize the signature as trademark, but not the person *per se,* they can seek any protection is in common law. In cases of

Copyright Law

The law is unclear whether the copyright law is applicable on celebrities or not. In Sim v Heinz & Co Ltd[39], the court said that copyright is neither granted to voice, likeness nor other identifiers of a persona. Copyright gives exclusive, although, limited rights of protection and allows celebrities to authorize reproduction, creation of a derivative image, sale or display of, say, a commissioned photograph of themselves by others[40]. In the case of *Toney v L'Oreal and Wella*[41], the plaintiffs photograph is used for advertising a hair product marketed by Johnson Products Company, for a limited time period only. In the above case *Toney* sought he publicity right to endorse, or appears to endorse, was with her alone, her photograph may have been copyrighted under the copyright act in US but, still had the right vested in her, as the use was of a nature of license, that is, for a temporary period.

Similar view can be adopted in India, with the recognition of performer's rights and broadcaster's rights under the copyright law, the use of the photographs can be limited by th celebrity.

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39 Sim v Heinz & Co Ltd [1959] 1 WLR 313 1959

40 Prather M, Celebrity copyright law, http://www.ehow.com/about_6461739_celebrity-copyright-law.html (7 August 2012).

41 384 F3d 486 (2004) (7th Circuit).

Passing Off Action

English courts have developed a variety of common law torts that grant protection in specific situations and demand specific requirements.[42] The tort of passing-off established in its basic form that "nobody has any right to represent his goods as the goods of someone else".[43] In the case of *Jif Lemon*[44] the House of Lords held that – (1) the goodwill or reputation must be attached to the products or services of the plaintiff, (2) the misrepresentation must lead to confusion as to the source of the goods or services, and (3) this confusion must cause damage to the claimant. An action of passing off cannot be extended to all cases relating to celebrities in the case of Lyngstand v. Anabas Products[45]. The members of the pop group ABBA were unsuccessful in establishing a connection with the merchandise of the defendants. In printing the names and photos of pop singers, an action of wrongful exploitation cannot be claimed in every case involving celebrities.[46] The court in this case decided the use of photos of the celebrities amounted to mere catering to the public demand among teenagers for effigies of their idols. In all cases, the action of passing off can be sought were a celebrity has been misrepresented or unfairly exploited without prior permission.

Conclusion

The law is in India a new and are growing by the day, case like *ICC Development (International) Ltd. v. Arvee Enterprises*[47] gave recognition to publicity right, the *D.M. Entertainment v Baby Gift House*[48], voice the problem of celebrity used a characters (Daler Mehndi), and latest *Star India Private Limited v Leo Burnett (India) Private*

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42 Jan Klink, *50 years of publicity rights in the United States and the never ending hassle with intellectual property and personality rights in Europe,* 2003 I.P.Q. 363, 371.

43 *Reddaway v Banham* , (1896) 13 R.P.C. 218, 224.

44 *Reckitt & Colman Ltd v Borden Inc,* [1990] 1 All E.R. 873

45 (1977) FSR 62, 67

46 *Supra* note 8.

47 *Supra* note 27.

48 Suit No. 893 of 2002 before the High Court of Delhi.

Limited[49]. The in the field of monopoly and exclusivity is developing. One might agree that other jurisdiction have greater protection with regard to celebrity's right but India is meeting the problems through litigation. But with growing litigations a need is recognized to protect it statutorily. The judiciary is filling up the gap of law, but that shall not be a solution to the multi-million dollar law suits that take place India.

[49] Supra note 30.

R2P an Emerging Concept in International Humanitarian Law

*Vikas Chandra Shukla**

ABSTRACT

***Prevention requires apportioning responsibility and promoting collaboration between concerned States and the International community**. The most important and recent development in the world community in relation to humanitarian law is the drafting of UN outcome document in United Nations World Summit in 2005 and after that in 2009 when the UN passed its first resolution in regard to Responsibility to Protect [hereinafter referred as R2P]. The three pillars of the R2P, as stipulated in the Outcome Document of the 2005 United Nations World Summit (A/RES/60/1, para. 138-140) and formulated in the Secretary-General's 2009 Report (A/63/677) on Implementing the Responsibility to Protect are: First;The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; Second The International community has a responsibility to encourage and assist States in fulfilling this responsibility; and ThirdThe International community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.R2P is a narrow concept- it applies only to the four crimes of ethnic cleansing, genocide, crimes against humanity, and war crimes - but deep: there are no limits to what can be done in responding to these atrocity crimes. The other problem is that if the states have to work in accordance to the charter of the UN then how this concept can be termed as new. Is it not the same old wine in a new glass? My hypothesis revolves around the same*

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question.This paper will discuss about the loopholes and the political embargoes amongst the states before using this resort in times of needs.

Keywords: *International community, United Nations World Summit, Charter of the United Nations.*

Introduction

Military intervention for humanitarian purposes has a controversial past. As the International Commission on Intervention and State Sovereignty reportrecognizes that, this is the case 'both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed tohappen, as in Rwanda'[1]Since the then United Nations Secretary-General Kofi Annan posed his much cited question at the United Nations Millennium Summit, 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?'[2]

The R2P is premised on the understanding that international order is best maintained by non-intervention in the internal affairs of other states. However, it also challenges this principle in so far as it recognizes that 'to respect sovereignty all the time is to risk being complicit in humanitarian tragedies sometimes'.[3] That is, the R2P adopts a view of sovereignty which emphasizes as its defining characteristic the capacity to provide protection, rather than territorial control.[4]

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1 International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, International Development Research Centre, Ottawa, 2001, p. VII, available at http://www.iciss.ca/pdf/Commission-Report.pdf (Last Visited on 23rd September 2012).

