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EDITORIAL

Allow me to begin with the statement- "an order will be called law if it is externally guaranteed by the probability that coercion (Physical or psychological) to bring about conformity or average violation, will be applied by a staff of people holding themselves especially ready for that purpose" (*Wafer, Economy and Society*, edited by G. Rath & Wittich 1978, Berkely, University of California Press, P. 317). This observation is very much pertinent in the background of present legislative policy of Legislatures of most of the countries, including India, using law as an instrument of wide scale social and economic planning to shape the attitude of people in social relations, obligations, restructuring economic enterprise. The present trends of law enforcement processes in general, and India in particular, is undoubtedly revealing the issues of conformity, violation and application.

In the present volume our focus is on conformity of legal norms and violations by the people. The issues of effectiveness or efficiency level of law enforcement agencies in application of various legislations have raised in most of the papers. The limits of effective legal action can be traced with writers of American Jurist Rescoe Pound (Pound,1917, Sociology of Law, p -51) who suggested that as a practical matter, law can deal only with outside, and not inside of people and things; and law cannot attempt to control attitudes and beliefs but only observable behaviour. Most of the papers published in this volume regarding, enforcement of laws relating to transplantation of human organs, prevention of corruption, Forest, Mining, Trade and investment, consumer rights, copyright or human rights issues involved the questions of limit of effective legal actions, and reiterated the idea of Pound that 'law cannot attempt to control attitudes and beliefs but only observable behaviour. The various writers attempted to depict the behavioural pattern of citizens of India in matters of law abiding and violations. The papers reveal that we need appropriate in depth studies on the effectiveness of laws.

Prof. (Dr.) N. K. Chakrabarti,

Editor

Transplantation of Human Organs

Dr. N.L.Mitra, Ms Ojashvi *

Abstract

[Whereas demand for human organ and tissue transplantation has increased in many fold in the two decades, a surreptitious human organ market has developed, with huge demand and short supply. As a result, in spite of the fact that commercialization of human organs is the soul and spirit of the present law under the Transplantation of human Organs Act of 1994 amended by 2011 Amending Act and the Rules of 1995 amended and supplemented by 2008 and 2013 Rules, human organs and rissues are traded by unscrupulous intermediaries so much so that the poor and poverty-driven donors of deep rural villages do not get even more than 5 to 10 percent of the traded amount. Ity is understand that while the owner cannot trade with his one spare organ or a part of the tissue of his/her body, it is the intermediaries who indulge in trading. It is argued that intending donors may register their names with Authorization Committees and a data base be made available to donees applying for any organ or issue. The settlement of the compensation could be directly talked about at the Registered Hospitals' Consultation Room with AC supervising the same so that poor donor can not be cheated by the intermediaries. Provisions of the Amended Statute and Rules and jurisprudence developed over the last decades in organ transplantation system has been critically reviewed.]

I.Introductory note

With the expansion of therapeutic knowledge and the stress and trains of modern life, the demand for human organ transplantation has tremendously increased so much so that demand is there in almost on every issues and limbs. There are basically two types of human organ transplantations, firstly life donation by the donor donating organ of his/her body and secondly organs that can be transplanted from a deceased person's body either on the desire of the person when he/she was alive so that after death in deferment of his/her desire the organ can be removed from the dead body and transplant in donee's body or the authority for removal of an organ from the body can be obtained from the lawful custodian of the body. The law to facilitate the organ transplantation has to balance between the public interest and the private therapeutic demand. It is true that in law no one has the proprietorial right on the life and organs of his/her body due to over-riding public interest. Besides, for several social, religious, and other reasons the motivation of organ donation is extremely low in our country. Removal of organ from the dead body is also publicly considered as disrespecting the human body. One can appreciate the deep concern about removal human organs from the dead body when the nearest family members of Late Sunil Gangopadhyay refused to pass on his dead body for the use of medical college in Kolkata against the last desire of the great writer.

* Chancellor, KIIT University, Former Vice Chancellor of National Law School of India, Bangalore and Founder Vice Chancellor of NLU, Jodhpur, assisted by Ms Ojashvi of Fox Mandal Associates, Bangalore and Ms Kirandeep Kaur Research Scholar, NLSIU assisted with research input.

II. Legal System

Naturally the Transplantation of Human Organs Act, 1994 (THOA) maintained in its extended name that the Act shall (i) provide "for the regulation of removal, storage and transplantation of human organs for therapeutic purpose", and (ii) "prevent commercial dealings in human organs". The Act is followed by its Rules, 1995. This legislation is enacted for the purpose of prevention of commercial dealing in Human Organs and for regulating the removal, storage and transplantation of the human organs only for therapeutic purposes[2]. The legislation was necessary to streamline organ donation and transplantation activities which accepted 'brain death' as a form of death and made the sale of organs a punishable offence. The acceptance of brain death, made it possible to undertake organ transplants like kidney, liver, heart, lungs, and pancreas. In India, the subject of health comes under the purview of the state government and any central parliamentary Act relevant to the health of the state, needs to be endorsed by the state assembly with or without changes in order to make it a law. This Act though passed in the Indian parliament in 1994 was not ratified by some of the Indian states till 2003. This Act is passed under Article 252 of the Indian Constitution where two or more States urge by resolution, the Parliament to pass a law in relation to any matter included in the State list, such laws applies in these States which pass the resolution and may also be adopted by any other State[3]. Once a state passed the Act it needed to establish two regulatory bodies. One, the Appropriate Authority (AA) for licensing hospitals to conduct transplant operations, and the other Authorization Committee (AC) to "prevent" commercial transactions between donors and recipients. 1994 was further amended in 2011 and the Rules of 1995 has been amended in 2008. New Rules on Transplantation of Human Organs and Tissue Rules, 2013 are now waiting for notification.

III. Types of Organ transplantation

There are two sources of human organ transplantation. Firstly living donor can donate the extra organ or any part thereof (if we can say so) that human body contains like, kidney and some parts of lung, liver or pancreas. Secondly, in case of many organs of the dead body (brain-stem death and not in cardiac death) such as, heart, lungs, pancreas, liver, stomach, bone marrow, kidney and tissues like cornea, heart valves, bones, ligaments, tendons, veins etc. can be donated by at the desire of the deceased or the custodian of the body or to be collected by order of competent authority.

IV. History of Kidney transplant in modern India

Kidney transplants in India first started in the 1970s and since that time, India has been a leading country in this field on the Asian sub-continent. The evolutionary history of transplants consisted of the first 10 years which were spent mastering the surgical techniques and immune-suppression and its success resulted in a phenomenal rise in the numbers of transplants in the next 10 years which gave rise to unrelated so called 'kidney donation' though 'collected against consideration' from economically weaker section of the society. The pressure on the Government saw the passing of the Transplantation of Human Organ Act, legislation that made unrelated transplants illegal and 'deceased donation' a legal option with the acceptance of brain death. Overcoming organ shortage by tapping into the pool of brain-dead patients

[2]therapeutic purposes- means systematic treatment of any disease or the measures to improve health according to any particular method or modality

[3]Some other examples for Acts passed under Article 252 are The Prize Competition Act, 1955, The Urban Land (Ceiling and Regulation) Act, 1976, The Wild Life (Protection) Act, 1972 etc.

was expected to curb the unrelated transplant activity. The 1994 Act allows transplantation of human organs from living donors and cadavers[4]. A living donor is classified as either a near relative or a non-related donor. A near-relative needs permission of the doctor in-charge of the transplant Centre to donate his organ. A non-related donor needs permission of an Authorization Committee established by the state. Additional Authorization Committees may be formed in hospitals in metros and big cities where more than 25 transplants take place in a year. Any commercial trade in human organs is prohibited.

For years, India has been known as a "warehouse for kidneys" or a "great organ bazar" and has become of the largest centres for kidney transplants in the world, offering low costs and almost immediate availability. In a country where one person out of three lives in poverty, a huge transplant industry arose after drugs were developed in the 1970's to control the body's rejection of foreign objects. Renal transplants became common in India about thirteen years ago when the anti-rejection drug cyclosporine became available locally. The use of powerful immuno-suppressant drugs and new surgical techniques has indirectly boosted the kidney transplant activities. The dramatic success rates of operations, India's lack of medical regulations and in atmosphere of "loose medical ethic mechanism" has also fueled in the growth of kidney transplant. The result has been that "supply and demand created in marriage of in-equals, wedding wealthy but desperate people dependent on dialysis machines to those in India grounded down by the hopelessness of poverty" (*Max)*. Consequently, the poor and destitute, victims of poverty, has either willingly sold their kidneys to pay for a daughter's dowry, build a small house or to feed their families unknowingly or for very little sums of money. Ironically, medical technology meant to advance and save human lives has been abused to such lengths, that in some cases, it has resulted in the death of innocent individuals.

Most countries require living donors to be family members, or that organs must be removed from cadavers, usually accident victims. Because of the stringent rules regarding organ transplantation in other countries (specifically, that it is illegal and unethical to remove kidneys from a live donor, especially for money), and the shortage of kidneys, India has become (along with China) an "international centre" for the transplantation of kidneys. Furthermore, until recently, with the passage of the Transplantation of Human Organs and Tissues Act, 1994, there was not any legislation prohibiting the sale of organs in India. Due to the naiveness and desperation of poor, along with the fact that donating a kidney isn't particularly risky as it does not impair one's health, kidneys have become easily available in India. Combined with low costs and the emergence of an illegal kidney black market which caters to the kidney buyers from around the world, many foreigners and the rich in India have taken advantage of and benefited from the kidney trade.

With the eruption of the kidney scandals in India's major cities, the Indian Parliament passed an act (Act 42) : The Transplantation of Human Organs Act 1994 (which was amended in 2011 as The Transplantation of Human Organs and Tissues Act, 1994) in order to block the trade in human organs. This law prohibits all commercial trading and allows organs to be removed only for therapeutic purposes. Furthermore, it bans all organ transplantations, except those donated by relatives (specified as spouse, son, daughter, father, mother, brother or sister) and states explicitly that organs can only be removed from brain-stem dead people unless it is between the relatives. Thus, this law

[4]dead bodies

makes it illegal to donate a body organ to anyone outside one's immediate family and requires that proof of familial relationship be shown when donating an organ.

The effectiveness and viability of this law in India however, is questioned by many for various reasons. Since individual states are responsible for health matters, their local assemblies must adopt the legislation and only three States have done this so far (Maharashtra, Goa and Himachal Pradesh). The kidney trade still flourishes in those states (neither Karnataka, which includes Bangalore, nor Tamil Nadu, which is the home of many donors) which haven't endorsed this Act. Given this break between federal and state law, it is difficult to implement the cadaveric organ transplantation alternative that the law envisions. The punishment for selling an organ has also come under heavy criticism. As it stands, selling an organ is punishable by up to seven years in prison and provides a fine of Rupees 10,000/- which is less than US$ 200. Many feel that this punishment is "paltry", considering the lakhs and lakhs of rupees that change hands in every illegal transplant. Other complaints center moves around legal loopholes and shortfalls of the law. These range from cases where person could be taken out of the states that have endorsed the law for illegal donations of their organs, the view that this may encourage "kidney marriages" since spouses are included in the definition of near relatives who can be organ donors, the lack of infrastructure (there are no intensive care units which can supply cadaver kidneys or provide for the storage for brain-dead cadavers, poor transportation system which makes it difficult for the timely retrieval of organs) to implement the cadaver transplantation, India's hot climate which makes it hard to store and preserve kidneys and the lack of trained cadaveric transplant surgeons.

Moreover, it is estimated that in India, there are estimated 80,000 people with severe renal failure, and the 650 dialysis units available are insufficient to support the need (*Kandela, P. 1534*). There seems to be a time lag where the country's infrastructure needs to catch up in order to meet the cadaver donation alternative that the law offers. Without a computerized country-wide database on recipients, as well as an efficient transportation system involving helicopters and aeroplanes to rush the organs to recipients this has become a major criticism of the law. Moreover regarding the clause that only family can be donors, there are often special reason (in cases here there is a history of diabetes or cardiac conditions in the family) why family as possible donors, is not always a feasible option. For these people, maintaining the increasing costs of dialysis, enduring the pain and suffering of family members awaiting kidney transplants, and possibly losing their loved ones because family members are unable to donate a kidney, the said Act 42 has brought about much outrage. Therefore, as the law currently stands, the aim of curbing kidney trade in India is no more possible now than it was before the law was enacted and passed.

As the international law on organ trade in India, the World Health Organisation has stated that it is "deeply concerned with the 'immoral' traffic of organs, (including kidneys) and has urged member countries to ban it (*Chandra, P.53*). Recently, pressure from a number of international medical societies, such as the International Transplant Society and the Middle East Transplant Society, has caused reputable Indian transplant surgeons to stop operating on foreigners.

The great Indian kidney bazaar is an eloquent comment not only on the ethic of the medical profession but also on the social inequality and deprivation in our society. The current bill

clearly makes this form of organ procurement a punishable offence. It remains important to consider the arguments of advocates of rewarded gifting since it is likely that they will continue to make efforts to revive this practice. "Kidney donation is a good act. It is a gift of life. The financial incentive to promote such an act is moral and justified." (11) " "It is better to buy than to let die (12) Proponents also claim results for this form of transplant comparable to those in living, related donors. Since we are a 'free' society and since we have now accepted 'market principles' in all aspects of life, what is wrong in a person selling a kidney for a price?

Transplant physicians from Oman described the fate of 130 patients who obtained live-unrelated kidney transplants in Bombay between 1984 and 1988.13 There was a high post-operative mortality, several infections (including conversion to HIV positivity in four) and inadequate provision of information to the patient about treatment. In many instances, the names of doctors and hospitals in Bombay where the transplants were performed were not given to the patient. The governments in India and Oman chose to ignore this detailed report in a leading journal. No investigation was followed. It is now obvious that many such donors have been taken for a ride by middle men. The proposition that organs are donated by 'free will' has been demolished. It is often forgotten that the operation for removal of the kidney from a paid donor is fraught with danger. The person selling his kidney, like the person selling blood, will hide information on transmissible infections like AIDS.

Then what about the patient who desperately requires a kidney but does not. have a close relative to donate it? Can there not be a role for buying the organ from a donor, with no middle men and proper maintenance of standards in the procedure? It is hoped that with the development of cadaveric transplantation the dependence on live donors will become unnecessary over time. The bill does allow for donation from a non-related person as long as the intentions of such a donation are scrutinized by an official committee.

Every year, almost two lakh people in India need kidney transplants and there are only 4,000 people donating them, reveals by Narendra Saini, Media co-ordinator of the Indian Medical Association in Delhi. And this discrepancy in demand and supply leads to cases like the deeds of "Dr Horror" Amit Kumar, accused of running an illegal kidney racket out of Gurgaon. The incident has raised many questions, including the efficacy of the Transplantation of Human Organs Act, 1994. Such scams keep breaking out time and again.

V. Features of law as it is

Some of the chief features of the legal provisions are as follows.

(1) The Hospital to carry on any activity like, removing, storing and transplanting any human organ shall have to obtain a certificate of registration from an appropriate authority constituted by the State Government. Such a registered Hospital can only engaged into any or all of such activities only for therapeutic purpose. However, ear-drums, ear-bones, ear, and cornea can be removed by any medical practitioner from any place for therapeutic purposes [Sections 10-12 of Chapter III and sec 14-17 of Chapter V of the Act].

(2) Central Government for the Union territories and the state governments for the state concerned may appoint one or more Appropriate Authority to (i) grant of registration; (ii) suspend or cancel registration; (iii) enforce standard prescribed; (iv) conduct investigation and take appropriate action for any breach; (v) inspect Hospitals

periodically; and (vi) undertake such other measures required [Section 13 of the Act].

(3) The donor may authorize removal of any organ from his/her body before death for only therapeutic purposes. If the donor authorizes before his death in writing in the presence of two or more witnesses (at least one has to be in near relation) in that case the person who has the lawful possession over the dead body shall authorize removal of any organ from the dead body for therapeutic purposes. The removal has to be by a registered medical practitioner.

(4) Transplantation of Human Organs (Amendment) Act 2011 was passed to include donation of tissues, enhancing penalties for commercial trade and making it mandatory for a doctor in Intensive Care Unit (ICU) facilities to ask every patient or his near relative if he is willing to donate his body in case of death.

(5) The Act (i) covers both organs & tissues; (ii) permits donations from living persons who are near relatives (Expansion of the term "Near Relatives" included grandparents and grandchildren) (iii) defines tissue and transplant coordinator;[5] (iv) defines Human Organ Retrieval Centre[6]; (v) adds the provision that a doctor shall ask the patient or relative of every person admitted to the ICU whether any prior authorization had been made (If not, the patient or his near relative should be made aware of the option to authorize such donation); (vi) adds that if a neurologist or neurosurgeon is not available to be on the board, the doctor in-charge of the hospital may nominate an independent doctor who is a surgeon or a physician and an anesthetist or intensives' not on the transplant team; (vii) adds that if the donor or recipient is a foreign national, prior approval of the Authorization Committee is required; (viii) prohibits removal of organs or tissues from a minor before his death except in a manner to be prescribed; (ix) adds the provision that appropriate authorities shall have the powers of the civil court for summoning any person, producing documents and issuing search warrants;

(6) It is generally difficult to keep available an eye surgeon for the removal of corneas. So, for the removal of corneas, a trained eye technician could easily do the job. Therefore a clause has been inserted to provide that a technician possessing such qualifications and experience as may be prescribed, may enucleate a cornea.

(7) A new clause has been incorporated that in the event of the non-availability of a Neurosurgeon/ neurologist, a surgeon/ physician and an anesthetist / intensives could be nominated from a panel already approved by the Appropriate Authority. Such surgeons/ physicians Anesthetist / Intensives shall, however, not associate with the removal of the organs from the donors or its transplantation into the recipients in any time before the members of the transplant team arrive.

(8) The central and/or state governments shall provide for constitution of (i) an Advisory Committee for a period of two years to aid and advise the appropriate authority; (ii)The central government may establish a National Human Organs and Tissues Removal and Storage Network at any place. Rs. 5 crores has been allocated in the Financial Memorandum. (iii) The central government shall maintain a registry of the donors and

[5] "Tissue" means a group of cells except blood performing a particular function in the human body. "Transplant coordinator" means a person of the hospital appointed for coordinating matters related to transplantation

[6] Human Organ Retrieval Centre" means a hospital,- (i) which has adequate facilities for treating seriously ill patients who can be potential donors of organs in the event of death; and (ii) which is registered under sub-section (1) of section 14 for retrieval of human organs; (hb) "minor" means a person who has not completed the age of eighteen years

recipients of human organs and tissues.

(9) Penalty for making or receiving payment for supplying human organ increases penalty to imprisonment for 5-10 years and a fine between Rs. 5 and 20 lakh. The Act also adds offence of abetting in submission of false documents to prove that donor is a near relative or donating for affection. Penalty has been increased to imprisonment for a maximum of 5 years or with fine of up to Rs. 5 lakh for contravening any other provisions of THOA.

VI.Need for critical review

The present philosophy of THOA, one for frame-working regulatory system and the other for non-commercialization, both require critical review. In both these regards, the gap between the purpose and performance is quite wide. In ***Balbir Singh v. Authoriation Committee and Ors***. (AIR 2004 Del.413) the court observed "particularly in kidney transplant, of exploitation of poor persons where either in grab of donations, affection or special circumstances, with involvement or connivance of medical practitioners, transplantation of organs is done for consideration. The donors receive a pittance, while the middlemen and others retain the cream. There are also cases of deception or clandestine removal of organs from unaware and unsuspecting persons''. In view of the aforesaid direction of the High Court, a Review Committee was constituted. The Committee reviewed the standard requirements for both the types of donors, relatives and non-relatives in case of life donors. The Review Committee recommended that the responsibility of conducting the medical test to find that the donor was a near relative (son, daughter, mother, father, spouse, brother, sister) on the registered medical practitioner under Rule 4(1) of Rules, 1995 to be given to the Authorization Committee. That would take off unnecessary and avoidable pressure from the medical practitioners.

The Committee further recommended Hospital based Authorization Committee in metropolitan cities and large capital cities and District or Division-wise AC. Based on the Committee Report a detail working guidelines for the Authorization Committee.

VII. Working Guidelines for AC

The ACs are of the respective States or Union Territories is constituted to "approve" or "reject" transplants between the recipient and unrelated donors. The primary duty of the AC is to be able to establish that the unrelated donors are not under any coercion or undue influence by monetary consideration to donate their organs. The joint applications from live unrelated donors and recipients are forwarded to the AC by the hospitals (where the transplant is proposed to be performed, after conducting all medical tests). The AC meets regularly to scrutinize applications and looks into the motives of the donors and tries to establish if there is the motive of 'true affection' for the recipient and there is no possibility of commercial transaction between the two. This is done by a personal interview of both the donors and recipients. Approved pairs intimation is sent by post to the concerned hospitals.

The notification of the Official gazette clearly lays down the following guidelines:

Where the proposed transplant is between persons related genetically (close relative, i.e., mother, father, brother, sister, son, or daughter above the age of 18 years old), the following shall be evaluated:

Results of tissue typing and other basic tests

(a) Documentary evidence of relationship e.g., relevant birth certificates and marriage

certificate

(b) Documentary evidence of identity and residence of the proposed donor e.g., Ration Card or Voters Identity Card, Passport, Driving License, PAN Card, or Bank Account and family photograph depicting the proposed donor and the proposed recipient along with another near relative

(c) If the relationship is not conclusively established after evaluating the above evidence, direct further medical tests may be given as described follows.

(d) Test for Human Leukocyte Antigen (HLA), human leukocyte antigen-B alleles to be performed by the serological and /or polymerase chain reaction (PCR) based Deoxyribonucleic Acid (DNA) methods

(e) Test for human leukocyte antigen-Dr beta genes to be performed using PCR-based DNA methods.

Tests shall be done from a laboratory accredited with National Accreditation Board for Laboratories (NABL). When the tests referred to above do not establish a genetic relationship between the donor and the recipient, the same tests should be performed on both or at least one parent, preferably both parents. If parents are not available, the same tests should be performed on relatives of donor and recipient that are available and are willing to be tested failing which, the genetic relationship between the donor and the recipient will be deemed to have not been established.

When the proposed transplantation is between a married couple, the Registered Medical Practitioner i.e., the person in charge of the transplant center must evaluate the fact and duration of marriage (marriage certificate, marriage and family photographs, birth certificate of children containing particulars of parents). When the proposed donor or recipient or both are not Indian Nationals/citizens whether close relatives or otherwise, the AC shall consider all such requests. A senior Embassy official of the country of origin has to certify the relationship between the donor and the recipient. When the proposed donor and the recipient are not close relatives, the Authorization Committee shall evaluate that there is no commercial transaction between the recipient and the donor and the following shall specifically be assessed:

(i) An explanation of the link between them and the circumstances that led to the offer being made

(ii) Reasons why the donor wishes to donate

(iii) Documentary evidence of the link, e.g., proof that they have lived together

(iv) Old photographs showing the donor and recipient together

(v) There is no middleman or tout involved

(vi) The financial status of the donor and the recipient is probed by asking them to give appropriate evidence of their vocation and income for the previous three financial years. Any gross disparity between the statuses of the two must be evaluated with the objective of preventing commercial dealing. Besides it has to be ensured that (a)the donor is not a drug addict or known person with criminal record and (b) the next of kin of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ, the authenticity of the link between the donor and the recipient and the reasons for donation.

VIII. AC's approval or rejection, a written order

The AC should state in writing its reason for rejecting or approving the application of the proposed donor and all approvals should be subject to the following conditions:

(i) The approved proposed donor would be subjected to all medical tests as required at relevant stages to determine his biological capacity and compatibility to donate the organ in question.

(ii) Psychiatrist's clearance in such cases is deemed mandatory to certify the donor's mental condition, awareness, absence of any overt or latent psychiatric disease, and ability to give free consent.

(iii) All prescribed forms have been completed by all relevant persons involved in the process of the transplantation.

(iv) All interviews should be video recorded.

The AC is required to take a final decision within 24 hours of the meeting for grant of permission or rejection for transplant. Every authorized transplantation centre must have its own website. The decision of the AC should be displayed on the notice board of the hospital immediately and on the website of the hospital or institution within 24 hours of making the decision.

IX. Guidelines for Composition of AC

There shall be one State Level AC. It will provide approval or a no objection certificate to the donor and recipient to establish legal and residential status in a particular state. Additional ACs may be set up at various levels as per the requirements as follows:

(a)No member from the transplant team of the institution should be a member of the respective AC.

(b)The AC should be hospital-based in metros and big cities if the number of transplants exceeds 25 in a year at the respective transplantation centres. In small towns, there shall be state or district level committees if transplants are less than 25 in a year in the respective districts.

X. Composition of a hospital-based AC

(i) Medical Director or Medical Superintendent of the Hospital

(ii) Two senior medical practitioners from the same hospital who are not part of the transplant team

(iii) Two members of high integrity, social standing, and credibility

(iv) Secretary (Health) or nominee and Director Health Services or nominee

XI. Composition of State or District Level ACs

(i) Medical Practitioner officiating as Chief Medical Officer or any other equivalent post in a main/major government hospital of the district

(ii) Two senior medical practitioners who are residing in the concerned district and who are not part of any transplant team

(iii) Two senior citizens of high reputation and integrity residing in the same district

(iv) Secretary (Health) or nominee and Director of Health Services or nominee

XII.Interpretations

(1) The AC concludes that if the recipient and donor pledge affection in front of them they should not object unless there is a complaint or some gross oversight. They also believe that since the doctor himself has sent such a case to the committee, they need verify such claims. The majority of applications to the AC are usually accepted. Most unrelated donations occur when the donor expresses their true affection for the recipient in front of the AC.

(2) As per the law, any person who is aggrieved with the order of the AC is allowed to make an appeal within 30 days of the issue of the order to the State government.

(3) The problem has been on how to use Sub-Clause (3), Clause 9 of Chapter II of the Act and how to protect the exploitative element in the word affection. The law, which was meant to prohibit commercial dealings in human organs, now provides protection for those very commercial dealings[7].

XIII.Authority for Removal of Human Organ

Any donor may authorize the removal, before his death, of any human organ of his body for therapeutic purposes as specified in Forms 1(A), 1(B), and 1(C). These forms have been made more comprehensive and are to be submitted with proof of identity and address, marriage registration certificate, family photographs, etc. with attestation by a Notary Public.

The notification of the Official gazette states that before removing a human organ from the body of a donor before his death, a medical practitioner should satisfy himself that the donor has given authorization in Form 1(A) if the relative is a close relative i.e., a mother, father, brother, sister, son, or daughter. Form 1(B) is used for a spouse and Form 1(C) is used for other relatives. He should also confirm the following:

(a) The donor is in a proper state of health and is fit to donate the organ. The registered medical practitioner should then sign a certificate as specified in Form 2.

(b) The donor is a close relative of the recipient as certified in Form 3 and has signed Form 1(A).

(c) The donor has submitted an application in Form 10 jointly with the recipient and the proposed donation has been approved by the concerned competent authority. The relationship between the donor and recipient also needs to be examined to the satisfaction of the Registered Medical Practitioner in charge of the transplant centre through appropriate tests as stated in the rules.

(d) In the case of the recipient being a spouse of the donor, the donor has given a statement to the effect that they are so related by signing a certificate in Form 1(B) and has submitted an application in Form 10 jointly with the recipient and the proposed donation has been approved by the concerned competent authority.

(e) In the case of a donor who is other than a close relative, the donor has signed Form 1(C), submitted an application in Form 10 jointly with the recipient, and permission from the Authorization Committee for the donation has been obtained.

The inclusion of spouse as a possible donor was controversial, as it was felt that this was potentially exploitable and marriages could be performed for the sole purpose of transplantation and later absolved. However, so far such instances of donation have not come to light.

[7] " Dr. Mani's article is titled 'The Law is an Ass'.

XIV. Factors to be confirmed before removal of organ

A registered medical practitioner shall, before removing a human organ from the body of a person after his death, confirm the following:

(i) The donor had, in writing, in the presence of two or more witnesses (at least one of whom is a close relative of the recipient), unequivocally authorized as specified in Form 5 before his death, the removal of the human organ of his body after his death for therapeutic purposes and there is no reason to believe that the donor had subsequently revoked the authority.

(ii) When no such authority was made by any person before his death and no objection was also expressed by such person, the person lawfully in possession of the dead body of such person may, authorize the removal of any human organ of the deceased person for its use for therapeutic purposes.

(iii) The person lawfully in possession of the dead body has signed a certificate as specified in Form 6.

A registered medical practitioner shall, before removing a human organ from the body of a person in the event of brain-stem death, confirm the following that:

(a) the life is extinct.

(b) A certificate as specified in Form 8 has been signed by all the members of the Board of Medical Experts[8].

(c) In the case of brain-stem death of a person of less than 18 years of age, a certificate specified in Form 8 has been signed by all the members of the Board of Medical Experts and an authority as specified in Form 9 has been signed by either of the parents the person.

No Authority shall be given for the removal of any human organ from the body of a deceased person, if an inquest may be required to be held in relation to such body in pursuance of the provisions of any law.

If any deceased body lies in the hospital or prison and is not claimed by any relatives within 48 hours, the person incharge of the hospital or prison may give authority for the removal of any human organ from the dead body in the prescribed form.

After the removal of any human organ from the body of any person, the registered medical practitioner shall take such steps for the preservation of the human organ so removed as may be prescribed.

Any competent person can make available the organs which are not required for of post-mortem for the purpose of donation from such dead body.

XV. Hospital practices

The clause (Sub Clause (3), Clause 9 of Chapter II) in the Act that gives room for unrelated transplant activity reads as follows: "If any donor authorizes the removal of any of his human organs before his death under sub-section (1) of section 3 for transplantation into the body of such recipient, not being a near relative as is specified by the donor, by reason of affection or

[8] Board of medical experts consist of (i) the registered medical practitioner in charge of the hospital in which brain-stem death has occurred;(ii) an independent registered medical practitioner, being a specialist, to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate authority; (iii) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate Authority; and (iv) the registered medical practitioner treating the person whose brain-stem death has occurred.

attachment towards the recipient or for any other special reasons, such human organ shall not be removed and transplanted without the prior approval of the Authorization Committee."

This clause of the Act has often been misused or misinterpreted by one and all over the years, since the Act was passed.

As per the law any person who is aggrieved with the order of the AC is allowed to make an appeal within 30 days of the issue of the order to the State government. In, ***B L Nagaraj & others Vs. Kantha & others***,(AIR 1996 Kant.82) the prospective recipient, filed a writ petition before the High Court of Karnataka against the order of the AC which rejected the application for organ donation by the sister-in-law of the recipient on the grounds that near relatives were not considered donors.

The High Court while allowing the writ petition held:

"There is no provision in the Act which prohibits the person who is not a 'near relative' by definition, from donating his kidney merely because the 'near relative' have not been considered as donors by the family for kidney transplantation. The Committee has misdirected itself in this regard while refusing permission to the petitioners."

"The Committee would ascertain from the second petitioner whether she would be donating the kidney out of 'affection and attachment'. The donors relationship with the recipient, period of acquaintance and the degree of association, reciprocity of feelings, gratitude and other human bonds are perhaps some of the factors which would sustain 'affection and attachment' between two individuals. The committee has to ensure that the human

organ does not become an article of commerce. The main thrust of the Act is against commercial dealings in human organs."

A patient whose kidney has failed uses this clause to find an instant affection in a stranger who is willing to donate his/her organ for money but they deny any such information to the AC. Later, the same donor makes a claim to the police or the media that they were duped into the donation process and not paid the promised sum for the organ. The affection in these instances, which they expressed for the recipient in front of the AC, has no meaning or relevance. The police having no knowledge that the Act of donation for money is illegal instantly pulls up the middleman or doctor or the hospital. Occasionally, when there is a media expose, the authorization committee in a knee-jerk reaction, tightens its regulations and stops clearing even genuine cases. For the past 3 years, the AC in Tamil Nadu videotaped all the interviews so that these videos can be used as evidence later if necessary.

XVI Regulation for Hospitals

Every Hospital for the purpose of carrying out transplantation of human organs or tissues should be registered and medical practitioner shall conduct the transplantation in the premises of the registered hospital itself which shall be used for therapeutic purposes only.

The eyes or the ears[9] may be removed at any place from the dead body of any donor, for therapeutic purposes, by a registered medical practitioner.

A Hospital shall be granted a certificate of registration provided it fulfills the requirement of manpower, equipment, specialized services and facilities as laid down under the Transplantation of Organs Rules, 2008. Before a hospital is registered under the provisions of this Rule, it shall be mandatory for the hospital to have / nominate a transplant coordinator.

[9] "Ears" includes ear drums and ear bones.

The Appropriate Authority shall either grant or reject the registration after appropriate inquiry and after satisfying itself that the applicant has complied with all the requirements of this Act and the rules.

XVII. Appropriate Authority (AA)

The purpose of this body is to regulate the removal, storage, and transplantation of human organs. A hospital is permitted to perform such activities only after being licensed by the authority. The Appropriate Authority constituted by the State governments, is vested with the following power:

(i) Inspect and Grant registration to the hospitals for transplant surgery.

(ii) Enforce the required standards for hospitals.

(iii) Conduct regular inspection of the hospitals to examine the quality of transplantation and follow-up medical care of donors and recipients.

(iv) Suspend or cancel the registrations or erring hospitals.

(v) Conduct investigation into complaints for breach of any provisions of the Act.

Hence the removal, storage and transplantation of human organs can only be undertaken at hospitals licensed by the Appropriate Authority.

However, the removal of eyes from the dead body of a donor can be made at other places. AA can issue a license to a hospital only for a period of 5 years at a time. It can renew the license once every five years. Each organ requires a separate license.

The Appropriate Authority may, suo moto or on complaint, issue a notice to any hospital to show cause why its registration under this Act should not be suspended or cancelled for the reasons mentioned in the notice. Aggrieved person may prefer an appeal to Central or the State government as prescribed.

XVIII OFFENCES UNDER THE ACT

Offences under the Act include:

1. Any person who makes an offer of payment for supply of human organs
2. seeks to find a person willing for organ donation,
3. initiates or negotiates any arrangement involving the making of any payment for the supply,
4. Publishes or distributes any advertisement, inviting persons to supply for payment or offering to supply any human organ for payment.

XIX PROBABLE SOLUTIONS

1. A ‘Required Request Law’ that would make it compulsory for hospital staff to ask for organs in the event of brain death’
2. Undertaking –‘Post-mortem Examination during the Same Time as Organ Retrieval Surgery in Medico-Legal Cases.’ At present after organ donation for retrieval surgery the brain death patient is subjected again to post-mortem and this cause’s unnecessary emotional trauma to the already aggrieved relatives.
3. ‘Delinking Hospitals Where Organs Can Be Retrieved from Hospitals,’ where they can actually be transplanted. Moving bodies from one hospital that is not approved to another

that is approved, limits the scope of number of brain death patients that is made available, difficult in brain death situation and most important traumatic to relatives of the patient.

4. There is also a need to explore possibilities of how the Sub Clause (3) of the Transplantation of Human Organ Act does not get misused.

(a)Strengthening and making the AC's working more transparent.

(b)Providing uniform guidelines to AC on how to interview - Donors and recipients.

(c)Video-recording the proceedings of the AC

(d) Exploring and encouraging paired donations, where no match is available in a family.

XX. Appropriate Forms for Information enlistment

The Transplantation of Human Organ Act clearly lays out various procedures; for this purpose, it has thirteen different forms.

Form 1	Consent Form - From Donor for Live Related or Unrelated Organ Donation
Form 2	Certificate to be issued By Medical Practitioner To Organ Donor Before Considering For Organ Donation
Form 3	Certificate by Medical Practitioner Establishing Relationship as Based On HLA Antigen Tests
Form 4	Certificate by Medical Practitioner Before donation and transplantation Between Spouses
Form 5	Consent form for organ donation after death Donor Card
Form 6	Certificate Of Consent By Person having Lawful possession of the Body in Event of Death (including Brain death)
Form 7	Certificate Of Consent By Person having Lawful possession of the Body in Event of Death (including Brain Death) where deceased has Given Prior Approval for Organ Donation
Form 8	Brain Death Certificate
Form 9	Informed Consent From Parents for Organ Donation of Their Child (Less Than 16years)
Form 10	Application For Approval For Transplantation Live Donor Other Than Near Relative
Form 11	Application For Registration Of Hospitals To Carry Out Organ Transplantation
Form 12	Certificate of Hospital Registration to undertake transplant activities
Form 13	Office Of The Appropriate Authority for renewal of certificate of registration by a hospital

XXI An alternate proposal for a directory of voluntary donor

In ***Kuldeep Singh and another v. State of Tamil Nadu and others*** (AIR 2005 SC 2106) it was rightly observed that object was "to find out the true intent behind the donor's willingness to donate the organ". The inclusion of 'non-near relation' as donor but 'for not

commercial object' is a very rare occasion to rely on. As a result more often than not the court has to necessarily become doubtful about the genuineness of the applications filed by petitioners and direct the government to hold an enquiry to ascertain the genuineness. This was what happened in ***S.Maligamma alias Malligavva and another v. State of Karnataka*** (AIR 2005 Kant 74). But in ***Rajinder Kumar v. State of Punjab*** (AIR 2005 P&H 172) where donor was from a deep rural area more than thousand miles away and had no occasion to visit any nearby city also and having no relation with the donee a High Court did not find any reason as to deny the right to donation for a person unknown and could not find any reason to doubt the transaction on commercial purpose. No presumption was made. Another High Court in similar situation found any reason as to why the donation could be allowed. There were at least four to five states having dubious donations. Poor people are deceived of both, a kidney as well as the money what the donee was required to pay. It is quite possible that the AC can be authorized to make lists of donors willing to donate an organ with the responsibility of examination of ability and health conditions, advising the after-care requirement and the legal and health literacy and understanding to the expected donors. The donee. That at least will facilitate (a) donor's health checkup and finding worthiness, appreciation of the fact that poverty is not the mere reason for donation and making the donor appreciate after care; (b) donee to link up available intending donors from national data base; and (c) donor-donee can directly negotiate the compensation amount what donee would be paying without any intermediary demanding any major cut. Presently several studies showed that 'poverty driven donor' does not get more than 5 to 10 percent of the amount involved through a chain of thugs who are enriched without any cause in organ trade.