2 Ibid.,p.VII.

3 Ramesh Thakur, 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS', Security Dialogue, Vol. 33, No. 3, 2002, pp. 323–340, at p. 324, available at http://sdi.sagepub.com/cgi/content/abstract/33/3/323 (Last Visited on 23rd September,2012).

4 See further Anne Orford, 'Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect', Michigan Journal of International Law, Vol. 30, No. 3, 2009, pp. 984–1015, atp. 990.

Civilian protection rested first with the State, and R2P should not become a basis for contravening the principles of non-interference and non-intervention. The intentional community's responsibility within R2P was to "provide appropriate, diplomatic humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter".[5]

Indeed, the primary responsibility of R2P rested with each individual State. The need for appropriate collective measures arose only in cases of manifest failure by States to protect people from the core crimes. The Secretary-General's report provided a clear framework and was an excellent basis for further discussion. It made clear that the three main pillars of the R2P concept were based on existing international law, particularly the United Nations Charter, and were equally important.[6]

VIOLATION OF INTERNATIONAL LAW:

The protection of civilians rested first with the State, and sovereignty should remain the overarching principle for contemporary international relations. R2P should not become a basis for contravening the principles of non-interference and non-intervention. The international community's responsibility within R2P was to "provide appropriate, diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter". R2P should be implemented on a case-by-case basis, not as a norm but an exception.[7]

IS IT REALLY A NEW CONCEPT?

The shift in language under the R2P, away from the notional idea of '*right to intervene*' and '*humanitarian intervention*', is of significance. The Commission took the approach that the language of the debate was very important for three key reasons. *First*, there was a need to focus attention on the beneficiaries of the doctrine rather than the rights of the intervening states. *Second*, there was a need to incorporate the often neglected elements of preventative effort and post-conflict assistance. *Third*, the use of the word 'right' was

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5 UN Document no. GA/10849.

6 Sixty-Third General Assembly Plenary 98th& 99th Meeting.

7 UN Document no. GA/10849.

problematic in that it 'loaded the dice in favour of intervention before the argument had even begun'.[8]Bellamy goes so far as to say that the use of language, to prevent abuse of the doctrine by those wishing to use humanitarian arguments to justify interventions that are anything but, is 'one of the two key strategies' adopted by the R2P 'for preventing future *Rwandas* and *Kosovos'*.[9]The meaning of '*humanitarian'* is open to interpretation. Vitoria and Grotius had different ideas to that of the Commission; China and Russia often have different ideas to Britain and the United States. Further, the use of the word *'humanitarian' for military action has always been of concern to humanitarian actors.* The International Committee of the Red Cross (ICRC), as well as some non-governmental organizations working in this field, stress the importance of neutrality and impartiality in their work: the argument being that, whilst the military can do good deeds (and certainly are often the organization with the best logistics chain to effectively support the civilian population), there is always anunderlying political agenda to their actions. The military can never be acting in a truly humanitarian manner.[10]This is the case even when military engineers are, for example, constructing water-sanitation facilities for civilian use. As such, disposing of the term 'humanitarian' when discussing military intervention will certainly be welcome in some circles.

However, while the Commission's reasoning behind the change in the language makes sense and is in keeping with the general approach of the R2P towards a more holistic, victim-focused approach, it should be understood that the phrase 'responsibility to protect' creates expectations. Terry warns against the use of the phrase, in particular by humanitarian organizations without the resources or mandate to actually provide protection.[11] Further, the word 'protect' is a very powerful one. There is a difference between intervention and protection:'It is one thing to intervene because the country in question is unstable andunable to provide protection to its citizens. It is quite another

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8 Supra note 2, pp. 16, 17.

9 Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', Ethics and International Affairs, Vol. 20, No. 2, 2006, pp. 143–169.

10 Fiona Terry, 'Humanitarian Protection Conference', seminar delivered at Melbourne University, 22 February 2006.

11 Ibid.

thing to enforcestability and provide protection for the citizens of that country, having onceintervened'.[12]

Of course the terminology itself is not going to save lives. However, what it can do is go some way to making the military intervention aspect of the R2P appear different to previous articulations of humanitarian intervention. This may have the effect of invoking more widespread support for it. Certainly the R2P's adoption (inpart) by the World Summit Outcome Document goes some way to evidencing this. What may, however, be of more significance is what Weiss calls the 'continuum ofresponsibility' at the heart of the R2P, which he asserts is of 'indisputable' 'utility'.[13]Welsh, Thielking and MacFarlane use the phrase 'Spectrum of Responsibilities'[14]. Bellamy focuses on the 'parameters of responsibility': "By defining the circumstances in which international society should assume responsibility for preventing, halting, and rebuilding after a humanitarian emergency and placing limits on the use of the veto, the commission aimed to make it more difficult for Security Council members to shirk their responsibilities."[15]

WHAT IS THE AUTHORITY?