Data of the prospective donor can be generated with detail particulars at the district/city level by the AC which can then be fed into a national data accessible throughout by any patient requiring the donation. All negotiations are required to be at either the Registered Hospital (Under the AC) of the donor or the donee's. Only in such transparent system a welfare state like India can ensure that (a) donor has motivation to donate against a fair compensation, (b) organ trade by some intermediaries can be prevented, (c) organ transplantation can be done only through registered Hospitals, (d) donors' particulars are available with the Hospital authorities so as to provide after care and • donor gets reasonable compensation through direct negotiation. This will to a large extent eliminate an exploitative sub-culture of organ trading in the name of "non-commercialization". After all, the donor cannot trade with his organ because he/she sacrifices a limb once for all and there is no stock-in-trade. The commercial practice is indulged into by only other intermediaries including unregistered Nursing Homes and Hospitals.

XXII Non-standardized Jurisprudence

The strength of common law jurisprudence, or case-based precedent laws, is the certainty, predictability, and definiteness of the law and practice. Law is similar and similarly enforced in similar fact situation. Unfortunately that is not the character of Indian law and practice. In spite of the fact that Indian law is predominantly based on statute, rules and regulations both in the substantive part of law as well as the procedure, your interpretative jurisprudence built up at the level of the High Courts is highly uneven, confusing and making the law and justice very uncertain. A random survey of jurisprudence in human organ transplantation, law and practice shall unveil this uncertainty, notwithstanding the parliamentary law thought to be definite and codified.

In ***Balbir Singh v.Authorization Committee and others*** (AIR2004 Del 413) Delhi High Court observed that "particularly in kidney transplant, of exploitation of poor persons where either

in grab of donations, affection or special circumstances, with involvement or connivance of medical practitioners, transplantation of organs is done for consideration." In its concern the Court in its concern recommended setting up a review Committee to review the working the Act and Rules during the last decade on the working of the 1994 Act and Rules. In ***Kuldeep Singh and another v. State of Tamil Nadu and others*** (AIR 2005 SC 2106) the Supreme Court of India held "that the Authorization Committees of the State to which the donor and the donee belonged should decide whether approval is to be accorded". The Court laid down various relevant factors to be considered by the Authorization Committee in this regard, namely, "relationship if any (need not be near relationship for which different considerations have been provided for), period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors and bonds can throw light on the issue." In ***B.L.Nagaraj and others v. Dr.Kantha and others*** (AIR 1996Kant.82) Karnataka High Court while debating on an issue of the Authorization Committee refusing to accept the proposal of donation of kidney by the sister in law of the donee because the donor was only a relative and not within the defined parameter of near relative. The Court directed the Committee to consider the petition for allowing donating her kidney to the sister-in-law on the ground of affection and attachment because the Court observed that there was no prohibition of donating kidney if the person was not a near relation. ***Rajinder Kumar v. State of Punjab and others*** (AIR 2005 P&H 172) the Court observed that the ground that because there was economic disparity between the petitioner and the proposed donor, was not reason enough to draw the inference that the petitioner was receiving the said donated organ on consideration of money. The court observed that "It is apparent that the Authorization Committee as well as Appellate Authority have been influenced by the suspicious atmosphere which had been created on account of some irregularities in kidney transplantation in the past. However, the result of the aforesaid suspicious atmosphere cannot be allowed to become a dead wall for seriously ill patient, the petitioner." In a similar nature of incidents the Karnataka High Court was doubtful about the genuineness of the application filed by the petitioner and hence the Court directed the Government to hold enquiry in ***S.Malligamma*.** There is a very wide gap between the perception of various High Court

XXIII Concluding remark

Correspondingly, law and practice on human organ available from 'brain death' as well as dead bodies sent for *post mortem* examination on unclaimed bodies could be dealt with more élan. People may be made more conscious about the donation of dead bodies for organ and tissue use for therapeutic reasons as well as donation of dead bodies for medical education and research purposes. Law may prescribe that organ and tissues from accidental death cases, unclaimed dead bodies, and bodies sent for *post mortem* examinations can be used for transplantation. People may be motivated to make wills/written form of last desire for donations of their dead bodies for medical and therapeutic purposes. Law can prescribe that such a last desire would be respected by the near relations after the death of the person concerned.

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Rising In Peace But Not Dead: The Legacy On Nani Palkiwala Continues....

Prof. Gurjeet Singh *

On being approached to write about a well known person in public life is indeed a pleasure and a privilege for a writer. However, when one is asked to write about a person whose personality and persona cannot adequately be described in words, one certainly gets into a dilemma. And when the person about whom one is asked to write is no less than an institution in himself/herself, and is instead a legend, the writer's or the biographer's job becomes exceedingly difficult and challenging, too. Nevertheless, sometimes you are so much enamored and captivated by the charisma and magnetism of an individual, that you are always ready to write about or talk about that person to anyone at anytime on any platform, whatsoever. I am, therefore, no exception. For example, I have never met Nani Palkhivala during his lifetime, however, I am always unable to resist the temptation of talking about him or of writing about him for any book, journal or periodical. Whenever anybody has in the past approached me to write about Nani Palkhivala, my answer has always been in the affirmative. I wrote the first piece on Nani Palkhivala entitled: "Nani Palkhivala: A Man of My Dreams" for the book entitled: *Nani Palkhivala: A Role Model*[1] edited by Major General Nilendra Kumar, the former Judge Advocate General, Indian Army - a book, that to me atleast, is perhaps one of the best collections and compilations of articles contributed by the eminent people from all walks of life, on the life and times of one of the greatest jurists the world has ever produced. My second piece entitled: "Nani Palkhivala: A Tribute to a Legend" was published in the *Law Journal of Guru Nanak Dev University*, Amritsar.[2]

The offer to write once again on the life and works of Nani Palkhivala came during one of my visits to the KIIT Law School, Bhubaneswar in Orissa where I had gone to deliver a few

* B.A. (Hons.), M.A. (Eco., Pol. Sce. & Pub. Admn.), LL.M. (GNDU), Ph.D. (GNDU, ASR), Ph.D. (SOAS, London). Professor of Law, Guru Nanak Dev University, Amritsar. Formerly Vice-Chancellor, Rajiv Gandhi National University of Law, Punjab (Patiala) and presently Vice-Chancellor, National Law University and Judicial Academy, Assam (Guwahati). Two eminent persons deserve sincere appreciation for making me write this piece about Nani Palkhivala. They are: Professor Faizan Mustafa, the former and Professor Nirmal Chakraborty, the present Directors respectively of the KITT Law School, Bhubhaneswar. I have explained in the body of this paper as to how this was conceived and written and how could it ultimately reach the publication stage after four years of its writing. My heartfelt gratitude and profound thanks are due to both the above named learned colleagues of mine for their kind encouragement, patience and perseverance.

1 Gurjeet Singh (2006): "Nani Palkhivala: A Man of My Dreams." In: Nilendra Kumar (ed.): Nani Palkhivala: A Role Model, New Delhi: Universal Law Publishing Co., pp. 171-80.

2 Gurjeet Singh (2004): "Nani Palkhivala: A Tribute to a Legend." In: Law Journal of Guru Nanak Dev University, Amritsar, Vol. 13, pp. 11-22.

lectures on the subject of Legal Research and Methodology to the LL.B. students in the year 2009. My host and a very close friend Professor Faizan Mustafa, one of the most accomplished and dedicated young law teachers in the country, gave me this offer while traveling in a car from Biju Patnaik Airport to the KITT Law School. Professor Mustafa, who was then the Director of the KITT Law School informed me that he was bringing out an Inaugural Issue of the *KITT Journal on Law and Society* wherein he wanted to include a piece or two on the lives and works of those legal luminaries who had made signal contribution to the knowledge of law - the one who could be the role models for the students. All of a sudden, our discussion shifted to the contribution made by some of the leading lawyers to the public life in India in general and to the field of law in particular. Both of us were unanimous that the contribution made by Nani Palkhivala and Homi Seervai to the field of law was matchless. Professor Mustafa lost no time in persuading me to write two pieces, one each on Nani Palkhivala and Homi Seervai respectively, for the inaugural issue of the aforesaid journal. I was left with no option but to say yes to my host and a very dear friend. While excusing myself to write two pieces simultaneously, I agreed to write only one - but yet another piece, once again on the man of my dreams, and the man whom I still admire and worship and that, too, without having met him even once. He is none other than Mr. Nani Ardashir Palkhivala who was "a supremely gifted individual, unspoilt by success, emotional, affectionate and generous to a fault, a man with a deep sense of spirituality that transcended religious boundaries."[3]

I wrote this piece and sent it to Professor Faizan Mustafa for publication hoping to receive in return the copy of the Inaugural Issue of the journal containing my piece, alongwith a few off-prints of the article for my personal collection and use. However, before it could be published, Professor Mustafa was appointed as the Vice-Chancellor of the National Law University, Orissa. He left for his new assignment and I, too, forgot about the piece, till I got an unexpected call from Professor Nirmal Chakraborty, the present Director of the School of Law, KITT University, another dedicated teacher and a distinguished researcher who somehow came to know about my piece written in honour of Nani Palkhivala. I was politely asked by Professor Chakraborty to revise the aforesaid paper for publication in the forthcoming issue of their law journal. I hesitatingly agreed to Professor Chakraborty's proposal, lest the history may not be repeated, however, with a rigorous condition that nothing written by me shall be modified or abridged in any way, whatsoever. Quite fortunately, during this transition period, I had come across a few more writings on the life and times of Palkhivala[4], the prominent amongst them being a book written on the lives of some of the eminent parsis. The book entitled: *Sugar in Milk: Lives of Eminent Parsis* authored by Bakhtiar K. Dadabhoy[5] is one such book that enabled me to have further insight into the professional career and the personal life of one of the greatest advocates of the 20th Century, that is, none other than Nani Palkhivala. Dear readers, here is the thoroughly revised and enlarged piece on the life of an extra-ordinary man whom I have admired all through my life, and will perhaps continue to do so till I meet him in person, may be in the next birth or in the next world.

I would, however, like to reiterate here that while writing this piece, I was not at all oblivious of the apt observations of Hon'ble Mr. Justice Krishna Iyer, former judge of the Supreme

3 Y.H. Malegam (2007): "Introduction." In: M.V. Kamath: Nani A. Palkhivala - A Life, New Delhi: Hay House India, pp. 11-13, at p. 11.

4 See, for example: M.V. Kamath (2007) and Soli J. Sorabjee (2011): Nani Palkhivala: The Courtroom Genius, New Delhi: Lexi-Nexis.

5 Bakhtiar K. Dadabhoy (2008): Sugar in Milk: Lives of Eminent Parsis, New Delhi: Rupa and Co.

Court of India, a distinguished jurist and a living legend himself, that to praise Nani Palkhivala was to 'paint a lily' or 'to guild refined gold' or to 'throw a perfume on the jasmine'.[6] What a wonderful tribute to a wonderful individual !

I first learnt about Nani Palkhivala while preparing a class assignment for the subject of Constitutional Law, that is, a 'Case Comment' on the famous case of *Kesavananda Bharati* v. *State of Kerala*[7] Also known as the '*Fundamental Rights Case'*, arguably one of the most famous cases in the Indian legal history and the longest case ever heard by the Supreme Court of India. It was in this case that Palkhivala had innovated a unique doctrine that though the Indian Parliament could amend the Constitution, however, it had got no authority to alter or amend the 'Basic Structure' of the Constitution.[8] This doctrine is the most enduring contribution of Nani Palkhivala to law. In Palkhivala's own words, "Thus Kesavananda's case ensures that tyranny and despotism shall not masquerade as constitutionalism."[9] I still vividly remember our Constitutional Law teacher's wording that the advocates who had made intensive contribution to the field of law in India were countable on fingers only[10] and according to

6 V.R. Krishna Iyer (2004): "Palkhivala - A Profound Appreciation." In: Nilendra Kumar (ed.): Nani Palkhivala: A Tribute, New Delhi: Universal Law Publishing Co., pp. 73-75, at p. 73.

7 AIR 1973 SC 1461. On 24 April 1973, a judgment was delivered in this case and the historic pronouncement was that though Parliament could amend the Constitution, it had no right to alter its basic structure. As a matter of fact, it was this construct of the 'basic structure' of the Constitution that saved India from the horrors of totalitarianism during the dark days of the Emergency imposed by the then Prime Minister of India, Mrs. Indira Gandhi. It may be appropriate to mention here that the decision in Kesvananda Bharati's Case became the hallmark of Nani Palkhivala's professional success. It was during the hearing of this case that the crowded Supreme Court of India was witness to some of the most eloquent arguments ever advanced in the Indian legal history. However, soon after the proclamation of the Emergency on 25 June 1975, the government sought to get the judgment in the Kesavananda Bharti's Case reversed. However, Palkhivala's powerful resistance for reconsideration of the decision in the aforesaid case by the Supreme Court is also remembered till date and it may be no exaggeration to say that his intervention saved democracy in India. About the latter case, Hon'ble Mr. Justice H.R. Khanna had gone on record by saying: "The height of eloquence to which Palkhivala rose on that day had seldom been challenged and never surpassed in the history of the Supreme Court." For details, see: H.R. Khanna (1985): Neither Roses Nor Thorns, Lucknow: Eastern Book Co., pp. 74-75. Another Supreme Court Judge, referring to Nani's address in the latter case observed: "Never before in the history of the Court has there been a performance like that". "Such arguments will not be heard in this Court for centuries to come"; "a forensic feat that will perhaps never be equaled"; "advocacy and eloquence of unparalleled merit in the entire history of the world" were the views of some of the senior lawyers present in the Supreme Court. Justice H.R. Khanna had further remarked: "It was not Nani who spoke. It was Divinity speaking through him." For details, see: Behram A. Palkhivala (2004): "This was a Man !" In: Nilendra Kumar (ed.), pp. 217-28.

8 It may be appropriate to mention here that when Hon'ble Mr. Justice S.N. Dwivedi, one of the thirteen Hon'ble Judges on the Supreme Court Bench constituted to hear the Fundamental Rights Case, asked Palkhivala as to what he considered the essential or basic features of the Constitution to be, Palkhivala enumerated those, inter alia, to include the supremacy of the constitution; sovereignty of the country, republican form of government; democratic way of life; guarantee of basic human rights, secular state; free and independent judiciary; dual structure of the executive and judiciary; balance between the legislature, the executive and the judiciary; and the amendability of the Constitution according to the basic scheme of Article 368. It may further be mentioned here that the 'Doctrine of Basic Structure' is perhaps the most enduring contribution that Nani Palkhivala made to the field of law. It is this doctrine that has effectively controlled the power of Parliament to amend the Constitution as it pleased. In addition to the Kesavananda Bharati's Case, following are some of the other prominent cases where Palkhivala had scaled the heights of his passionate advocacy and persuasive oratory: Golak Nath v. State of Punjab, AIR 1967 SC 1643; R.C. Cooper v. Union of India (The Bank Nationalisation Case), AIR 1970 SC 564; Madhavrao Jivaji Rao Scindia v. Union of India (The Privy Purse Case), AIR 1971 SC 590; Ahmedabad St. Xavier's College Society v. State of Gujarat, AIR 1974 SC 1389; Indira Nehru Gandhi v. Raj Narain (The Indira Gandhi Election Case), (1976) 2 SCR 347; ADM Jabalpur v. Shiv Kant Shukla, AIR 1976 SC 1207; Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789; Indira Sawhney v. Union of India, (1992) Supp 3 SCC 217; and T.N. Seshan v. Union of India, (1995) 4 SCC 64. I may add here that due to space constraints, it is not possible to discuss, even briefly, any of the above listed cases. Their discussion can, however, be a subject matter of a full-fledged research paper.

9 For more details, see: Bakhtiar K. Dadabhoy (2008), p. 344.

10 Prominent among these were: C.K. Daphtry, M.C. Sitalvad, H.M. Seervai, Soli J. Sorabji and Fali S. Nariman.

him, and perhaps rightly so, Nani Palkhivala was the most prominent among them, a man who was not only a genius in advocacy, but was also a distinguished jurist.

Later when I joined as a 'Student Member' of the Forum of Free Enterprise, Bombay, an institution with which Palkhivala had long association,[11] I started receiving small booklets published by the Forum on varied topics year after year. Out of the 10 booklets sent by them in a year, most commonly, at least one booklet was a Budget Speech of Palkhivala that he used to deliver at Bombay immediately after the presentation of the Union Budget in the Parliament. It was on reading these books and his various other writings, that I came to know a little more about him, about his eminence, eloquence, excellence, integrity, perceptivity and versatility, besides his broad vision, charismatic communication, mesmerizing oratory and interpretative ability.

Palkhivala's analysis of the Budget proposals in the Finance Bill and his skills as an orator earned him the respect of the government and adoration of the public. His oratory was all the more astonishing considering that as boy he had a stutter.[12] On reading Palkhivala's budget speeches year after year, I had started developing admiration for him, and more particularly for his God-gifted intellect, deep analysis and erudition, and above all, for his masterly presentation of the complex budgetary provisions in the simplest possible language.[13] His speeches were replete with wit and humour and punctuated with quotations from literature and references from history and his analysis of the budget brought to life the economic panorama of the world at large and India in particular. Quite expectedly, his post-budget speech was awaited more than the budget speech of the Finance Minister of the country. It is said that on several occasions, P.C. Alexander, the then Governor of Maharashtra described Nani Palkhivala as "the best Finance Minister India did not have"[14].

Besides his budget speeches, the Forum of Free Enterprise also published couple of his other monumental and memorable contributions, e.g., articles,[15] convocation addresses,[16] and memorial lectures[17] - all in the forms of small booklets. Each of his writings was worth reading. I would like to quote his apt observations about our social system that he had made in one of these writings. He had observed: "There is a persistent tendency in India to have too much

11 Nani Palkhivala took over as the President of the Forum of Free Enterprise from the late Murarji Vaidya in the year 1968. Except for the period when he was ambassador in the USA from September 1977 to July 1979, he led the movement with great commitment and dedication.

12 Bakhtiar Dadabhoy (2008), p. 359.

13 It was a commonly known fact that there used to be two Budget Speeches in the country, one by the Finance Minister in the Parliament and the other one by Nani Palkhivala to the public of the country. There is hardly any need to reiterate which was the better one. Above all, Palkhivala used to speak without a scrap of paper before him while reeling of facts, figures, statistics, quotations and historical references. He had the unique distinction of holding an annual public discussion of the Union Budget for almost three decades under the Forum of Free Enterprise. He started his Annual Budget Speech in 1958 which was attended by about 800 people. However, his budget analysis in March 1992 saw over 1,00,000 in attendance. However, he discontinued it in 1994 after addressing one of the largest ever Budget Meetings on Barbourne Stadium, Bombay. For more details, see: M.R. Pai (2002): The Legend of Palkhivala, Mumbai: Popular Prakashan. Also see: M.R. Pai (2001): Budget The Legendary Meetings of Nani Palkhivala, Bombay: Forum of Free Enterprise.

14 M.R. Pai (2002), p. 96.

15 See, for example: N.A. Palkhivala (1992): Casteism - The Scourge of India, Bombay: Forum of Free Enterprise and Nani A. Palkhivala (1995): Making Indian Industry Globally Competitive, Bombay: Forum of Free Enterprise.

16 Nani A. Palkhivala (1974): The Role of Education in a Democratic Society, Bombay: Forum of Free Enterprise.

17 See, for example: Nani A. Palkhivala (1991): Forty Three Years of Independence, Bombay: Forum of Free Enterprise.

government and too little administration; too many laws and too little justice; too many public servants and too little public service; too many controls and too little welfare. Every segment of the people's enterprise is festooned with red tape"[18]. According to Palkhivala, "a democracy without discipline was a democracy without a future."[19] He had also observed that the "Indian democracy has reached its nadir because in our average politician, we have the sordid amalgam of lack of intellect with lack of character and lack of knowledge."[20] He, therefore, exhorted the citizens to voluntarily observe the high standards of morality and decency that the law could not compel them to do.

Palkhivala held the Indian Constitution in a real great esteem, something which is evident from some of his memorable speeches delivered on different occasions. For example, while addressing the audience at a function organized by the International Bar Association at New York in September 1986, he had observed:

A Constitution is not a jellyfish; it is a highly evolved organism. It has an identity and integrity of its own, the evocative Preamble to the Indian Constitution being its identity card. It cannot be made to lose its identity in the process of amendment. The Fundamental Rights are the very heart of our Constitution - taking them away would deprive the Constitution not only of its identity but of its life itself. Parliament, when it claims the right to amend the constitutional law, cannot set itself up as the official liquidator of the Constitution . . . . The Foundations of the Constitution have been shaken by the folly of the people, the corruption of our politicians and the negligence of the elite."[21]

Palkhivala was an orator par excellence who spoke the truth with sincerity and conviction. In persuasive charm and accuracy of presentation, he was without peer.[22] He was also the most strident critic of the government and the bureaucracy, however, his criticism was always based on principles, never on personalities, and as a result thereof, he commanded the highest respect and admiration. There is perhaps no single non-political individual of his generation who wrote and spoke so often or traveled so extensively within and outside the country to address the vast array of issues vitally affecting the nation and its citizens as Nani Palkhivala did.[23] He also expressed many concerns that have equal, if not greater, relevance today; prominent among these are the inadequate pace of the alleviation of poverty, the growing irrelevance of our education system, the need for individual self-discipline that alone can make possible the adherence to the 'unenforceable', public apathy and, above all, the serious lack of probity in public life. In many ways, Palkhivala was a thoughtful leader and the profundity of his thoughts was matched only by the unparalleled felicity of his language.[24]

On reading Palkhivala's two famous books - *We, the People*[25] and *We, the Nation*[26], I was

18 ibid., p. 6.
19 M.V. Kamath (2007), p. 411.
20 Bakhtiar Dadabhoy (2008), p. 347.
21 ibid., p. 346.
22 M.R. Pai writes that once Palkhivala was to address two public meetings within a gap of one hour, at two different venues in a small town in South India. After the first meeting was over, the audience was seen running to the second venue to hear him all over again. For more details, see: Bakhtiar Dadabhoy (2008), p. 359.
23 Y.H. Malegam (2007), p. 12.
24 id.
25 N.A. Palkhivala (1984): We, the People: India - The Largest Democracy, Bombay: Strand Book Stall.
26 Nani A. Palkhivala (1994): We, the Nation: The Lost Decades, New Delhi: UBS Publishers Distributors Ltd. Both these books are the collected extracts from his speeches and writings and bear testimony to his life, work and his passionate commitment to the public causes.

transformed from his admirer into his worshipper. How can anyone forget his observations in his classic work *We, the People*, where he had written: "To India, Nature has given immense intelligence and skills but no sense of public duty, discipline or dedication."[27] He further wrote: "The Tricolour fluttering all over the country is black, red and scarlet - black money, red tape and scarlet corruption"[28]. Whereas about the education system, he had observed, "at best, our present-day universities are academic cafeterias offering junk food for the mind. At their worst, they are the breeding-grounds of corruption and indiscipline, dishonesty and irresponsibility."[29] About the legal system, he had remorsefully remarked, "our legal system has made life too easy for criminals and too difficult for the law-abiding citizens"[30]. He did not mince words describing our economic system by remarking that the "black market is the ulcer in the stomach of our economy, and we seem to take deliberate pains to ensure that it is not cured."[31] Nor did he hesitate to describe our national character by observing, "we have close to 600 million individuals as against Japan which has a little over 100 million citizens; and one citizen is worth a thousand individuals"[32]. He seemed disappointed and disgruntled when he wrote that our constitution had aimed at making India the "land of opportunity" but our politicians had converted it into a "land of opportunism"[33]. I still remember his visionary views about India when he had written that "what India today badly needs, and sadly lacks, is not political leadership but moral leadership which can lead to a renaissance of true Indian culture."[34]

In his second famous book, namely, *We, the Nation: The Lost Decades*, Palkhivala had expressed dissatisfaction with the Indian way of tackling national problems. He had written: "We keep on tackling fifty-year problems with five-year plans, staffed by two-year officials, working with one-year appropriations, fondly hoping that somehow the laws of economics will be suspended because we are Indians !"[35]. Nevertheless, he had an optimistic vision of the unity and integrity of India when he had observed: "The day will come when the 26 States of India will realize that in a profound sense they are culturally akin, ethnically identical, linguistically knit and historically related. The greatest task before India today is to acquire a keener sense of national identity, to gain the wisdom to cherish its priceless heritage, and to create a cohesive society with the cement of Indian culture. We shall then celebrate the 15th day of August not as the Day of Independence but as the Day of Interdependence - the dependence of the States upon one another, the dependence of our numerous communities upon one another, the dependence of the many castes and clans upon one another - in the sure knowledge that we are one nation"[36].

Palkhivala was an author par excellence and that almost all the books written by him had created history. Each book was a class by itself and obviously acquired the status of a classic.[37]

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27 N.A. Palkhivala (1984), p. xiv.
28 ibid., p. xiv.
29 ibid., p. 8.
30 ibid., p. 3.
31 ibid., p. 13.
32 ibid., p. 15.
33 ibid., p. 56.
34 ibid., p. 48.
35 Nani A. Palkhivala (1994), p. 7.
36 ibid., pp. 13-14.
37 In addition to writing books, Palkhivala had diverse interests right from his early days. He played the violin and piano, was an expert at fretwork, dabbled in palmistry, took part in elocution competitions, sketched, painted water-colours, and loved photography.

They bear eloquent testimony to his erudite scholarship and profound understanding of the principles of law, economy, and polity. His *magnum opus The Law and Practice of Income Tax,*[38] was described by the reviewers as a 'monumental work' and 'an incredible performance'. Till date it is considered to be the standard reference on taxation. *The Highest Taxed Nation* shook the Finance Ministry and compelled it to take the first step towards simplification of the tax structure and reduction of the tax rates. *Our Constitution Defaced and Defiled*[39] was a scintillating book, with the spirit of liberty - the eternal flame - as its theme. It was an incisive and astonishing analysis of the working of the Indian Constitution and was meant to arouse the people to their duty as the keepers of the Constitution. The theme of the book, as stated in the Introduction, was "1947 and 1973 are the key dates in India's twentieth century history. The first marked the end of the struggle for winning freedom. The second saw the beginning of the struggle for preservation of freedom . . ."[40] The book is a scholarly review of basic human rights, rule of law, power of judiciary and power of Parliament to amend the Constitution. I have already mentioned about *We, the People* and *We, the Nation*. Two of his other books *India's Priceless Heritage*[41] and *Essential Unity of All Religions*[42] show how deeply Palkhivala could delve into the spiritual treasure of India.[43]

It may be appropriate to mention here that the skills of an advocate are judged by his/her ability to persuade. For this communication is essential; and this is possible only when the matter is put forward as simply as possible before a judge. In this, Palkhivala had no equal as he presented legal propositions in a crystal clear style and had an uncanny knack of starting in the simplest terms the most complex facts and arguments. The simplicity of his arguments, the precision of his words, the appropriateness of his analogies and anecdotes, and the liveliness of his sense of humour all ensured that no judge could resist being mesmerized. Palkhivala also had the ability of thinking on his feet. If he found that his line of argument was not making much headway with the judges, he would immediately change track and would adopt another line of reasoning.[44]

C.K. Daphtary, the former Advocate General of Maharashtra, was quoted as saying, "I have not heard or seen a lawyer of this brilliance and I do not think we'll see one for another hundred years to come." What made this compliment even bigger was that it came in the early part of Palkhivala's career when he had not yet appeared in many of his landmark cases. As a matter of fact, Palkhivala cast a spell over the court and some judges confessed that they waited for a few days for the spell to wear off before writing their judgments. A judge always had to be on guard, lest he accept an unsound argument presented by Palkhivala with masterful persuasion. However, the judge knew that when Palkhivala stood before the Bench representing

38 Jamshedji Kanga and Nani A. Palkhivala (1950): The Law and Practice of Income Tax, Bombay: N.M. Tripathy.

39 N.A. Palkhivala (1974): Our Constitution Defaced and Defiled, New Delhi: Macmillan Publishing Co.

40 M.R. Pai (2002), p. 70.

41 N.A. Palkhivala (1980): India's Priceless Heritage, Bombay: Bharatiya Vidya Bhavan.

42 N.A. Palkhivala (1990): Essential Unity of All Religions, Bombay: Bharatiya Vidya Bhavan. Nani Palkhivala was very respectful to all religions. In one of the interviews, he had said, "Nor only by birth but also by conviction, I am a follower of the religion of Zarathushtra, but I have equal respect for all religions." He had further said, "I believe I can honestly claim that I am totally non-communal in my outlook and in all my private and public dealings. What matters most to me is the character and caliber of a person and not the religion which he practices." For more details, see: M.V. Kamath (2007), pp. 417-18.

43 L.M. Singhvi et. al. (eds.)(1999): Nani Palkhivala: Selected Writings, New Delhi: Viking / Bhavan's Book University, p. xxvi

44 Bakhtiar Dadabhoy (2008). p. 356.

a client, he was also fair to the other side. According to Hon'ble Mr. Justice V.R. Krishna Iyer, Palkhivala would not willfully misstate the law or facts to only win a case. He was aware of the fact that though he was a retainer of a client, he was first and foremost the perpetual retainer on behalf of truth and justice.[45]

Palkhivala's grasp of legal matters was unbelievable. As an advocate, he had the ability to reduce the most complicated legal propositions to clear and simple terms. As a matter of fact, his arguments were mercilessly intellectual. His appearance in the Bombay High Court became infrequent due to his many other pre-occupations. However, when he did turn up, the word would spread like wild fire and the courts would be crowded with people eager to hear the great man.[46]

Palkhivala fought for his countrymen in Indian courts, and for his country in international forums.[47] Justice H.R. Khanna, former judge of the Hon'ble Supreme Court, had aptly observed that "if a count were to be made of the ten topmost lawyers of the world, I have no doubt that Mr. Palkhivala's name would find a prominent mention therein."[48] It is no exaggeration to say that if today we have a Constitution whose basic structure is intact and unamendable and our fundamental rights inviolable, it is entirely due to people like Nani Palkhivala who single-handedly launched a crusade against violation of human rights and civil liberties. In summing up, one can safely vouch that it was Palkhivala that saved the Indian Constitution from total destruction.

On several occasions, I bumped into many of Palkhivala's colleagues, contemporaries, acquaintances and admirers - be it Fali Nariman, Kuldip Nayar, Kushwant Singh, L.M. Singhvi, Lalit Bhasin, Ram Jethmalani, Soli Sorabji, Upendra Baxi, or Hon'ble Mr. Justice Kuldip Singh, Hon'ble Mr. Justice Krishna Iyer and many more. To all I asked one simple question: what best they liked in Nani Palkhivala. Whereas for some, it was Palkhivala's 'inborn brilliance'[49], 'inimitable eloquence'[50], 'unassailable logic'[51], 'transparent benevolence'[52], 'profound excellence'[53], 'razor-sharp intellect'[54], 'phenomenal memory'[55], 'intellectual integrity'[56] 'interpretative ability'[57], 'legendary professional skills'[58] 'indomitable spirit'[59], 'originality of thought'[60], erudite scholarship'[61], 'incomparable prose', 'passionate[62] and

45 id.
46 id.
47 It may be appropriate to mention here that all arguments before the International Court of Justice at Hague are usually read from written briefs; since every word matters and there is not a moment to waste. However, Palkhivala was a solitary exception who used to argue orally, brilliantly, and successfully from a carefully prepared text embedded in his phenomenal memory.
48 H.R. Khanna quoted in Behram A. Palkhivala (2004), pp. 217-28, at p. 223.
49 Dinesh Vyas (2004): "Single Pointed Determination." In: Nilendra Kumar (ed.), pp. 169-76, at p. 172.
50 Murlidhar C. Bhandare (2004): "The Highest in Profession." In: Nilendra Kumar (ed.), pp. 12-15, at p. 13.
51 Sriram Panchu (2002): "A Man for the Common Man." In: The Hindu (22 December), p. 5.
52 See: C.R. Irani (2004): "A Tribute to Greatness." In: Nilendra Kumar (ed.), pp. 105-07.
53 P.C. Alexander (2003): "A Truly Good and Great Indian." In: Nilendra Kumar (ed.)(2004), pp. 60-61, at p. 60.
54 Dinesh Vyas (2004), pp. 169-76, at p. 172.
55 Soli J. Sorabjee (2002): "Nani was Tender to the Bashful, Merciful to the Absurd." In: Nilendra Kumar (ed.)(2004), pp. 3-5, at p. 4.
56 Venkat Iyer (2004): "A Remarkable Human Being." In: Nilendra Kumar (ed.), pp. 44-51, at p. 47.
57 B.K. Khare (2004) "The Legend-Remembered." In: Nilendra Kumar (ed.), pp. 231-40, at p. 233.
58 Karan Singh (2004): "Perceptive Consciousness." In: Nilendra Kumar (ed.), pp. 57-58, at p. 57.
59 A.P.J. Abdul Kalam (2003): "Message." In: Nilendra Kumar (ed.)(2004), p. v.
60 Sriram Panchu (2002), p. 5.
61 M.R. Pai (2002), p. 122.
62 id.

masterful advocacy'[63], 'persuasive oratory'[64], 'impeccable character'[65], 'dedication, devotion and determination'[66] and 'loving, caring and self-effacing nature'[67], besides 'courage'[68], 'candour'[69], 'sincerity and conviction'[70], 'compassion'[71] 'perfection'[72] and 'erudition'[73] that were the hallmarks of his personality, for others, it was his 'ability', 'humility'[74], 'modesty'[75], 'honesty'[76], 'charity'[77], 'civility'[78], 'simplicity'[79], 'dignity'[80], 'generosity'[81], 'hospitality'[82], 'politeness', 'courtesy'[83], 'warmth'[84] 'endearing humour'[85] and 'soft mannerism'[86] that earned him great admiration**.** Many more admired Palkhivala for his 'clarity of thinking'[87], 'thorough preparation'[88], 'elegant expression'[89], 'superb presentation'[90] and 'charismatic communication'[91]. However, all agreed that Palkhivala was 'humility on two legs'[92] who "touched the hearts and minds of many different persons in many different ways"[93] and that he was the one who had endeared himself to generations of people in and out of the country. An 'epitome of courtesy'[94] and an 'epitaph in history'[95], Palkhivala was "peerless and incomparable"[96], "a master sculptor sculpting a magnificent monument from marble."[97]

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63 K.K. Venugopal (2004): "In Memoriam: Nani Ardeshir Palkhivala." In: Nilendra Kumar (ed.), pp. 9-11, at p. 9.
64 id.
65 Karan Singh (2004), pp. 57-58, at p. 57.
66 Janak Raj Jai (2004): "A Personality of Multi-Dimensions." In: Nilendra Kumar (ed.), pp. 185-88, at p. 185.
67 Venkat Iyer (2004), pp. 44-51, at p. 45.
68 Rajeev Dhavan (2004): "Nani Palkhivala: Lawyer Extraordinary." In: Nilendra Kumar (ed.), pp. 39-41, at p. 41.
69 ibid.
70 S. Ramakrishnan (2003): "A Vibrant Embodiment of all that is the Best in India's Ageless Culture." In: Nilendra Kumar (ed.)(2004), pp. 62-64, at p. 62.
71 Murlidhar C. Bhandare (2004), pp. 12-15, at p. 13.
72 M.R. Pai (2002), p. 60.
73 Murlidhar C. Bhandare (2004), pp. 12-15, at p. 13.
74 Abhishek Singhvi (2004): "Nani As I See Him." In: Nilendra Kumar (ed.), pp. 36-38, at p. 37.
75 Venkat Iyer (2004), pp. 44-51, at p. 45.
76 Kuldip Nayar (2004): "Legends Do Not Die." In: Nilendra Kumar (ed.), pp. 108-10, at p. 108.
77 M.G. Arora (2004): "A Real Karamygi." In: Nilendra Kumar (ed.), pp. 115-19, at p. 119.
78 S.P. Sathe (2004): "Palkhivala: As I Knew Him." In: Nilendra Kumar (ed.), pp. 142-46, at p. 143.
79 Fali S. Nariman (2004): "Memories of Nani Palkhivala." In: Nilendra Kumar (ed.), pp. 6-8, at p. 6.
80 Kuldip Nayar (2004), pp. 108-10, at p. 108.
81 id.
82 A.M. Sethna (2004): "A Recollection." In: Nilendra Kumar (ed.), pp. 247-48, at p. 248.
83 Venkat Iyer (2004), pp. 44-51, at p. 45.
84 Lalit Bhasin (2004): "Nani A Great Indian." In: Nilendra Kumar (ed.), pp. 42-43, at p. 43.
85 H.P. Ranina (2004): "The Legacy of a Legend." In: Nilendra Kumar (ed.), pp. 90-93, at p. 91.
86 Iqbal Chagla (2002): "Silence: Palkhivala is in the Court Room." In: Nilendra Kumar (ed.)(2004), pp. 166-68, at p. 167. According to Iqbal Chagla, whose father Hon'ble Mr. Justice M.C. Chagla was Palkhivala's favourite judge, "Nani's felicity of expression elevated his arguments to something that resembled an essay in classic prose." For more details, see: Bakhtiar Dadabhoy (2008), p. 336.
87 M.R. Pai (2002), p. 113.
88 P.P. Rao (2004): "An Outstanding Personality." In: Nilendra Kumar (ed.), pp. 23-28, at p. 23.
89 Soli J. Sorabjee (2002), pp. 3-5, at p. 3.
90 D.M. Sen (2004): "The Spell of His Enchantment." In: Nilendra Kumar (ed.), pp. 81-83, at p. 82.
91 S. Ramakrishnan (2004): "A Vibrant Embodiment of all that is the best in India's Ageless Culture." In: Nilendra Kumar (ed.), pp. 62-65, at p. 63.
92 M.V. Kamath (2007), p. 448.
93 Y.H. Malegam (2007), p. 11.
94 Sucheta Dalal (2004): 'A Legendary Life." In: Nilendra Kumar (ed.), pp. 94-97, at p. 95.
95 Arun Vakil (2002): "My Recollections of Nani Palkhivala." Available at: http: // www. Indiainfoline. com / nevi / nani. html, pp. 1-3, at p. 1. Visited on 10 February 2005.
96 Goolam E. Vahanvati (2002): "Nani A. Palkhivala R.I.P." In: Nilendra Kumar (ed.)(2004), pp. 20-22, at p. 22.
97 M.R. Pai (2002), p. 50.