The R2P outlines that the Security Council should always be the first point of callon matters relating to military intervention. The Security Council should be the body that authorizes any intervention.[16]The United Nations Charter clearly provides for the use of force necessary to 'maintain or restore international peace and security' when authorized by the Security Council.[17] The idea of collective security dates at least to the Peace of Westphalia, which

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12 SatvinderJuss, International Migration and Global Justice, Ashgate, England, 2006, p. 112.

13 Thomas G. Weiss, Military–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect, Rowman and Littlefield Publishers Inc., USA, 2005, p. 199.

14 Jennifer Welsh, CarolinThielking and S. Neil MacFarlane, 'The Responsibility to Protect: Assessing thereport of the International Commission on Intervention and State Sovereignty', International LawJournal, 2001–2002, p. 490.

15 Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', Ethics and International Affairs, Vol. 20, No. 2, 2006, pp. 143–169.

16 Supra note 2, p. 53.

17 United Nations Charter, Art. 42.

included a collective security mechanism (although this was never utilized),[18]and is not of itself controversial. However, as the High-level Panel notes 'the Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all'[19]

The Commission's 'solution' to this problem is to discuss the potential roles of the General Assembly and Regional Organizations in authorizing military intervention. Of General Assembly authorization, the R2P says 'if supported byan overwhelming majority of member states, it would provide a high degree of legitimacy for an intervention'.[20]Specifically the R2P proposes the use of Emergency Special Sessions of the General Assembly established under the 1950s'Uniting for Peace' procedures (which were designed to specifically address cases where the Security Council failed to maintain international peace and security) to authorize the use of force (by a two-thirds majority).[21]

The many proponents of the North Atlantic Treaty Organisation intervention in Kosovo have also raised various arguments to justify intervention without Security Council authorization.[22]In sum, despite discussing the options at length, chapter six of the Commission report does not go so far as to permit bodies other than the Security Council to authorize the use of force to protect populations. Further, the paragraphs of World Summit Outcome Document that seek to embrace the R2P are entirely limited to those aspects which speak to collective action through the Security Council. Thus in this respect, it can be argued that even in theory, the R2Pdoes not envisage a reassessment of international law so as to alter the 'right authority'.[23]

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[18] See Antonio Cassese, International Law, 2nd edn, Oxford University Press, Oxford, 2005, pp. 22–25.

[19] Report of the High-Level Panel on Threats, Challenges and Change,para. 202. 100 S. Chesterman, above note 7, pp. 114–115.

[20] Supra note 2, p. 53.

[21] Supra n. 2 at pg.54.

[22] Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, pp. 22–25;ImerBerisha, Humanitarian Intervention The Case of Kosova, Kosovo Law Centre, Pristina, 2002, p. 29.

[23] Military intervention for humanitarian purposes: does theResponsibility toProtect doctrine advance the legalityof the use of force forhumanitarian ends?,Eve Massingham in *International Review of the Red Cross*, Volume 91 Number 876 December 2009.V

INTENTION FOR SUCH INTERVENTION:

The primary purpose of an intervention must be to halt or avert human suffering.[24]That there are some criteria by which the 'goodness' of any use of force is judged is certainly not a new idea. Thomas Aquinas's theory of just war required there to bean intention to promote good not evil.[25] There are, however, two aspects of this criterion that warrant further analysis in terms of the question of whether the R2Pdiffers from previous articulations of humanitarian intervention. The first is theterm 'intention'. The second is the term 'primary purpose'.

The Commission's use of the word 'intention' rather than 'motives' or 'purpose' is potentially significant. In order to distinguish between these concepts, it is helpful to adopt an example Bellamy uses: a country could intervene with the intention of halting injustice but still be motivated by, for example, a desire to secure its borders.[26] Bellamy argues that looking at the intention of the interveneras opposed to its motives is significant because intentions are much easier to judgethan motives,[27] seeing that they can be inferred from acts.

The use of the term 'primary purpose' arguably presents a significant and positive departure from 'classical' humanitarian intervention (of which some would argue has never actually taken place) where the 'threat or use of force (…)for the sole purpose of preventing (…) serious violation of human rights' was required. The reference to 'primary purpose' may be viewed as a concession, but can perhaps be best viewed as a concession to reality. Humanitarian intervention critic Mohammed Ayoob argues that it is 'impossible to prevent considerations of national interest from intruding upon decisions' regarding humanitarian

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[24] ICISS, Supta note 2, p. 35.

[25] Sean D. Murphy, *Humanitarian Intervention*, University of Pennsylvania Press, Philadelphia, 1996, p. 37. Murphy also notes that the Jewish, Greek and Roman natural law traditions from which the Christianjust war doctrine emerged contain ideas relating to the justice of using force against others: p. 62.

[26] Alex J. Bellamy, 'Motives, outcomes, intent and the legitimacy of humanitarian intervention', Journal of Military Ethics, Vol. 3, No. 3, 2004, pp. 227-232, at p. 227.

[27] Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations, Basic Books,New York, 1977, pp. 155–56;

intervention.[28]This is a common (and valid) criticism of any attempt at military intervention. To have adopted a sole purpose criteria would, for this reason, undoubtedly result in the R2P never gaining momentum.