Over the years, Palkhivala had become 'voice of the common man'[98], a 'towering icon', and the 'conscience keeper of the nation'[99]. He was considered to be the country's 'finest intellectual'[100], a 'defender of citizens rights'[101], a 'phenomenon in public life'[102], a 'unique blend of tradition and modernity'[103], the 'greatest jurist'[104], and above all, the 'greatest Indian'[105] we ever had. From an individual and a 'complete human being'[106], he had acquired the status of an institution. As a matter of fact, he had become a legend in his lifetime[107], the one who "walked with the Kings, without losing the regard for the common man and the needy."[108] He was a 'very religious person'[109]. According to one of the numerous citations that he got during his lifetime, he was an 'Exemplar of Excellence' and an 'Explorer of Bramha'.[110] Whereas for some, he was a '*jagadguru*'[111], '*purshsharesta*'[112] and '*yugapursha*'[113], for others, he was a '*karmayogi*'[114]. For other few, he was a living embodiment of *Zoraostranism*'s credo of '*Humata, Hukhata, Huvarashta*' - good words, good thoughts, good deeds[115]. If Ram Jethmalani felt 'enchanted by the music in Nani's speech'[116], Lalit Bhasin felt the warmth of his magnetic personality that 'had the effect of de-freezing even the cold hearts'[117]. Whereas for Justice Kuldip Singh, Nani was 'like a cool breeze on a warm sunny day'[118], for Soli Sorabji, he was 'a redeeming star in an otherwise dark firmament'[119]. For C. Rajagopala Achari and for all of us, Nani Palkhivala was indeed a **'God's Gift to India'**[120].

I had never met Palkhivala in his life-time. Yes, of course, I did have his glimpse during one of my visits to the Bombay House - the corporate office of the TATA Group of Companies at Mumbai - where he used to sit. Till date I cherish that fleeting of the glimpse - the man was immaculately dressed with urgency in his walk and smile on his lips.[121] Fali Nariman is right when he says that Nani Palkhivala "never walked, but breezed into the court" and that he was "always in high gear, always at top speed"[122].

98 Arun Vakil (2002), pp. 1-3, at p. 2.
99 Behram A. Palkhivala (2004), pp. 217-28, at p. 223.
100 L.M. Singhvi et.al. (1999), p. xvi.
101 M.R. Pai (2002), p. 110.
102 Ajay G. Piramal (2004): "A Phenomenon." In: Nilendra Kumar (ed.), pp. 88-89, at p. 88.
103 Manmohan Singh (2004): "An Outstanding Citizen." In: Nilendra Kumar (ed.), p. 59.
104 B.M. Hegde (2004): "Purushashreshta Nani Palkhivala." In: Nilendra Kumar (ed.), pp. 156-59, at p. 59.
105 Khushwant Singh (1999): "God's Gift to India." In: The Tribune (6 November), p. 3.
106 M.V. Kamath (2007), p. 417.
107 M.R. Pai (2002), p. vii.
108 B.K. Khare (2004): pp. 231-40, at p. 237.
109 M.V. Kamath (2007), p. 417.
110 Arun Vakil (2002), p. 3.
111 M.V. Kamath (2007), p. 411.
112 M.R. Pai (2002), p. vii.
113 ibid., p. 62.
114 M.G. Arora (2004), pp. 115-19, at p. 115. Also see: S. Ramakrishnan (2003), pp. 62-65, at p. 65.
115 T.R. Andhyarujina (2004): "A Genius in Advocacy." In: Nilendra Kumar (ed.), pp. 16-18.at p. 18.
116 Ram Jethmalani (2004): "The Late Nani Palkhivala - A Tribute." In: Nilendra Kumar (ed.), pp. 31-35, at p. 32.
117 Lalit Bhasin (2004), pp. 42-43, at p. 43.
118 L.M. Singhvi et. al. (1999), p. xxxiv.
119 Soli J. Sorabjee (2004), pp. 3-5.
120 C. Rajagopalachari as quoted by L.M. Singhvi et.al. (1999), p. xxxi.
121 I have given a complete account of this incident in my article that I wrote for General Nilendra Kumar's Book on Nani Palkhivala.
122 Fali S. Nariman quoted in Bakhtiar Dadabhoy (2008), pp. 371-372.

Palkhivala admired the American poet Robert N. Test's poem "To Remember Me". The first lines of the aforesaid poem are: "When I die, give my sight to the man who has never seen a sunrise". The poem ends with the words: "If, by chance, you wish to remember me, do it with a kind deed or word to someone who needs you. If you do all I have asked, I will live forever."

Of late, due to falling health, Palkhivala had stopped appearing before the Supreme Court. He had also discontinued his budget speeches. In the last few months of his life, he suffered a lot of pain and agony in the shape of loss of speech, inability to swallow food, loss of the use of fingers and legs, a tumor in the neck, urinary infection, prostrate pain and a failing heart.[123] According to one of his acquaintances, it was indeed a most tragic event to see that the man who had made unparallel contribution in the field of taxation law was "unable to sign even his personal income tax return"[124]. At the same time what the loss of speech must have meant to arguably India's finest orator does not require much imagination.[125]

And then one day (on 11 December 2002) came the sad news: "We the Nation, We the People, Had lost a Legend." The loss was entirely ours - a loss that could not be cured and thus had to be endured. And this is the loss that shall always be irrecoverable. His sad demise has left a huge void in the public life of India. **'But Death, Be not Proud, Only people die, Legends do not** ! They live in the minds, memories, hearts, soles and thoughts of millions of admirers and well wishers.' Palkhivala was the conscience of the nation, a trustee of human values, a man of genius, who never lost the virtue of simplicity. He may not be alive today, but the flame of liberty that he lightened and gifted to the people of India through his intellectual writings, illuminating speeches, and eloquent advocacy shall always remain lighted as long as the Indian civilisation lasts. In summing up, I would like to end this tribute by saying that **"Nani Palkhivala might be resting in peace, but he is not dead, the legend and the legacy of Palkhivala continues . . . "**

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123 For more details, see: Bakhtiar Dadabhoy (2008), p. 373.
124 B.K. Khare (2004), pp. 231-40, at p. 240.
125 Bakhtiar Dadabhoy (2008), p. 374.

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The Art of Human Rights: Enriching the Life of the Law School through Drawings and other Visual Resources

Santiago Legarre [*]

Abstract

The paper has examined the visual aspects of teaching and learning. Furthermore, that interest is pinned down here to the area of constitutional rights and human rights in general, even though the conclusions reached can (and should) likely be extrapolated to other areas of law. The author has suggested in this paper measures to counterbalance the problem posed by the unlimited availability of technological resources. Given that drawings are no less visual than what is happening on a screen the odds are that they might succeed in keeping people's attention better than the mere rhetoric of a speech.

I In General

In the life of the Law School, focus on the "visual" can operate at three different levels: learning, teaching, and examining (legal concepts). My main interest in this paper is to explore the latter level, "examining", broadly considered so as to encompass evaluation in general. Furthermore, that interest is pinned down here to the area of constitutional rights and human rights in general, even though the conclusions reached can (and should) likely be extrapolated to other areas of the law.

The following passage by psychologist Kendra Cherry sums up well the distinction between the first two levels referenced above:

> While aligning teaching strategies to learning styles may or may not be effective, students might find that understanding their own learning preferences can be helpful. For example, if you know that visual learning appeals to you most, using visual study strategies in conjunction with other learning methods might help you better remember the information you are studying.[1]

In effect, the first logical step regarding the relevance of the visual approach has to do with using it yourself when you study —assuming that you came to the conclusion that you are a

[*] Professor of Law, Universidad Católica Argentina; Visiting Professor, Notre Dame Law School (USA) and Strathmore University Law School (Kenya); indepedent researcher, CONICET. LL.B., Universidad Católica Argentina; M.St., Oxford; Ph.D., Universidad de Buenos Aires. A paper delivered at the IALS Annual Meeting, Mysore, March 6th-8th, 2013 and, previously, at the Third Anuual Meet of The Law Schools Global League, Jindal Global Law School, Sonipat, 27-28 February 2013.

[1]Kendra Cherry, "VARK Learning Styles: Visual, Aural, Reading and Kinesthetic Learning", at http://psychology.about.com/od/educationalpsychology/a/vark-learning-styles.htm?r=et, last visited on 10 December 2012.

"visual learner". As you know, VARK theorists propose a quadripartite classification of learners. The acronym VARK stands for Visual, Aural, Read/write, and Kinesthetic sensory modalities that are used for learning information. This model was designed in the late 80s by Neil Fleming and it has received some acceptance and a lot of attention.[2]

I am not much of an expert in educational psychology so I would rather remain agnostic as to the definitive merits of VARK theory. But you don't need to buy into it to understand that, for example, you are a visual learner, i.e., one who "would rather see information presented in a visual rather than in written form."[3] So if you come to the conclusion that you learn better by seeing than by reading, you will naturally tend to study through charts, diagrams, and illustrations —and you should!

Half way through my law degree I realized that I was a visual learner (even though I didn't quite put it like that then). It is truly amazing for me to compare and contrast now the notes I made then in order to prepare my final exams. The notes and summaries from my first years are plagued by full sentences and paragraphs. By contrast, the notes from my last years of law school lack all proper writing and syntax; they are a bunch of arrows pointing at correlations; drawings; charts: the kind of thing, by the way, that only I could understand. Indeed, while my notes for the first years of the law degree were quite palatable to my friends, who used to borrow them, the same was not true of the later notes: no one wanted them at all for the obvious reason that they were… indecipherable.

Now, as Ms. Cherry suggests in the passage quoted above, it is one thing to accept that if you are a visual learner you are likely to be better off studying through visual resources, and quite a different one to conclude that teaching strategies ought to be aligned with students' learning styles. This is especially the case given that you will not only have visual learners in your classroom but also, ex hypothesi, representatives of other VARK categories.

In any event, and without foreclosing the possibility of using visual devices for purposes of teaching some human rights questions, I will focus in the next section on the third level I had announced at the opening of the paper: the evaluation of the students' understanding of human rights concepts.

II ***Evaluation of human rights concepts through visual devices***

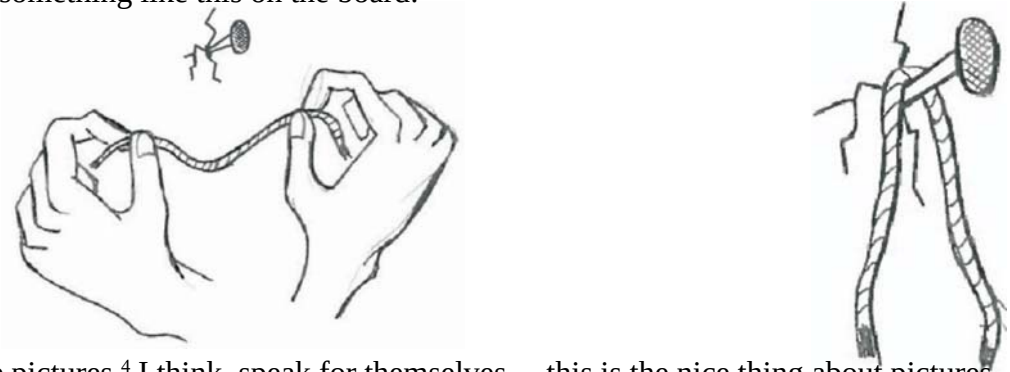
Let me share with you a real story —my own story of how I ended up using visual tools with a view to evaluating law students' understanding of human rights concepts. I have taught full-time since 1995, which means that I have been teaching full-time for 18 years. The reason I clarify this is not for you to think that I am old; or for you to think that I look younger than I really must be. The reason is that it was about time I came up with a smart idea from my many years of teaching experience. A few years ago I came up with such an idea, I hope. This is how it happened.

In 2010 I found myself in the situation where, to be honest with you, I was a bit bored with my teaching. (If you have been teaching for a while, perhaps you will not find that disclosure too surprising.) I had taught Constitutional Law and Human Rights Law for many years. I decided that to not get frustrated —and for my students not to notice my incipient boredom— I had to introduce something new into the classroom. (The students are those who are more harmed

[2] See http://www.vark-learn.com/english/page.asp?p=categories, last visited on 10 December 2012.
[3] Kendra Cherry, cit.

by their teacher's boredom, it should be noticed in passing.) So I came up with the idea of drawings.

The idea dawned on me when, during one of the German lessons I attend at the Goethe-Institut, professor Wolfgang Tichy explained the meaning of the proverb "the extremes meet" —a proverb meaning that antagonistic positions often have much in common, a proverb more common in other languages than in English, as it seems—… by means of a drawing. He drew something like this on the board:



These pictures,[4] I think, speak for themselves —this is the nice thing about pictures…

So one day I came to class and I told the students: "For next week you will have to draw a map". The objective of this exercise was for them to *show* me the structure of my country's judiciary, at both the local and the federal level. I had the impression that having them draw a map would: i) give them a suitable tool for explaining the concept of the judicial power and the interrelations between the local and the federal judiciary; ii) help them to better understand and remember that concept and those interrelations. Both things, I must say, proved to be true. Indeed, one student even said on reflection that what he had learnt through drawings was by far what he had remembered the most.

As an incentive for the students, I told them that I would award prizes for the best drawings. I also explained that by "drawings" I didn't mean just drawings: they could use any visual device and they would be assessed based on creativity and the limited use of words.

It goes without saying that I had to start thinking about good prizes. Several colleagues and friends gave me suitable books that ended up in the hands of the winners. I also got them limited subscriptions to journals and law reviews. I finally found a culminating prize for the best "drawing" of the whole year. I wrote to my colleagues who run the International Youth Leadership Conference and they generously agreed to offer a scholarship each year for one of my students to attend the extraordinary event that takes place in Prague every winter. Two of my winning students have already participated in the conference. Their feedback makes it clear that a good drawing is well worth the effort: it can be worth a visit to the most beautiful city in the world!

In my second year using drawings for the purpose of assessing comprehension of legal concepts, I introduced some additional dimensions. First, I started to use the tool to evaluate difficult human rights dilemmas, such as the tensions between the right to privacy and compelling state interests. I remember that one of the best drawings illustrating this tension was one of a kite divided into four quarters, each of which contained different levels of state intervention in private life.[5]

[4] I thank much Max Cernello, an attorney quite interested in visual tools, for drawing these pictures at my request.

[5] On the tensions between the police power and constitutional rights (a more general instance of the problem mentioned in the text) see the Appendix to this paper.

Second, I tried to solve a quantitative problem: the number of drawings I had to consider for evaluation purposes was too high. If I was going to give adequate consideration to each one of them, which was required at least by the fact that I was going to be awarding prizes, including a scholarship to attend a conference in Prague, I needed a filter to reduce the number of works I reviewed. To this end, I appointed two teaching assistants (students from the previous year, who knew how and why I used drawings, having produced them themselves) to evaluate drawings according to the following system. The TAs handle the first round of evaluation such that only half of the students participating in the drawings contest make the cut. The other half is eliminated. Only the victorious half makes it into the second round of the contest, where the professor (i.e., yours truly) performs the evaluation and awards the prizes. (Normally there is a first, a second, and a third prize.)

Third (and partly thanks to this new system), I started to use the students' drawings to teach some topics I encountered in reviewing their works (and deciding to whom will the awards go). It is much easier to teach some difficult concepts with drawings as the starting point, even if to correct mistakes in the pictures. And, believe me, my working materials were *very* good, very ingenious drawings. I think it will probably be a universal experience that if you do this kind of contests you will find out, to your surprise, that you had many hidden artists in your class. Therefore, you will end up with some fantastic drawings to work with, which will make it easier to shed light upon obscure realities and concepts.

Last, I decided to have some of the contests take place at my university's small art gallery. The curator kindly agreed to this, and so from time to time my students and I have class in the art gallery, where they bring their drawings and I explain some topic and award the corresponding prizes. Of course this is quite thrilling for the students. Not only do they display their own home-made art in a museum —on its floor, that is to say— but they also have the opportunity to visit an art gallery, sometimes for the first time in their lives. They certainly did not expect this when they signed up for their Constitutional Law course!

All in all it has been a great experience. I have the joyful role of contributing inadvertently to developing the hidden talents of my students, plus the notable responsibility awarding prizes without knowing much about art myself.'

III *Visual tests*

The third year of using drawings for purposes of assessing the comprehension of constitutional law and constitutional rights came with a new twist. In 2012 I used for the first time drawings… on tests.

Given that the students had consistently practiced explaining concepts through pictures during two semesters (first in "Constitutional Law" and subsequently in "Constitutional Rights") I thought that the time was ripe for my method to be tested on tests. Even though this new use was going to be fair (given that prior practice), I decided to offer it as an option so that those with less artistic inclinations would not feel prejudiced by the system.

Consequently, in the last written exam of the second semester (corresponding with "Constitutional Rights") the students were allowed to choose to answer half of the questions through drawings. Those who opted to do so would have the advantage of being given extra time to draw their answers. This was a minor incentive that I decided to introduce in order to shift the balance towards visual answers, though the students could likely discern my inclination

to (perhaps unconsciously) reward those who elected to draw.