ONLY AS LAST RESORT:

The 'last resort' criterion is criticized by some who warn that the time taken to exhaust other measures before using force is often the time in which the deaths of those most in need of protection occur. Furthermore, it has been argued that delays in invoking military intervention can result in any such intervention being 'politically less likely and practically more lethal'.[2929]Thomas G. Weiss, Military

–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect,

However, the inclusion of this criterion is unsurprising given the international community's Charter-based ideal to exhaust all peaceful means of dispute settlement before resorting to the useof military force.[30] As such there is nothing in this criterion to distinguish it much from previous articulations of humanitarian intervention. Furthermore, 'last resort' refers as much to the fact that any form of military intervention should be invoked in rare and extreme cases[31] as much as it does to the timing of the intervention itself**.**

PROPORTIONAL MEANS:

The Commission defines proportionality as meaning 'the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question'.[32] Proportionality is a fundamental principle of jus ad bellum; its inclusion as a criterion for intervention is therefore necessary and uncontroversial. However,

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28 Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty', International Journal of Human Rights, Vol. 6, No. 1, 2002, pp. 81–102 at pg. 58.

29 Thomas G. Weiss, Military–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect, Rowman and Littlefield Publishers Inc., USA, 2005, p. 199.

30 United Nations Charter, Article 2(3).

31 Simon Chesterman, *Just War or Just Peace*?, Oxford University Press, Oxford, 2001, p. 7.

32 ICISS, Supra note 2, p. 37.

that is not to say that such importance has always been attributed to clearly articulating this requirement in previous situations of humanitarian intervention. Chesterman notes that 'it is curious that more writers did not comment on the modality of humanitarian intervention, given the amount of ink spilt on the question of its legitimacy'.[33] As such perhaps the main significance here, in contrast to previous articulations of humanitarian intervention, is that proportionality is clearly spelt out as a requirement. As such perhaps the main significance here, in contrast to previous articulations of humanitarian intervention, is that proportionality is clearly spelt out as a requirement.

REASONABLE PROSPECTS:

The Commission notes that 'military intervention is not justified if actual protection cannot be achieved or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all'.[34] That this criterion is so overtly apt in the R2P, makes this significant. Michael Ignatieff has made the comment:

"It is not merely that no one wants to go in anymore. It is also that no one believes that, once you do, you can succeed and then come home. Fixingbroken states once looked possible. In Afghanistan and Iraq, everyone has learned how difficult it is to stay this course."[35]

The interventions in Afghanistan and Iraq might, as Ignatieff argues, put the world off invoking any form of military intervention for some time; however, if and when it does intervene it is vitally important that this criterion has been given explicit acknowledgement. Its importance in intervention decision making should never be overlooked. Doing so could and has lead to disastrous consequences. That said, it is not clear how one might objectively and correctly evaluate if a proposed action 'stands a reasonable chance of success'. Military strategists can certainly berelied on to some extent to undertake this analysis, but even the world's military super powers can get this drastically wrong. Perhaps this is one area where much more work needs to be done: to create sub-criteria for evaluating whether there are 'reasonable prospects for success'.

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33 Supra n. 32, p. 7.

34 ICISS, Supra note 2.

35 Michael Ignatieff, 'Whatever happened to "responsibility to protect"?', National Post, 10 December 2008, http://www.nationalpost.com/story.html?id=1054758 (last visited 27th September 2012).

EXTENT OF ITS APPLICATION:

When debates arise that R2P has now increased the chances of intervention in the internal matters by the international community. I feel the other way round. By giving certain instances where the international community can interfere, it has now controlled and reduced the chances of the intervention.

CONCLUSION:

There are undoubtedly a plethora of unanswered questions in the development of the R2P, yet it is still a significant step forward for the international community in so far as it clearly articulates a holistic and integrated approach to protecting populations from mass atrocities. It resoundingly supports the adoption of measures short of the use of military force that can save lives. Furthermore, military intervention under the R2P differs from previous articulations of humanitarian intervention in that it:

1. Clearly articulates humanitarian intervention decision making criteria. These criteria reflect the views of various practitioners and academics in this field asset out in the literature to date as well as aspects of state practice;
2. Asserts that an inability to intervene in one situation should not be used as ajustification for not intervening in another;
3. Limits the use of force by way of humanitarian intervention to situations of actual or apprehended large scale loss of life. It is not therefore intended to be a human rights advocacy tool but rather a protection against the most serious breaches of international humanitarian law. As such, it gains legitimacy rather than contributing to perceptions of imperialism; and
4. Most significantly, its acceptance by United Nations confirms the legality of declarations by the Security Council in which they find genocide, war crimes, ethnic cleansing or crimes against humanity within the borders of one state constitute a threat to peace.

In sum, it is fair to say that the R2P builds in a positive way on the existing literature on Humanitarian intervention. In particular it provides greater specificity to criteria for intervention that had begun to crystallize as a result of usage in both academic circles and State Practice.

CASE COMMENT

Nandini Sundar & Ors : V State of Chhattisgarh[1] : A Precedent Forever in the Human Rights Jurisprudence of India

Sandeep Suresh *

ABSTRACT

Nandini Sundar & Ors: v State of Chhattisgarh is a landmark judgment by the Supreme Court in 2011 establishing the importance of human rights and constitutionalism in India. The division bench which heard the matter held that the situation present in Chhattisgarh was in complete dissonance with Article 14 and Article 21 of the Constitution. I have discussed the main reasons given by the judges in support of their holding. I have also talked about a few vital issues that I thought was pertinent regarding this judgment.

Keywords: Salwa Judum, Article 14, Article 21, Chhattisgarh Auxiliary Armed Police Force Act, Human rights

"We will not enjoy security without development, we will not enjoy development without security, and we will not enjoy either without respect for human rights."

- Former UNO Secretary General, Kofi Annan

I. INTRODUCTION

The above quote asserts the importance of human rights. The Supreme Court decision in *Nandini Sundar & Ors* v *State of Chattisgarh* (Hereinafter '*Nandini Sundar*') also

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1 (2011) 7 SCC 547

carry the essence of this statement which is universally true. The Supreme Court laid another milestone in the path of human rights jurisprudence and Constitutional law in India when it held the appointment of illiterate tribal youth as Special Police Officers (Hereinafter 'SPOs') to form a group called *'Salwa Judum'* to fight against naxalism as unconstitutional.

II. BACKGROUND & FACTS

The State of Chhattisgarh had been plagued with violence since 2005. The naxal violence had shown an increase that was directly proportional to the proliferation of an armed vigilante force called Salwa Judum sponsored by the State Government & Union of India (Hereinafter 'UOI') to combat naxalism. It had empirically been established that numerous atrocities were committed by Salwa Judum with the full connivance of the Government. Chhattisgarh Government spawned the vigilante force in 2005. It was projected as an impulsive people's movement to counter naxalism. It started in Dantewada district under the aegis of the Jan Jagran Abhiyan. Jan Jagran Abhiyan was subsequently renamed as *'Salwa Judum'*. Salwa Judum consisted illiterate tribal youth who were appointed as SPOs under the Indian Police Act, 1861(Hereinafter 'IPA') till 2007 and Chhattisgarh Police Act, 2007(Hereinafter 'CPA') thereafter. The members were given firearms and training for involving in counter insurgency operations.

In May 2006, the petitioners Nandini Sundar, Ramachandra Guha and E.A.S Sarma had conducted a fact-finding into Salwa Judum, as part of the Independent Citizens Initiative. Subsequently on 17th may 2007, Nandini Sundar & others filed a writ petition (Civil) 250/ 2007 under article 32 of the Constitution with the tag of Public Interest Litigation. The petitioners had alleged, inter-alia, widespread violation of human rights of people in Chhattisgarh by Salwa Judum and its activities. The petition was essentially in the tribal interest against naxal violence and as well as the State viciousness.

III. DECISION & REASONING

The decision of the case which was heard over 5 years was finally pronounced by the division bench of *Justice B. Sudarshan Reddy* and *Justice Surinder Singh Nijjar* on July 5th 2011. The bench had no hesitation in holding the appointment of SPOs for counter

insurgency operations against the naxalites as unconstitutional since it was in complete dissonance with Article 14 and Article 21 of the Constitution. The Apex Court also commented that the creation of Salwa Judum was an abdication of the state of its constitutional responsibility to provide safety to citizens. *"The situation in Chhattisgarh represented an extreme form of transgression of Constitutional boundaries."* This statement in the judgment clearly depicted the undesirable and undemocratic scenario that existed in Chhattisgarh. The judges had umpteen number of instances to point out that Salwa Judum was unconstitutional:

Violation of Article 14 –

- *Arbitrary power of the Superintendant of police (Hereinafter 'SP'):-* Illiterate tribal youth were recruited as SPOs to Salwa Judum under section 17 of IPA. But with the enactment of CPA, they were recruited under section 9 of the new act and drew their powers and duties similar to that of ordinary police officers from section 9(2). But neither of these provisions specifies the conditions under which the Superintendant of police (SP) may appoint a SPO. That would be a grant of discretion without any specification of limits, with respect to the number of SPOs who could be appointed, their qualifications, their training or regarding their duties. Conferment of such unguided & uncanalised power would clearly be in the teeth of Article 14.

- *Unequal treatment of SPOs and Police officers:* - As per section 9(2) of CPA, SPOs were expected to carry out all the duties of police officers, and be subjected to all the liabilities and disciplinary codes like the members of the regular police force. Unfortunately, the SPOs who are far less educated than the regular police officers were made to place their lives on more dangerous lines. The relief camps where the SPOs stayed were frequently attacked by the naxalites. At the end of all this discrimination shown to these SPOs, they were just remunerated only an honorarium of around 3000 Rupees in a month.

Contravention of Article 21 –

- *Inadequate safety and high levels of danger:* - Affidavits by the UOI and Chhattisgarh Government clearly stated that SPOs were being employed for direct

combat with naxalites. The SPOs may have to engage in pitched battles. Also, civilians had been killed by naxalites by branding them as "police informants". This would perceptibly mean that SPOs would be amongst the first targets of naxalites as they also perform such intelligence roles. These SPOs were placed in grave danger which was clear by the fact that 173 SPOs had lost their lives. Apart from firearms, SPOs were not provided with any other necessary safety measures. The judges commented that these young tribal citizens had literally become cannon fodders in the killing fields of Chhattisgarh.

- *Insufficient training:* - The training given to these SPOs was also insufficient. The State Government expected these youngsters with little education to learn requisite range of analytical skills, legal concepts and other sophisticated aspects of knowledge provided in the training programme within a span of just two months. Expecting such persons to take part in counter insurgent acts against naxalites who prepare on scientific lines these days was just shocking and not feasible. Consequently, appointment of such youngsters as SPOs would have the negative result of endangering their lives and is revelatory of the Government's disrepute for human lives and therefore a violation of Article 21.