Well, be that as it may, half of the students decided to draw. They did so really well and also did really well on the exam. I was utterly delighted. Let me tell you what the exam was about and how the students drew their answers.

One of the questions that could be answered by drawing pictures asked about differences between two theories concerning the constitutional right to privacy[6] —theories that also apply, by and large, to the human right to privacy as recognized by several international documents.[7] In US Constitution Law, as well as in Argentine Constitutional law, to mention but a couple of examples, these theories are sometimes called "spatial" and "decisional".[8] The theories don't really matter for our purposes, except to illustrate how students who drew their answers approached the task.

That a significant portion of the students chose to draw their answers is telling, as is the fact that they generally performed satisfactorily (even though most of the students that are within the group of drawers are not what one could call natural born artists). I think that the experiment —testing my method on tests— passed the test. Perhaps next year will bring a new opportunity to further test its outer limits.

IV *The Foremost Enemy of the Visual: the Visual*

I will conclude by noting a contrast. Insofar as it is true that visual tools have great advantages for learning about, teaching, and examining legal concepts —in particular, in the area of human rights—, it is also true that other visual tools can detract from the efficacy of teaching. If drawings can effectively convey complex situations within Constitutional Law, the presence in the classroom of electronic devices can certainly distract the drawers.

There is now the ever increasing availability of the Internet in the classroom, be it through Wi-Fi, iPads, BlackBerrys, iPhones or other Smartphones. Furthermore, law schools pride themselves in this increased availability of wireless technology. As a result, students experience a daily temptation —an irresistible temptation, most of the time— to navigate the web during classes.

I sometimes offer my students an analogy between the current situation in the classroom and the Star Wars trilogy —though we all know that it is no longer a trilogy. The first part, as you might remember, is called "A New Hope", where we first meet Luke Skywalker et al.. The new hope is, for the bored professor, PowerPoint presentations, projected on a screen in a darkened classroom. The second part of my modified version of the saga is "The Students Strike Back". Here the students, tired of watching slides on a screen, bring their own screens to the classroom: their laptops coupled with Internet availability provide for an amusing alternative to what is happening on the main screen. On your own little screen you can, in

[6] See, for example, article 19 of the Argentine constitution of 1853: 'The private actions of men which in no way offend order and public morality, nor harm a third party, are reserved to the judgment of God only, and exempt from the authority of the magistrates […].'

[7] See e.g. article 8.1 of the European Convention on Human Rights: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

[8] For a thorough account of the spatial theory of the constitutional right to privacy see Louis Henkin, 'Privacy and Autonomy', 74 Columbia Law Review 1410, 1411 y 1424 (1974); a useful account of the decisional theory can be found in Justice Blackmun's dissent in the United States Supreme Court case Bowers v. Hardwick 478 U.S. 186, 204 (1986).

hiding, check your email, read the New York Times, play a game or even watch Star Wars or some other movie. Surely this couldn't last? Well, I don't know about that, but some professors couldn't stand the shame and hence the last installment of the trilogy: "The Return of the Prof", in which the teacher decided to turn on the lights of the classroom, gaze at the students in search of eye contact and talk to and with them.

Whether you like my analogy with Star Wars or not, and whether the *status quo* regarding Internet in the classroom should change or not, methods like the one that I have suggested in this paper help counterbalance the problem posed by the unlimited availability of technological resources. Given that drawings are no less visual than what is happening on a screen the odds are that they might succeed in keeping people's attention better than the mere rhetoric of a speech.

I hope that by further exploring the virtues of drawings and pictures for the purpose of teaching human rights concepts, we will be able to offer our students a higher quality legal education.

Appendix

An outstanding instantiation of the theory: Sofia Arroyo's award-winning picture on the police power and constitutional rights, titled "The Police Power Inc.: Your Favorite Gardener".

Trade Remedies within a Future China-Japan-Korea FTA

Hakchun LEE Andreas PIEDERSTORFER *

Abstract

The aspirations for a WTO global system seem to have faded and given way to regionalism or bilateralism, with the number of FTAs increasing rapidly. South Korea for instance, has presently FTAs in the works with a number of countries, including Australia, New Zealand, India and the 10 ASEAN countries, China and Japan. It ardently tries to weave a web of comprehensive regional economic cooperation agreements. This paper will provide a first look at the economic and political circumstances of the envisioned FTA and then introduce different trade remedies. Finally, it will suggest solutions that should help to reach a trilateral FTA that will provide fair outcomes for all partners.

I. Introduction

"We recognize that Doha is at an impasse." This gloomy diagnosis of the sorry state of the WTO negotiations by the leaders at the Pacific Rim economic summit meeting on October 8, 2013 rang familiar.[1] It was just a repetition of conclusions drawn many times since the first breakdown of the talks in 2008. As a result, at least for the moment, the aspirations for a WTO global system seem to have faded and given way to regionalism or bilateralism, with the number of FTAs increasing rapidly. The 'Bali-Package' of December 2013 has not changed anything as its scope is criticized or even ridiculed with some justification as miniscule and inconsequential. Consequently, South Korea for instance, has presently FTAs in the works with a number of countries, including Australia, New Zealand, India and the 10 ASEAN countries, China and Japan. It ardently tries to weave a web of comprehensive regional economic cooperation agreements.

But, this new trade environment isn't all the proverbial moonlight and roses. If countries have bitten off more than they can chew and threaten to do material damage to domestic industries, countries have reserved themselves a way out in form of trade remedies. Those instruments of the last resort have emerged as minefield ready to ignite. After all, Doha has stalled because of 'special safeguard measures' to protect farmers in developing countries and the refusal of developed countries to reduce their agricultural subsidies. Nevertheless, however perilous,

[1]New York Times, Pacific Rim Leaders Urge New Focus on Global Trade Talks, October 9, 2013

due to the sheer magnitude of FTA market opening regimes, the number trade remedies is destined to increase. Already now, in many countries they have mutated from emergency measures to weapons of choice employed to protect domestic industries.

Under those circumstances, a cautious and deliberate approach in negotiating an implementing those instruments has become crucial for the success of trade agreements. It will be a demanding task to strike a balance between the need to protect still fragile industries and placate powerful and indispensable political lobbies in the own camp and the danger of overly antagonizing their competitors and counterparts in the camps of the partner countries. This is especially true in the present emotionally charged situation where conflicting narratives of historic responsibility and guilt as well as a multitude of territorial claims are colliding.

China, Japan and Korea are among the world's major economic powers. Their share of the regional trade has increased dramatically and they have become the most important trading partners to each other. They have developed similar economic structures and will reap similar benefits from trade liberalization via the restructuring of their industries and resulting advances in the competitiveness and the efficiency of their economies.

In order to shed some of that political ballast, a back-to-basics approach might be advisable. The WTO principles aim at granting most-favored-nation status to all trading partners and thus facilitating a smooth flow of trade in goods. The only exceptions permitted under very limited circumstances are anti-dumping actions against selling at unfairly low prices, 'countervailing' duties to offset other countries' subsidies, and temporary emergency measures in order to 'safeguard' domestic industries.

If administered wisely, trade remedy provisions under a future Korea-China- Japan FTA system can play a beneficial role to protect domestic industries against unfair trade. The three countries can implement an inspection system to correct inequitable trade practices based on the established violation provisions of international trade. In order to further improve these instruments, the three partners already now are deeply involved in the Doha round rulemaking negotiations.

Issues related to trade remedies among Korea, China and Japan are also particularly sensitive because those countries have been the main targets of trade remedies by developed countries, namely the US and EU members. With an watchful eye also on such ramifications, a future China-Japan-Korea FTA needs to supplement trade remedies in consideration of the involved countries regional proximity and production capacities.

This paper will provide a first look at the economic and political circumstances of the envisioned FTA and then introduce different trade remedies. Finally, it will suggest solutions that should help to reach a trilateral FTA that will provide fair outcomes for all partners.

II.The present trade environment

II.1.1The scale of the economy

China, Japan and South Korea belong to the world's major economic powers. The combined GDP of the three countries in 2010 accounted with a staggering US$ 12 trillion 3440 billion for 19.6% of the total world GDP.[2]

[2] IMF World Economic Outlook Database, 2011.

Between the world's major trading partners the three countries accounted in 2010 for 18.5% of the world exports and 16.3% of the imports.[3] The Inflow of foreign direct investment in 2010 amounted to 9.2% of the world total investment and outflows totaled up to 12.8 % of the world investment respectively.[4] Considering the enormous size and importance of the involved economies, their integration would provide a substantial contribution to the whole region's economic competitiveness and bring even greater benefits to the world economy.

II.1.2The scale of the trade

At first glance, the trade figures in East Asia are quite remarkable. From 1992 to 2010, the scale of the imports and exports of the three countries has increased rapidly. The ratio of the national exports of each country to total world export is 3.1% for Korea, 10.4 % for China, and 5.1 % for Japan and the ratio of national imports is respectively 2.8% for Korea, 9.1% for China and 11.5 % for Japan.[5]

The ratio of intra-regional trade between three countries continuously increased to 19.0% in 1996, and again to 24.1% in 2004, but then declined somewhat afterwards. The bilateral trade volume between Korea and China was about US$2071.7 billion in 2010 and had increased approximately by 32.6% from the start of the official diplomatic relationship in 1992. China's exports to Korea increased to US$687.7 billion (by 28.1% compared to 1992), the import amounted to US$1384.0 billion (up 35% compared to 1992). China has become largest trading partner to both South Korea and Japan. The other way around, Japan and South Korea were China's second and third largest trading partner. Between the two, Japan is South Korea's second ranking trading partner, and South Korea measures as Japan's third most important trading partner.[6]

However, as impressive as those numbers are, a look at other regions shows that there is still substantial room for improvement. In 2010, the ratios of intra-regional trade in the EU and the NAFTA were 64% and 40% respectively. Thus, the scale of intra-regional trade in the three East-Asian countries is still very low compared to the EU and the NAFTA.[7] Considering this still low plateau of intra-regional trade, a China-Japan-Korea FTA has a very high potential to further regional trade and bring more prosperity to the whole region.

An analysis of the trade and the industrial structure of the three countries shows both competitive as well as complementary features of the economies. Recent advances in the pattern of intra-regional trade among the three countries indicate how a trilateral FTA would promote competitiveness and efficiency and facilitate industry restructuring

III.The political environment

The FTA negotiations between the European Union and the USA provide a stark lesson in regard to political advances and impediments to trade agreements. From the outset, they had been boosted by the desire to create not only an economic but also a political counterbalance to a rising China and thus extend Western power and influence for at least a few more decades. Now, oppositely, we can see how a turnaround in the political environment can threaten the conclusion of even the largest mutually beneficial agreements and threaten to invalidate years of negotiation.

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3 WTO Statistics Database (time series), 2011.
4 UNCTAD, World Investment Report 2011.
5 WTO Statistics Database (time series), 2011.
6 KITA, 2011.
7 WTO Statistics Database, UN COMTRADE, 2011.

The European Commission calculates that the 'Trans-Atlantic Trade and Investment Partnership' (TTIP) - a trade agreement covering 818 million people and roughly one-third of global trade - would add every year •120 billion ($162.5 billion) to the EU economy or •545 to the average EU citizen's household.[8] But, the NSA scandal has antagonized many Europeans, among them even members of the German conservative government, traditionally some of the most loyal allies of the US, who tread very carefully as a tradition and are not given to emotional excesses. Now even there, continuing revelations about American tabbing the phones of Chancellors Schröder and Merkel has enraged the public to such a degree that the Chinese threat is forgotten at least temporarily and that there are calls for a suspension of talks. [9]

Such political obstacles to seemingly obvious economic choices exist in abundance also in East-Asia. Within Japan, there exist several competing narratives in regard to her Imperial past. One string – often argued by the political left - understands and subscribes to Japan's guilt in brutalizing her Asian neighbors during World War II and before and is ready for atonement. And there is the political right which clings to outdated concepts of a 'Greater East Asia Co-Prosperity Sphere' according to which Japan did not really attack its neighbors out of ill will but invaded them in order to protect them from Western colonizers. The present Japanese government under Shintaro Abe has positioned itself clearly in the latter camp as his and his ministers' repeated visits to the Yasukuni shrine and the highly contentious history textbook changes have proven. This move to the right has led to heated responses in China as well as in Korea.

In view of both countries painful past, this outrage is understandable and justified. But, also in these countries there exist powerful nationalist factions, who have unhealthy dreams of past glory and future destiny, thrive on anti-Japanese feelings and are happily fanning discord to the detriment of the well-being of their nations.

The same holds true for the territorial conflicts that have flared up in recent years. On the forefront is the virulent Japanese/Korean dispute concerning the Liancourt Rocks, tiny islets that cover an area of only 0.18745 square kilometers. The long forgotten name had to be dug up because Western Nations did not want to take sides in this bitter struggle and use either the Korean name 'Dokto' or the Japanese equivalent 'Takeshima' and thereby angering the other side. In 2008, a 50 members of the National Assembly of South Korea demanded that their government should claim the Japanese island of Tsushima as its territory. This move has been repeated by a somewhat smaller group in 2010 and - while not resonating much in Korea - has further infuriated Japan.

Between China and Japan, the Senkaku/Diaoyu Islands conflict has been heating up and lead to vitriolic exchanges between the government and the media of both nations. On 11 September 2012, the Japanese government further angered China by purchasing them from their private owners. Beijing threatened that it would not "sit back and watch its territorial sovereignty violated"[10] and imposed retaliatory airspace restrictions over the islands in 2013.

Even underwater rocks can become bones of contention. Following the United Nations Convention on the Law of the Sea, a submerged reef cannot be claimed as territory by any

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8 EU Commission Transatlantic Trade and Investment Partnership (TTIP) — The biggest trade deal in the world; http://ec.europa.eu/trade/policy/in-focus/ttip/

9 Spiegel Online: Widerstand gegen Freihandelsabkommen wächst, 02.03.2014; http://www.spiegel.de/politik/deutschland/grosse-koalition-minister-warnen-vor-freihandelsabkommen-a-950444.html

10 Washington Post. AP. September 10, 2012, "Japan says it will purchase disputed islands from private owner, angering China"

country. Nevertheless, China and South Korea fight about the Socotra Rock, Ieodo or Parangdo in Korean and Suyan Rock in Chinese, a rock that lies almost 5 meters under the surface of the sea.

Defusing such conflicts has become a necessity for the successful negotiation of trade agreements. It is very difficult to imagine nations who are hammering each other because of tiny or even submerged rocks opening their markets to each other and agree on compromises and concessions.

IV. The trade remedy policies

IV.1 The economic environment of the three countries in regard to trade remedies

Typical Trade remedies are anti-dumping, countervailing duties and safeguard measures. Out of that arsenal of trade remedies, anti-dumping measures are most widely used and safeguards the least. Invoking anti-dumping measures or countervailing duties is technically easier than the use safeguards. They carry the risk of misuse and overuse which may distort and discourage international trade and investment.[11]

The main purpose of the trade remedy system is to correct unfair trade practices such as dumping and subsidies and provide a remedy for trade-induced damage to local industries. Within a multilateral trading system, trade remedies are permitted under the regulations of the WTO. The invoking of trade remedy measures and implementation of the relevant WTO agreements must strictly adhere to the rules and the spirit agreed upon. Strict compliance with the WTO rules prevents the abuse of trade remedy measures and promotes a fair trade system.[12]

In 2012, WTO trade remedy measures between countries have reached their highest level in 10 years, and are in danger of evolving into a new weapon of trade protectionism. In the aftermath of the global economic crisis, especially the developed countries imposed many anti-dumping duties for the protection of their domestic companies.[13]

The developed countries demand trade liberalization, while at the same time freely utilizing anti-dumping measures in recent years. A quite liberal use of the anti-dumping system can also be observed in India, China, Taiwan, Russia, Argentina, Brazil, and Indonesia.

WTO multilateral tariff concessions either expanded the flow of tariff free goods or lowered tariffs, so the role of tariffs as barriers to trade has decreased. They got augmented or replaced by anti-dumping measures that have emerged as a new form of trade barriers. Unluckily, this has serious effects also on the exporting environment of China, Japan and Korea.[14]

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[11] Trade Commission, Trade and Investment Institute, previous reports

[12] A Report on the joining study on the FTA of Korea, China, Japan, 2011.12.16. p. 61

[13] For example, the U.S government levies anti-dumping measures on the refrigerators and washing machines produced by Samsung Electronics. Because the US market share of Korean electronic products increases, US electronic companies lobby for anti-dumping measures. The developing countries intensify trade protectionism in general.

[14] According to the International Trade Institute of the Korea International Trade Association, the investigation into 110 cases of anti-dumping duties initiated in the first half of 2012 resulted in 74 cases of anti-dumping duties. The number of steps taken in the year of 2011 (the numbers of an initiation of an investigation reached 155 , the number of actions taken reached 98) is almost reaching the same levels. This trend continued in the second half of 2012. So it is not too much to say that trade protectionism by anti-dumping measures intensified. More anti-dumping measures have been issued in first half of 2012 than in the preceding 6-7 years. In 2012, washing machines and refrigerators were covered by anti-dumping measures of the United States, and displays were decided as a first price fixing practice. So, Korean companies have to bear enormous damages. Other measures focused on steel and petrochemical industries (Korea Times 01/06/2013). As a whole, 19 Countervailing duties cases were decided in 2012, double the number of 2011 (9 cases). These case number have reached a peak since the establishment of the World Trade Organization (WTO) in 1995. In addition, cross-country WTO disputes also recorded 27 cases in 2012 comparing with only 8 cases in 2011. The number of disputes tripled in 2012 in comparison to the year before.

Anti-dumping duties are more easy to apply than countervailing duties, because the process is not complicated and carries a comparatively easy burden of proof of the subsidies to foreign relevant companies. And, as a threat, already the initiation of the an investigation alone frequently entails export reductions by the foreign partners.

The strengthening of trade protectionism delivers an especially hard blow to Korean companies, because the Korean economy depends greatly on exports. The cumulative number of anti-dumping investigations against Korea has reached 297 cases, and out of that, 180 cases resulted in anti dumping duties. In this unenviable field, Korea is ranking second only to China.

IV.2 FTA policies of the three countries and their trade remedies

IV.2.1 China

The three countries focus on the multilateral trade liberalization process, and they try to expand FTAs with a large number of countries after the impasse of the 'Doha' Round negotiations. They regarded bilateral agreements as complementary measures for a further multilateral liberalization of free trade.

China, after joining the WTO in 2001, entered in FTA negotiations with various partners in the spirit of a win-win game and a mutually beneficial principle. It has already signed FTAs with New Zealand, ASEAN, Chile, Singapore, Peru, Pakistan, and with Costa Rica and has economic partnership agreements with its own special administrative regions of Hong Kong and Macao. Meanwhile it has also reached bilateral economic cooperation agreements with Taiwan, Penghu, Ginmen, and Majorca, which are separate customs territories. At present, China is negotiating FTAs with the GCC (Gulf Cooperation Council), the SACU (southern African Customs Union), Australia, Switzerland, Norway , Iceland. The FTA negotiations with Korea are in a preliminary stage.