IV. CRITICAL ANALYSIS OF THE JUDGMENT

According to Justice H.R. Khanna, "Rule of law is the antithesis of arbitrariness."[2] Arbitrariness must be excluded in law, for if power is arbitrary, it is potential inequality and Article 14 is fatally allergic to inequality before law[3]. Without any explanation, Article 14, the instrument of equality principle in our Constitution, is inherent in rule of law on which the scheme of India's Constitution is based upon[4]**.** Equality principle is one of the corner stones of the Indian democracy and is regarded as one of the basic features of the Constitution. So any treatment of equals unequally or unequals as equals, as it has happened in this case is necessarily the violation of basic structure of the Constitution of India.

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2 *ADM Jabalpur* v. *S. Shukla*, AIR 1976 SC 1207

3 *Avinder Singh* v. *State of Punjab,* AIR 1979 SC 321

4 Durga Das Basu, SHORTER CONSTITUTION OF INDIA, (Lexis Nexis, 14th ed, vol. 1, 2009), at p. 434

Such inhumane acts of the Government seriously prejudice the lives of young tribal people. Right to life, as a fundamental right is not negotiable and it would cover a case where the state fails to discharge its duty to care cast upon it resulting in deprivation of life of a person[5]**.** Under Article 21, there is an inbuilt guarantee against torture or assault by the state and its functionaries[6]. Any decision affecting human life or which may put an individual's life at risk, must call for the most anxious scrutiny[7]. In further support of the judgment, it would be necessary to point out that Article 21 points out that no person's life shall be deprived except according to a procedure established by law. In *Nandini Sundar,* the way in which the right to life of youngsters appointed as SPOs and other civilians were deprived was in no way compatible with the principle of *'procedure established by law'*.

Another aspect that arises from this judgment is the credibility of India's 'welfare state' tag. The Preamble and the Directive Principles of State Policy (Hereinafter 'DPSP') describe India as a welfare state. *Gopal* Subramaniam, former Solicitor General of India, had justified this judicial pronouncement stating that DPSP envisaged that security of every citizen in this country is the responsibility of the concerned State and the Union Government[8]. The State of Chhattisgarh had abdicated itself of the constitutional responsibilities to provide adequate security to its citizens by creation of a temporary armed force like Salwa Judum instead of ideally creating a trained professional police force with adequate personnel. *In Captain Sube Singh v LT. Governer of Delhi,*[9] *it was held that State cannot pass on the burden of its social obligation on to private parties.* Backing vigilante groups such as Salwa Judum delegitimizes politics, dehumanizes people and above all, represents abdication of the State itself, it should be undone immediately[10]. Such actions seriously put

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5 *Shyama Devi* v. *NCT Delhi,* AIR 1999 Del 264

6 *Munshi Singh Gautam* v. *State of Madhya Pradesh,* AIR 2005 SC 402

7 *Bugdaycay* v. *State,* (1987)1 ALL ER 940

8 See, *No activism in apex court, says former solicitor general,* Times of India, July 24, 2011, online at http://Articles.timesofindia.indiatimes.com/2011-07-24/ahmedabad/29809209_1_sc-decision-judicial-activism-apex-court (visited June12, 2012)

9 *Captain Sube Singh v. LT. Governer of Delhi, AIR 2004 SC 3821*

10 *Development Challenges in Extremist Affected Areas*, Report of an Expert Group to Planning Commission, 77, (Government of India, New Delhi, 2008), online at http://planningcommission.nic.in/reports/publications/rep_dce.pdf (last visited June12, 2012)

into question the efficacy of governments in carrying out their duties towards the citizens. It is the state's moral and political responsibility to guarantee all the human rights to its citizens[11]. Definitely, a key indicator of the quality of governance is the commitment of a Government to the rule of law and human rights[12].

As human rights jurisprudence is adequately developed in the international arena through various covenants, treaties, and judicial decisions of international courts, the role of such laws in deciding domestic matters arise. Are they of any authoritative or persuasive value? International human rights law casts an obligation on the states to shield the human rights of all and a guarantee against the abuse or neglect of crucial rights[13]. The general rule is that it is the liability of the state to try to prevent the violent acts of revolutionaries and insurgents[14]. In *Velásquez Rodríguez* case[15], the Inter American Court of Human Rights broke a new ground in international law by laying out the responsibility a state incurs when it has not adequately investigated the actions of non-state actors and the court argued that where the acts of private parties that violate the convention are not seriously investigated, those parties are aided in a sense by the Government, thereby making the State responsible on the international plane[16].The European Court of Human rights in *Kiliç v Turkey:* 128 Eur. Ct. H.R.(2000), found that the state must take positive operational measures when the authorities knew or ought to have known at the time of the existence of a real risk to the life of individuals from the acts of a third party otherwise resulting in a violation of the right to life guaranteed by Article 2 of the European Convention[17]. The rulings of an international court should not be seen in isolation, but require concomitant actions by those closest to the situation[18]. Therefore, I believe the laws in domestic arena should also have to be in

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11 J. L. Kaul & Manoj K. Sinha (eds.), Human Rights and Good Governance - National & International Perspectives, (Seriels 2009), at p.88

12 *Id.*

13 *Id.* at p.90

14 Dr. S.K. Kapoor, International Law & Human Rights, (Central Law Agency, 13thed, 2006), at p.79

15 Inter-Am. Ct. H.R.(Ser. C) No. 4 (1988)

16 William Paul Simmons, *Remedies for the Women of Ciudad Juarez through the Inter-American Court of Human Rights,* 4 Northwestern University Journal of International Human Rights, (May, 2006), online at http://www.law.northwestern.edu/journals/jihr/v4/n3/2/ (visited June 12, 2012)

17 *Id.*

18 *Id.*

consonance with internationally recognized laws as India is a signatory to the International Convention on Civil and Political Rights (ICCPR) which binds the parties to respect the civil and political rights of the individual, specifically the right to life. The Apex Court in this matter has delivered the judgment in the light of these international human rights law authorities.

However, the judgment had been profoundly criticised by many politicians and legal personalities for the unwanted explanation of neo-liberalist paradigm and how socio-economic deprivation had acted as the root cause of insurgency in India. I also have the same worries on judges using such explanations which can be policy issues and vulnerable to criticism. The first 14 to 16 pages of the judgment contained passages about how the developmental mindset of the nation had created naxalites and other such insurgent groups in India which were superfluous and irrelevant for deciding the case. Brevity has to be the keyword for every judge. It is the most important quality of a judgment. Justice M. C. Chagla who was the Chief Justice of the Bombay High Court was known for his short and lucid judgments which dealt with only the issues at hand. But the strength of the ratio of this judgment will survive its rhetoric in the years to come.

The aftermath of this decision had not been favourable. The UOI and State of Chhattisgarh had immediately indicated their intention to file a petition for a review of the judgment. But two months after the judgment, the Chhattisgarh State Assembly on 9th September passed the Chhattisgarh Auxiliary Armed Police Force Act, 2011 (Hereinafter 'CAAPFA') with retrospective effect from the day SC passed its order (5th July 2011). The CAAPFA legalises the status existing SPOs by inducting them as members of the Auxiliary Armed Force to assist the police in dealing naxalism. This move by the Government was on a completely different note from its initial stand. Unfortunately, the effected move has more far reaching consequences. Even though there are various provisions in the CAAPFA which aims at improving the conditions of SPOs like payment of 7000 rupees a month (double of what they used to get previously), grant of five lakhs rupees and a government job to a family in case a member dies etc., it had virtually nullified the judgment. The Supreme Court in *Nandini Sundar* intended and directed the State Government and UOI to stop the employment of illiterate tribal youth as SPOs. The fact that the CAAPFA was enacted with

retrospective effect from 5th July 2011 itself prima facie indicates the malafide intention on behalf of the State Government. Section 11(3) of the Act further clarifies the fraud. The provision says: - *"Despite anything contained in any judgement, order or decree of any court, each person working as SPO on the date this Act came into force will have a right to remain at the post"*. This shameful move by the State Government as a whole is undemocratic and Independence of judiciary which is highly regarded as one of the basic features of the Constitution has been pummeled here. This event has potrayed one more instance where the Legislature has disregarded and disrespected the wisdom and prudence of the judges in the Supreme Court.

V. CONCLUSION

The facts of *Nandini Sundar* represented construction of a wall between constitutional values and the Chhattisgarh situation. Article 14 and Article 21 are necessarily tainted by such policies which create such miasmic situation of dehumanization of people in the deprived segments like the tribal community. The primary blame for this must be with the Indian political class which has failed to give the necessary leadership and moral pathway to the forces that do their functions, in the name of the state[19].

This decision is a landmark restatement of constitutional values and respect for human rights. The style and language of the judgment is crisp and offer no chance for the Government to hide and escape. The State should be committed to the democratic and humane objectives that are adorned in the Constitution. Governments must guarantee that everyone has access to justice for human rights violation. We ought to remind ourselves that there will be peace, harmony and social progress only if there is equity, justice and dignity for everyone. Without any doubt, the CAAPFA has to be declared *ultra vires* or be amended drastically in order to bring this judgment into complete effect. A Supreme Court decision on a substantive question of law and interpretation of the Constitution cannot be subjected to such an unethical move by the Legislature.

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[19] Manoj Joshi, *Salwa Judum is bad in law, worse as a policy,* India Today, July 8, 2011, online at http://indiatoday.intoday.in/site/story/salwa-judum-is-bad-in-law-worse-as-policy/1/144010.html (visited June 12, 2012)

BOOK REVIEW

Text book of Criminology, Penology, and Victimology (2012): by Dr. Rabindra Kumar Mohanty and Mr. Satyajit Mohanty, Himalaya Publishing House, "Ramdoot", Dr. Bhalerao Marg, Girgaon, Mumbai – 400004, Price Rs. 395/- , pp.481

Prof. P.C.Mishra*

The book under review is a testament to the authors learning and scholarships. The wide experience on the subject of prevention of crime and administration of criminal justice vis-à-vis its relationships with society makes the two authors more than qualified to write the book. Sri Satyajit Mohanty an IPS officer of the cadre of Inspector General of Police with varied experience in understanding in pathology of crime and crime prevention over the years has proved to be helpful in bringing the present text book for a clear understanding of the subject by the students.