IV.2.2 Japan

Japan supports the central role of the WTO in trade liberalization but it also pursues bilateral economic cooperation agreements (EPA: Economic Partnership Agreement). Up to now, it has entered 12 EPAs with Singapore, Mexico, Malaysia, Chile, Thailand, Indonesia, Brunei, ASEAN, the Philippines, Switzerland, Vietnam, India and Peru. It now negotiates with the GCC and Australia. The governments of Japan and Korea are holding talks on an FTA, which were suspended since 2004.

IV.2.3 South Korea

South Korea is pursuing FTAs for the same purpose of promoting trade acceleration, economic efficiency and prosperity. The Korean government has signed FTAs with 45 countries (Chile, Singapore, EFTA (4), ASEAN (10), India, EU (27), Peru, US), and all of them are now in effect. FTAs with 2 countries (Colombia, Turkey) have been recently concluded. Agreements with more countries are under way. The future partners include Canada, Mexico, GCC (6), Australia, New Zealand, Indonesia, China and Vietnam. Further 14 countries under capan, Korea-China-Japan, Mercosur (4), Israel, Vietnam, Mongolia, Central American countries (5), and Malaysia

In the case of successful conclusions of Korea-China, and Korea-Japan FTAs, one can expect that the reduction of tariffs and the intensifying competition will lead to dumping and other unfair trade practices. In the light of the geographical proximity and the enormous production

capacities of China, a Korea-China FTA in particular is in need of more supplementary policy measures to cope with trade deficits. If the question of trade deficits is not addressed, the positive effects of an FTA will be in danger.

By 2012, the volume of South Korean trade had become the eighth largest in the world trade.[15] Compared with this level of the performance, its trade remedies are insufficient. South Korea's export dependence on the manufacturing sector is very high and leads to a high degree of exposure to unfair competition. The economic benefits of the trade liberalization are reaped by only a few key industries and conglomerates with a sufficient degree of international competitiveness. The Korean export boom, up to now, did not foster the innovative and resilient small and medium enterprises that form the backbone of strong and healthy economies, like that of Germany.

In this situation, the advancing market opening measures within the framework of FTAs are raising concerns of an apoptosis of the existing few weak SMEs, because a sudden influx of very cheap foreign products would push them out of the domestic market. The polarization of trade market disrupts a strengthening of economic fundamentals by boosting domestic demand.[16]

V. A review of a trade remedy system covering the three countries

V.1 China

The basis of China's trade remedy system are its Foreign Trade Act and the related regulations and enforcement rules. The Foreign Trade Act is a law, which has been enacted by the Standing Committee of the National People 's Congress in 1994. Articles 29, 30, 31 and 32 regulate the guidelines of safeguards, anti-dumping measures, and anti-subsidy measures and their practical application. China has promulgated anti-dumping and anti-subsidy regulations, which entail investigation and anti-dumping provisions.

After China joined the WTO, it stipulated again anti-dumping regulations, a countervailing duties ordinance and safeguards, which are coherent with WTO agreements. These regulations were promulgated by the State Council, the Chinese chief administrative agency. They were designed to be both practical and transparent. China has promulgated 20 implementation rules, including questionnaire surveys by application form, local investigations, a range of surveys by products, a survey aiming at endangered industries, and a so-called "intermediate survey". They are process regulations of the Department of Commerce, an affiliate organization of the State Council. According to these rules and regulations, the Ministry of Commerce (MOFCOM: Ministry of Commerce of the People's Republic of China) is in charge of the investigation on the trade remedies. It reports to the CTC (Customs Tariff Commission of the State Council) about the purpose and the effects of different types of trade remedies. By approval of the CTC, the Department of Commerce publishes the final decision, and the Chinese Customs Agency is responsible for the implementation of trade remedy measures.

China's trade remedy system has the following features:[17]

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[15] The volume of Korean international trade grew by US$ 1 trillion from 2011 to 2012. The trade surplus remained stable during the first 11 months of 2012. The exports reached US$ 548.2 billion, and imports US$ 519.5 billion.

[16] Government policies to support local SMEs by increasing the income of consumers have not worked. Korean consumers choose to buy cheap foreign products instead of local brands. In the end, those government policies designed to boost domestic demand and local industries have in reality been advantageous mainly to foreign enterprises.

First, the current trade remedy system in China consists mainly of administrative regulations and department rules. So they lack legal authority and legal effect, because they are relatively lower sources of law.

Second, the Department of Commerce has seized considerable powers of legislative and operating rights. Furthermore it has the authority to investigate and determine the type of trade remedies. The Department of Commerce promulgates all the enactments of the regulations in regard to anti-dumping, anti-subsidy, and safeguarding measures.[18]

China recognizes that the provisions of the trade remedies in a possible China-Japan-Korea FTA must be concordant with the WTO agreements. To improve the fairness and transparency in the application of the trade remedies, a -Japan-Korea FTA could actually include some WTO positive (Plus) elements.

V.2 Japan

The Japanese regulations on anti-dumping, countervailing duties and safeguard measures are the Regulations of the Customs, Foreign Exchange and Foreign Trade Law (applied to the import restrictions of WTO safeguard measures). Under such a system, in case of the request of domestic industries, the Ministry of Finance, the Ministry of Economy, and the Ministry of Industry join the investigation of trade remedies. A decision on trade remedies can be made by the related ministries after consulting an advisory committee of the Customs and Foreign Exchange Agency.

The Japanese government seems to hold the position that trade remedy provisions must not be misused to protect domestic industries within the framework of China-Japan-Korea FTA. To prevent the misuse of safeguard measures, detailed procedures (conditions, inspections, reports, the periods of effect of safeguards, consultations, compensations and petition measures, etc.) must be beforehand regulated. In this spirit, the Japan-Singapore FTA for example stipulated, that safeguards are permissible only during the first 10 years after concluding the agreement. A similarly fastidious seems to prevail in Japan also in regard to the other available instruments, anti-dumping and countervailing duties. Furthermore, an advance notice of the initiation of an inspection (which would be a so-called positive or plus element of the WTO) may be introduced.[19]

V.3 Korea

South Korea's trade remedy system is regulated in a number of statutes including the Act of Customs, the Act of Foreign Trade, the Act of Investigation on Unfair Trade Practices and Relief of Industry Damages. Most of Korea's trade remedy laws are similar to the WTO Agreements.[20] Article 4 and Article 5 of the Exception of the Customs Act for the implementation FTA between South Korea and the Republic of Chile stipulate provisions of

17 Wang Kun, A Study on the improvement of the Chinese trade remedy system after joining the WTO, Cheongju University, Master's Thesis, 2011.7.p. 68-70 .

18 According to the article 86 of the Chinese constitution, the Chinese State Council comprises the Prime Minister, Deputy Prime Minister, committee members of the state council, ministers of each department, the supervisor of each committee, the Comptroller general, and the General secretary. Thus,Chinese administrative regulations are drafted by each department of the relevant ministries under the State Council.

19 A Report on the joining study on the FTA of Korea-China-Japan, 2011.12.16. pp. 62-64

20 First, Article 51"0 56 of the Customs Act provide the anti-dumping duties provisions for anti-dumping measures and Article 57"0 62 provide the countervailing duty provisions for countervailing measures. Safeguard measures to restrict import quotas are regulated in Article 26 "0 28 of the Act of Foreign Trade. The Imposition of the emergency duties is provided in the Article 65"0 68 of the Customs Act. In addition, the imposition of emergency duties aimed at specific countries is regulated in the Article 67-2 of the Customs Act

emergency import restrictions in the field of agricultural goods. After the signing of FTA between Singapore and Korea, Korea's first FTA with an Asian nation, general emergency import restrictions were introduce in Article 6 and Article 7 of the exception of the Customs Act for the implementation of the FTA.

Conflicts between various laws related to trade remedies still exist. Here, the laws with a higher priority prevail. As far as the legal weight is concerned, special law trumps general law. Despite contradicting provisions of the FTA Special Act, the Special Law of Implementation of FTA between Korean and Chile has priority in the field of imposition, collection and reduction of customs. If the tax rates in FTA Special Act FTA are higher than those provided by the Customs Law, the latter will be applied because the FTA aims at lowering custom tariffs.

The FTA Special Act of the Customs Tariffs regulates the imposition of duties necessary for the implementation, collection and reduction of tariffs and cooperation between the customs administrations of FTA partner countries. In matters that are not regulated by the Special Act of FTA, the Customs Act is followed.

South Korea invokes trade remedy measures in accordance with national laws and the WTO agreements. With some minor modifications, the Korean laws on the trade remedy system maintain the rights and obligations of the WTO agreements. Trade remedies are regulated in the Law of Inspection and Redress on Unfair Trade Practices , the Foreign Trade Act and the Customs Act.

The Korea Trade Commission is in charge of anti-dumping, countervailing duties and safeguard measures and other trade remedy measures. The Korea International Trade Commission can investigate unfair trade practices, and, if necessary, recommend appropriate trade remedy measures. The imposition of tariff within the anti-dumping and countervailing instruments can be decided by the Ministry of Strategy and Finance. The safeguard measures to restrict imports, including tariff adjustments can be determined by the Ministry of Strategy and Finance or the Ministry of Knowledge Economy in accordance with the recommendations of the Korea International Trade Commission.[21]

VI. Conclusion

The utilization of trade remedies hinges on the partner countries' international competitiveness in different trading areas. In order to introduce commensurate trade remedies, a comparison of the viability and competitiveness of the main industries in the participating countries needs to be made.[22] If they are found to be playing in the same league, maintaining the WTO agreements is the most desirable and recommendable outcome.

A China-Japan-Korea FTA will introduce trade remedy measures in some form by each partner to support their own industries. But, even after a successful conclusion of an agreement, partner countries might utilize arbitrary trade remedies for the protection of domestic industries. Herein lies the main hazard of such a trilateral treaty. Without transparent and predictable processes, the FTA would likely become a factor of bilateral conflicts, and would possibly do

[21] A Report on the joining study on the FTA of Korea-China-Japan, 2011.12.16. p. 61

[22] For example, Korea has a substantial disadvantage in the agricultural sector in comparison with China as a whole. Therefore, trade remedy measures and their issuing conditions must be negotiated on the basis of the competitiveness of trading sectors. A thorough empirical analysis of the industry is a persuasive argument in negotiations.

more harm than good for the trade environment between the partner countries. Therefore, it is very much in Korea's interest to carefully restrict arbitrary measures.

To this end, following elements should be considered for a trilateral FTA between China, Japan, and Korea:

- First, the three countries as members of the WTO must reaffirm the basic principles of the WTO agreements and reconfirm the rights and obligations under this Agreement.
- Second, the possibility and conditions of the adoption of safeguard measures should be discussed beforehand explicitly and in detail between the partner countries.
- Third, the three countries must discuss to introduce WTO-plus factors for promoting the transparent requirements of the issuing of trade remedies.
- Fourth, three countries must strive e=internationally to create a multilateral negotiation system, which governs trade remedies separate from the ongoing Doha Negotiation Round (Competition Policy Round).[23]
- Fifth, the three countries should establish a new cooperative organization (mechanism) to deal with trade remedies more effectively and efficiently.[24]

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Judicial Activism: Its importance and issues in Bangladesh perspective

Dr. Kudrat-E-Khuda (Babu) *
Uma-Rani Dash *
Shahadat Hossain Sarker *

Abstract

Judicial activism describes judicial ruling which is based on personal or political considerations. It has been on rise in the history of judicial activities in Bangladesh for a long since but it came in a wide range after 1990. The question of judicial activism is closely related to Constitutional interpretation, statutory construction and separation of powers. It is an instrument for developing the law to make it useful and relevant in an ever changing society. It signifies that judiciary, being aware of existing socioeconomic realities, voluntarily implements and social goals. Judicial activism does not find any mention in the Constitution of Bangladesh but is widely talked about in all section of society, NGOs and bureaucrats. It is considered, in the legal point of view, as the changing device of the society. It is also necessary for the application of law according to the social transformation.

I Introduction: One basic and fundamental question that confronts every democracy, run by a rule of law is what is the role or function of a judge? Is it the function of a Judge merely to declare law as it exists-or to make law? And this question is very important, for on it depend the scope of judicial activism. If we emphasis on the Photographic theory of Judicial function as exposed in a speech made by Lord Chancellor Jowett at the Australian Law Convention where he said, "The function of a judge is merely to find the law as it is. The lawmaking function does not belong to him, it belongs to the legislature"[1] the scope of judicial activism comes to an end. But on the other hand, if we really consider that the judiciary is the last resort for ensuring justice in every situation, the interpretative role of judiciary is not only welcomed but also a necessity. The Judiciary must interpret the law on basis of realities of the situation. It has to work out according to its problems, needs and demands of the country. As Justice Krishna Iyer once said, "Every new decision, on every new situation, is a development of the law. Law does not stand still. It moves continually. Once this is recognized, then the task of the judge is put on a higher plane."[2] Thus, judicial activism is an instrument for developing the law to make it useful and relevant in an ever changing society.[3]

* Assistant Professor & Head, Dept. of Law, University of Information Technology & Sciences (UITS); International member of Amnesty International; Climate activist of Greenpeace International and Regular Column Writer of different leading national dailies of Bangladesh.
* Lecturer, Dept. of Law, University of Information Technology & Sciences (UITS), Dhaka, Bangladesh.
* Lecturer, Dept. of Law, University of Information Technology & Sciences (UITS), Dhaka, Bangladesh.

1. A seminar paper on Judicial Activism in India by P.N. Bhagwati (Former Indian Chief Justice), p.6.
2. India Forbes Magazine, August 31, 2011.
3. A.S.Anand, "Key Note Address", in K. L. Bhatia (ed.), Op. cit., p. 11

II Origin and definition: Like many catchwords, "judicial activism" has acquired so many different meanings as to obscure more than it reveals. Yet it is not a term that can simply be ignored as intellectually "void for vagueness," for at the heart of it are concerns about the very meaning and survival of law. Abandonment of the term not being a viable option, clarification becomes imperative.

The term judicial activism was introduced by Arthur Schlesinger Jr. in a January 1947 *Fortune* magazine article titled "The Supreme Court: 1947. Keenan Kmiec , in a 2004 California Law Review article, describes its earliest known use:

> 'Arthur Schlesinger Jr. introduced the term "judicial activism" to the public in a Fortune magazine article in January 1947. Schlesinger's article profiled all nine Supreme Court justices on the Court at that time and explained the alliances and divisions among them. The article characterized Justices Black, Douglas, Murphy, and Rutledge as the "Judicial Activists" and Justices Frankfurter, Jackson, and Burton as the "Champions of Self Restraint." Justice Reed and Chief Justice Vinson comprised a middle group." [4]

It is very hard to trace the true meaning of judicial activism. To some it means 'dynamism' of the judges; to others 'judicial creativity'; to a third group bringing about 'social revolution' through the judiciary; and to a fourth a sort of 'cultural revolution'. [5]

Generally judicial activism is when courts do not confine themselves to reasonable interpretations of laws, but instead create law. Alternatively judicial activism is when courts do not limit their ruling to the dispute before them, but instead establishes a new rule to apply broadly to issues not presented in the specific action.[6]

Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions."[7]

David Strauss has argued that judicial activism can be narrowly defined as one or more of three possible actions: overturning laws as unconstitutional, overturning judicial precedent, and ruling against a preferred interpretation of the constitution.[8]

Others have been less confident of the term's meaning, finding it instead to be little more than rhetorical shorthand. Kermit Roosevelt III has argued that "in practice 'activist' turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with"[9]likewise, the solicitor general under George W. Bush, Theodore Olson, said in an interview on Fox News Sunday, in regards to a case for same-sex marriage he had successfully litigated, that "most people use the term 'judicial activism' to explain decisions that they don't like."[10] In recent years, a brand-new definition of "judicial activism" has been created by the political left, so that they can turn the tables on critics of judicial activism.[11] The new definition of "judicial activism" defines it as declaring laws unconstitutional.[12]

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4. Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism," 92 Cal. L. Rev. 1441, 1447 (2004)
5. JUDICIAL ACTIVISM AND FAMILY LAW IN BANGLADESH ByAlamgir Muhammad Serajuddin
7. http://conservapedia.com/Judicial_activism (access on 20.02.2012)
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11. Wallace, Chris; Olson, Theodore (August 8, 2010). "Ted Olson on Debate Over Judicial Activism and Same-Sex Marriage" . Fox News Sunday (Fox News Channel)
12. As quoted from what is Judicial Activism? A shopworn phrase that has outlived its usefulness By James Taranto published in Best of The Web Today on February 9, 2011.

III Importance of judicial activism: Judicial activism is a way for liberals to avoid the regular legislative means of enacting laws in order to ignore public opinion and dodge public debate.

Judicial activism signifies that the judiciary, being aware of existing socioeconomic realities, voluntarily implements social goals. Krishna Iyer, J., the most outspoken exponent of judicial activism, says that law cannot remain static. It must change with the changing mores of society.

The judge must consciously seek to mould the law so as to serve the needs of the time. "He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect – thinking of the structure as a whole – building for society a system of law which is strong, durable and just. It is on his work that civilized society itself depends."[13]Judicial activism is thus necessary for the application of law according to the social transformation.

Bihar Legal Support Society v. The Chief Justice of India, AIR 1987 SC 38, gives one of the finest expositions of judicial activism:

> … the weaker sections of Indian humanity have been deprived of justice for long, long years; they have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the Constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice….

This court has always, therefore, regarded it as its duty to come to the rescue of those deprived or vulnerable sections of Indian humanity in order to help them realize their economic and social entitlements and to bring to an end their oppression and exploitation.[14]

The importance of judicial activism in protecting the rights and entitlements is also significant. It is an instrument in the hands of judges to combat injustice.

Judicial activism is another way in which the judiciary plays a vital role in good governance in Bangladesh. [15] By exercising judicial activism, the Supreme Court is in a position to make government officials more responsible, accountable, transparent and efficient.

Nowadays, the pronouncements made by the judges from around the world reveal that there is growing enthusiasm to perform judicial functions in a proactive manner within the constitutional limitations of the separation of powers.

In the words of the Lord Chief Justice of England and Wales, Lord Woolf (2003):

> 'Just as the common law has been evolving with increasing rapidity, so has the role of the common law judge. The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and the defense. The role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. Jurists and commentators describe this pro-activism in

13. Fuzlunbi v. K. Khader Vali, AIR 1980 SC 1730, p. 1732.
14. JUDICIAL ACTIVISM AND FAMILY LAW IN BANGLADESH ByAlamgir Muhammad Serajuddin
15. JUDICIARY AND GOOD GOVERNANCE IN BANGLADESH by Md. Awal Hossain Mollah, South Asian Survey 15: 2 (2008): 245-262, SAGE Publications Los Angeles/London/New Delhi/Singapore DOI: 10.1177/097152310801500205.

the delivery of justice as 'judicial activism', which is indispensable for ensuring good governance in any country."