Criminology, being an advanced theoretical field of study particularly in the era of rising population, increasing crime rate, violent outbursts in the wake of various types of demonstration etc. is difficult to teach the undergraduate and post graduate students and even becomes more difficult to acquaint to the officers of law enforcement. It is possible here for the significant sharing of firsthand knowledge gained by the author Dr. R. K. Mohanty, a sociologist.

The book contains 26 chapters in all dealing with chapter 1 is the "inter disciplinary concerns" of criminology. Scientific study of crime in its entirety is the essence. The chapters virtually designed to acquaint the readers about the relationship of Criminology with other social sciences besides understanding the importance of studying it as a profession. The understanding of the subject is given in tabular form like the "intended objectives" and the "threshold achievement" is exemplary in nature. The pre-classical notion and classical notion of crime and sin are explained well. Crime and criminal are words of ordinary

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English usages. We know that there is no satisfactory definition of crime which embraces the many acts and omissions which are criminal and which at the same time exclude all those acts and omissions which are not.

The chapter 2 to 6 are devoted to the exclusive discussions of the concept and theories and the etiology of crime has been analyzed in chapter 7 through which the authors wanted to bring it to the notice of the students that a crime is a harm brought about by the human conduct which the sovereign power of the state desires to prevent. The theories relating to individual deviance and

Collective deviance are covered under the Chapter 8 and 9 respectively. In individual deviance the concept of juvenile justice and duties of a police officer in dealing with the juvenile who is in

Conflict with the law and the child who is in need of care and protection along with a distinction between a deviant juvenile and an adult criminal. In chapter – 9 the five approaches to collective

Deviance is discussed for better understanding of the issue. The issue involved here remained opaque, for violence by, and repression of, the impoverished masses in an economy of scarcity represents a phenomenon perhaps different in kind, rather than degree compared to violence and repression in economics of abundance or super abundance. And if collective violence "belongs to political life and changes in its form" tell us that something important is happening to the political system itself.

Chapter 10 to 18 deals with some specific forms of crime like organized crime, white collar crime, recidivism, gambling, prostitution, drug addiction, alcoholism and cyber crime have been dealt. In modern law punishment is appropriated almost exclusively to enforcement of absolute duties imposed for securing of social interest immediately as such. And it is imperative by that a book of given title to have a chapter on Penology the concept of which has been discussed from chapter 19 to 23 in which theories of penology including deterrence, retributive, reformatory and rehabilitative including the concept of parole, probation, pardon etc. analyzed. The authors have discussed historical background of each concept in order to acquaint the readers with the ideas that remain invisible. The

authors traced back the development to 1840 to explain the parole systems. Historically "Parole" is a concept known to military law and denoted release of prisoners of war on promise of return. However, now parole has become an integrated part of the English, American and most of the countries system of criminal justice with the changing attitude of the society towards criminals and crime. During parole, there is no suspension of sentence but the sentence is actually continuing to run during that period also, is the message. Inherent powers of the High Court under the provision of Code of Criminal Procedure 1973 are wide enough to enable interference with an improper refusal by the Govt. to grant parole in appropriate cases. A court can direct that a life convict be granted parole to enable him to write University Examinations even. As such the importance of the chapter cannot be over emphasized. The chapters under review clearly reveal the fact that probation differs from parole in that the term of probation is a suspension of sentence, while parole is directly tied to it. In effect, the probation is an alternative to punishment.

The chapter 24 on social defense the author rightly laments that in view of the complexity of issues involved a wholly satisfactory theoretical framework for policy formulation and programme development has not yet been developed (Page - 420). As a strategy for crime prevention and control the concept of social defense has many interpretations/ definitions. In a narrow sense social defense is a non-violent alternative to military defense. In a broader sense it is a non-violent community resistance to aggression that includes defense against exploitation, injustice and subjugation. The different facets of the concepts are well analyzed by the authors but it would have been better if the applied aspect of the concept also is being focused with regard to violence in the society. Since there is no clear cut policy with regard to social defense the author should have articulated with an alternative to it. Since no empirical findings are mentioned it seems that the criminal justice system is losing its credibility. The author has rightly mentioned the importance of police as a social service agency. But what is shocking in the many facets of corruption from top to bottom and inflicting every scheme or project where there is money involved. Thus the laxity of understanding has many levels of perception but any scientific enquiry will notice the need to study Criminology as broader than law-in-action, through mutual fertilization.

The fascinating chapter with which the book ends deals with Victimology and Victims of Terrorism. The learned authors elaborately analyzed the different dynamics of the concepts in relation to different types of victims. The trauma with which the victim of a crime suffers has to be compensated by the State to make up the loss sustained. This is of recent origin. There is difficulty in choosing the victims of Terrorism, as "Victimization and Terrorism are the old realities but new rhetoric in the terminological discourse of Criminology with its recent comrade –in-arms victimology". The term Terrorism and victim represents one term each with diverse meanings or one meaning endowed with diverse terms.

Apart from twenty six chapters with exhaustive coverage and a well furnished reference at the end of each chapter the book contains a learning objective in the beginning of each chapter. The book contains a learning objective in the beginning of each chapter that makes more fascinating for the readers. The authors deserve complements for weaving together different aspects of Criminology, Penology and Victimology in a coherent manner. The book I am sure has emerged as a valuable addition to the literature on the subject. It would prove to be a useful text book for the students of law and trainee police officers. However, the book does not offer any critical perspective on the subject. As a result the presentation remains descriptive rather than analytical.