Moreover, judicial activism helps to maintain the rule of law and peace in the country. If the judiciary were to shut its door to the citizen who finds the legislature as not responding and executive indifferent, the citizen would take to the streets and that would be bad both for the rule of law and democratic functioning of the state.[16]

IV Judicial activism in Bangladesh: Judicial activism does not find any mention in the Constitution of Bangladesh but is widely talked about in all section of society, NGOs and bureaucrats. Judicial activism has been on rise in the history of judicial activities in Bangladesh for a long since but it came in a wide range after 1990 i.e. ouster of autocratic government and establishment of elected government. For the first time Judicial activism started in 1992 when High Court Division issued a suo moto rule on the Deputy Commissioner of Satkhira on the basis of a newspaper report and ultimately directed release of a child named Nazrul Islam from custody. [17] In Hafizur Rahman's case, High Court Division without the seeking of the Muslim divorced wife declared that she is entitled to get maintenance from her former husband till her remarriage or death.

While unfortunately, the country's parliament has generally failed to hold the government accountable between elections because of the opposition's refusal to attend parliament sessions, the Supreme Court has been showing an increasing readiness to issue court orders requiring the government to justify actions.[18]

According to a recent study on politico-economic scenario in Bangladesh undertaken by the World Bank, the roots of this (judicial) activism appear to lie in the court's growing willingness to order the release of individual detained under the country's preventive detention act. In 1982, the court only freed 54 of the 1548 persons held under the act, by 1966, the last year for which figures are available, they ordered that 3376 of the 5413 detained individual to be released.[19]

However, the judiciary in Bangladesh has shown a very active and efficient role in dealing with family matters, environmental issues and other public interest concerned matters.

V Public Interest Litigation: In the context of Bangladesh, the judiciary has an enhanced role to protect the rights and interests of the marginalized, backward and vulnerable sections of society. Judicial activism is the instrument which paved the way in responding towards the interests of common people.

Unless a person is aggrieved he cannot seek judicial review for enforcement of any fundamental right or against any administrative action. This question of locus-standi so long prevented a public spirited person to seek redress from the High Court Division on behalf of or in the interest of the socially and economically deprived. Though in 1974 in Beru Bari case this question was raised, the same was set aside by the Court observing 'Constitutional issue of grave importance can be heard as locus standi does not involve court's jurisdiction to hear a person but the competency of the person to claim a hearing'.[20]

16. A. S. Anand, "Judicial Review - Judicial Activism - Need for Caution", JILI 42: 2-4 (2000): 156.
17. http://www.sas.sagepub.com (accessed on 14.02.12)
18. BD judiciary showing increasing assertiveness. By Sayed Kamaluddin. Retrieved from www.ceeraindia.org/documents/dawn.htm (accessed on 05.07.2012).
19. ibid
20. http://www.banglapedia.org (accessed on 16.02.2012)

But in the case of Dr. Mohiuddin Farooque v Bangladesh, the supreme judiciary gave a broader meaning to the concept of 'aggrieved person'. [21] Thus made the way for persons to institute proceedings who even may not have been actually suffering from the cause. The court observed that the expression 'any person aggrieved' approximates the test of or amounts to what is broadly called 'sufficient interest'. It was held that any person without any interest of his own is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from a breach of some public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provisions..Understandably, this case marks the beginning of public interest litigation in Bangladesh. Thus the judiciary introduced the concept of PIL in the interest of general people.

VI Interpretation of Constitution: Article 102(1) confers to the supreme judiciary the authority to issue directions or orders to any person or authority as may be appropriate for the enforcement of any of the fundamental rights. But the power cannot be exercised uncontrolled. The constitution does not accord to the supreme judiciary the authority to go beyond the letters of the constitution so as to construe a cause as violation of substantive provisions of fundamental rights which however have not been expressly spelled out in the constitution as fundamental rights[22]. The reason behind such restriction is that if the power is uncontrolled, it would make the constitution meaningless.

But in Dr. Mohiuddin Farooque v Bangladesh, [23] the supreme judiciary has construed the right to healthy environment as a fundamental right although a grammatical or literal interpretation would not support such view. The supreme judiciary has argued that right to life means a qualitative life free from environmental hazards (para-53)

In this case the supreme judiciary has made a bold step to give an interpretation to include 'right to life' within Article 32 of the constitution.

The supreme judiciary has played a very vital role in adjudging situations as violation of substantive provisions/stipulations (other than fundamental rights) which however have not been expressly spelled out in the constitution. In Anwar Hossain Chowdhury v Bangladesh, [24] the supreme judiciary invalidated a constitutional amendment for being incompatible with one or more of the basic features of the constitution, there was no stipulation to this effect in the then constitution.

Therefore, the judiciary has pronounced a creative role in family issues specially in restitution of conjugal rights, polygamy, *khula* divorce, *fatwa* relating to *talaq*, maintenance of wives, custody of children.

V Family Law: Judicial activism in Muslim family law denotes a conscious effort on the part of the courts to remove the discriminations and disabilities by means of a liberal and creative interpretation of law and secure to women equality of rights and social justice in keeping with the spirit and goals of the Constitution.

Referring to the necessity for removal of gender inequality and discrimination against women and advocating an activist judicial stance in this regard, Mohammad Fazlul Karim, J., of the Appellate Division of the Bangladesh Supreme Court observes: "There are discriminations against women in the society. We will have to come out of this situation by changing our

21. 49 DLR (AD) 1
22. The Daily Star, Dhaka,September 24, 2011
23. 55 DLR 69
24. 1989 BLD (Spl) 1

attitudes. The judges dealing with the cases regarding women will have to think how to give relief to the victims."[25]

VIII Restitution of Conjugal Rights: Restitution of conjugal rights is a reciprocal right. It helps to protect family values, preserve the sanctity of marriage as an institution and prevent its break-up. But it has become a common notion that under Muslim law the remedy is available to the husband alone and not to the wife.[26]

Moreover, the husband who seeks this remedy against his wife does not seek it out of a genuine desire for restitution of his conjugal rights and reconciliation but to defeat the claim of the neglected, deserted or aggrieved wife to maintenance against him.

In *Nelly Zaman v. Ghiasuddin Khan*, the court made a bold step by denying the claim of restitution of conjugal rights.[27] Husain, J., had found the right to restitution of conjugal rights

Unacceptable for three reasons. First, by lapse of time and social development the very concept of forcible restitution of conjugal rights against a wife unwilling to live with her husband has become outmoded. Secondly, there is no mutuality and reciprocity between rights of the husband and the wife, since it "is not available to a wife as against her husband apart from claiming maintenance and alimony." Thirdly, it violates the fundamental rights recognized under Articles 27 (equality of all citizens before law), 28 (2) (equal rights of men and women in all spheres of the state and of public life) and 31 (right to enjoy the protection of the law and to be treated in accordance with law, only in accordance with law).

It is claimed by scholar that the decision refutes the stereotyped conceptions of the wife as property of the husband and looks upon women as human beings having their own rights in marital relations.[28]

IX Divorce: If the mutual relationship between husband and wife is not good, either party may seek khula divorce. This is a divorce based on mutual consent. On the other side, some scholars argue that since in khula the desire to separate emanates from the wife and she has to make her husband agree to it by offering consideration, it would be proper to call it a divorce at the instance of wife.[29] Whatever may be the view of scholars it is undisputed that the consent of the husband is necessary. But sometime the circumstances in different cases were such that the court took bold step in pronouncing divorce without considering the issue of consent of the husband.

Hasina Ahmed v. Syed Abul Fazl, gives a clear exposition of the law of *khula* in Bangladesh.[30] In this case the husband had consistently alleged that his wife had illicit relation with her cousin. She instituted a suit for dissolution of marriage and expressed her willingness to part with the dower. Husain, J., well-known for his liberal and activist stance, found that, on the facts, she was entitled to dissolution of the marriage on the principle of *li'an* for the husband's false charge of adultery against her and also on the ground of cruelty under the Dissolution of Muslim Marriages Act, 1939. He, however, preferred to base his decision on the principle of *hula*. He held that a wife could obtain divorce by way of *khula* from the court, even if the husband did not agree.[31]

25. The Daily Star, Dhaka, 3 November 2008, p.3
26. D. F. Mulla, Principles of Mahomedan Law (19th ed., Bombay, 1990), p. 241. Mulla states the law thus: "Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights.;,
27. 34 DLR (1982) 221;
28. Taslima Monsoor, From Patriarchy to Gender Equity: Family Law and Its Impact on Women in Bangladesh (Dhaka, 1999), p.172;
29. Syed Khalid Rashid's Muslim Law, revised by prof. V.P. Bharatiya, Eastern Book Company, Lucknow. p.107;
30. 32 DLR (1980), p.294;
31. Judicial activism and family law in Bangladesh by Alamgir Muhammad Serajuddin, retrieved from http://www.asiaticsociety.org.bd (accessed on 16.02.2012)

X Maintenance: Under Muslim personal law, maintenance of the wife is an obligatory duty of the husband. If he neglects or refuses to maintain her without any lawful cause, she can sue him in a civil court claiming maintenance. But under Hanafi law, a wife who has left the house of her husband without sufficient cause or valid reason would not be entitled to any maintenance.

For this a court decree awarding maintenance to her is enforceable only from the date of the decree and not from the day the cause of action arose.

The courts have held that under Muslim personal law maintenance of the wife is an obligatory duty of the husband and where, for no fault of the wife, the husband has neglected or refused to maintain her, she is entitled to maintenance from the time the husband neglected or refused to maintain her.[32] Under Muslim personal law a wife is entitled to get maintenance only for *iddat* period of three month. Division Bench of the High Court Division of the Supreme Court of Bangladesh made a valiant effort in *Hefzur Rahman v. Shamsun Nahar Begum*,[33] to provide financial security to divorced women in impecunious circumstances by making their former husbands liable for their maintenance until their remarriage. Though overruled by the Appellate Division this judgment is marked as a major breakthrough in law of maintenance.

XI Custody: Custody of minor children is a very delicate and sensitive issue and it usually arises when the spouses are living separately or the marriage has broken down and the parties are divorced. In Bangladesh *hizana* or custody law of minor children is governed by a combination of statute laws, i.e., The Guardian and Wards Act, 1890, Muslim personal law, case-law, and court's concern for children's well-being. Irrespective of what the statute law or Shari a law provides, the paramount consideration is the welfare of the child and it is the court which decides what is in the best interest of the child

Concerning custody of children, the courts have firmly established the rule that the paramount consideration is the welfare of the minor child, and where personal law and the welfare doctrine are in conflict, the latter shall have precedence.[34] The application of this doctrine has been favorable to women.

XIIIssues of Judicial Activism in Bangladesh: There is no hesitation as to the role and importance of judicial activism. It is crucial for the administration of justice in any legal system as well as to ensure social justice. It is considered, in the legal point of view, as the changing device of the society. On the other hand, the judges, those who practice judicial activism, known as judicially activist judges, are considered as the engineer of the society. Judicially activist judges make society capable of keeping pace with the changing circumstances. That is why Prof. Brain Z. Tamanada cited that many prominent judges and jurists acknowledged that there were gaps and uncertainties in the law and that judges must sometimes make choices. That choice, that is to say judicial activism, must be reasonable and controllable as well as with conformity of the morality, laws and social justice. Thus we can say that judicial activism has various positive aspects for the welfare of the human society. Although judicial activism has positive aspect but the matter of sorrow is that it faces certain

32. Judicial activism and family law in Bangladesh by Alamgir Muhammad Serajuddin, retrieved from http://www.asiaticsociety.org.bd (accessed on 16.02.2012)
33. 47 DLR (1995), p.74
34. Ayesha Khanum v. Major Shabbir Ahmed [46 DLR (1994) 399], Md. Abu Baker Siddique v. S.M.A. Bakar[38 DLR (AD) (1986) 106], Nargis Sultana v. Amirul Bor Chowdhury [50 DLR (1998) 532].35. http://www.en.wikipedia.org/wiki/judicialactivism (accessed on 17.07.2011)

problem in its operation in our country.

- Judiciary has been separated from the Executive organ on 1st November 2007 in compliance with the provision of Article 22 of the Constitution of the People's Republic of Bangladesh. It is good to the Judiciary and also good to establish sustainable stable circumstances for practice of judicial activism on the part of judges. But it is not to be said that judges are exercising entire function being free from Executive organ. There are little bit of pressure on the part of Executive organ. That is clearly said that it is harmful for performing judicial function as well as judicial activism.
- There are certain judges those who are adapting unfair means in exercising judicial function. That is against the principle of social justice and provide bar to, create judicially activist judges, ensure judicial activism friendly environment in the Judiciary.
- There is a prone in certain judges not adapt any new principle of law that is not laid down in the law book because of only their self restraintness.
- There is lack of sustainable strong Judiciary that create bar to exercise judicial activism on the part of judges.
- Associates are considered as the helping hand of the Court. They provide legal assistance, for providing proper justice to the society, to the judges. But sometimes associates mislead court for gaining professional interest in contest that hamper practice of judicial activism on the part of judges.
- The most fatal or at the heart of the concern over judicial activism is the fear that the judge impose his own personal preferences in his decisions and their own preferences extend to such an extent as to ultimately negate the very meaning of law as a body of known rules to guide individual and social conduct.

It is possible to introduce actual principle of judicial activism in forming a sustainable civil society where social security, social dignity and social justice will be endured for all without any discrimination as to race, sex, color and religion. Though there are certain problematic issues is respect of establishing and practicing judicial activism.

The judges are not only interpreting and apply the law but they also make the law. Law is not a set of immutable propositions valid for all times, places and circumstances. Judges, as the engineer of the society, should take notice of the changed social and economic contexts in interpreting the meaning of law and determining the rights and obligations of the parties. In other words, the judges must take cognizance of the social needs and requirements and economic and political compulsions of the community; recognize change taking place in a fast developing society; and develop, adapt and reconcile law to these changing needs and requirements.

To this end, judges must exercise function without fail. That is to say, they have to act beyond any types of pressure, be it administrative of otherwise, for the sack of ensuring justice, quality and dignity for human in the society. It is to be stated that they should not be rigid as to the interpretation and application of the principles of law. They must keep in mind one matter that not to be biased in the question of justice, whatever it may be the situation.

XII Conclusion: Judicial activism is the mechanism that exclusively depends on the professional practice on the part of judges. This is an effective mechanism to make and ensue positive and sustainable change of the society to meet the changing needs of the society on

the part of the judges. Since, they can act as engineers of the social change and progress. Judicial activism also considered as the shield for the weaker sections of the society those who have no easy access to justice on account of their poverty, ignorance and illiteracy.

There is little practice of judicial activism in respect of family matters and public interest litigation in Bangladesh since it has been first introduced in the year of 1992 by a suo moto rule of the High Court Division of Bangladesh to the Commissioner of Satkhira on the basis of a newspaper report and directing to release a child from custody. That is to say, the history of judicial activism is not so long in Bangladesh. But the matter of hope is that the practice of judicial activism is a increasing issue in the judiciary, particularly High Court Division, of Bangladesh. This is not express that there is no practice of judicial activism in the lower judiciary. There is also practice of judicial activism but the prone of practice is not so mentionable than that of the High Court Division. Both higher and lower judiciary should aware and take effective initiative for, establishing friendly environment, practicing judicial activism to establish a oppression and exploitation free Bangladesh so as to meet our hopes and aspirations.

Enforced Disappearance: Human Rights Implications for India

Dr. KD Raju *

Abstract

Enforced disappearance is a common phenomenon reported especially in the armed conflict areas of the world in the recent times. International Human Rights instruments like the Universal Declaration on Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, Convention Against Torture, 1984 recall that the act is against the basic human rights principles. The UN General Assembly Declaration of 18 December 1992, No.47/133 is also proclaimed that enforced disappearances are violation of international law. The UN General Comments on various articles of the Declaration gives an insight into the interpretation of these provisions. The 1993 World Conference on Human Rights held at Vienna call upon all States to adopt appropriate legislative, administrative and judicial measures to prevent and punish the act of forced disappearances. The International Convention for the Protection of all Persons from Enforced Disappearance, 2006 gives us a clear mandate on the subject. India is a signatory to this Convention from 6 February 2007 but not ratified it.

The present study analyzes the international law on enforced disappearances from a human rights perspective and argues that enforced disappearances are violation of basic international human rights conventions. The second part of the study examines the obligation of India under various international instruments, especially, under the 1993 World Conference on Human Rights and the 2006 Convention.The study will also make a survey of domestic legislations which is in direct conflict with these basic human right instruments and argues that it is the duty of India to legislate a domestic law to implement the Convention obligations at the domestic level and to remove provisions in existing laws repugnant to the provisions of the 2006 Convention. This is important in the background of allegations against various Indian law enforcement agencies working in North Eastern states and the state of Jammu and Kashmir.

I Enforced Disappearance: Background and Definition

One of the most sinister phenomenon of our present time has been the policy of forced disappearance adopted by some of the governments affects a large section of the people who 'disappear' under mysterious circumstances and their families.[1]The act of forced disappearances seriously undermines the rule of law and it is a virulent form of state terrorism.[2] In the common parlance persons made to disappear by state authorities are known as enforced disappearances.[3]The crime of disappearance of persons was first heard when the Ruler of Germany, Adolf Hitler issued "Nacht und Nebel Erlas"[4] in 1941. Make people to vanish without trace and evidence is the essence of the crime. The term 'disappeared' was used to explain the plight of Latin American death squads in the 1960s in Guatemala.[5]During the 1970s and 80s it is a common feature in many countries like Argentina, Chile, Uruguay,[6]Iraq,

* B.Sc, LL.M (MGU), M.Phil, Ph.D (JNU), Fulbright Scholar and Microsoft Young Faculty Scholar. He is presently Associate Professor of International Law at Rajiv Gandhi School of IP Law, IIT Kharagpur andLife Member, Indian Society of International Law. E-mail: rajukd@gmail.com.

1 Reed Brody, "Commentary on the Draft UN "Declaration on the Protection of all Persons from Enforced or Involuntary Disappearances" *Netherlands Quarterly Human Rights*, vol. 8, 1990, p. 381.

2 Maureen R. Berman and Others, "State Terrorism: Disappearances," *Rutgers Law Journal*, vol. 13, 1981, p. 531.

3 http://www.ediec.org/uploads/media/Using_Law_against_Enforced_Disappearances_English.pdf, Accessed on 10.01.2012.

4 The 'Night and Fog Decree' of 7th December 1941.

5 Reoch, "Disappearances and the International Protection of Human Rights," *Year Book of World Affairs*, vol. 36, 1982, pp. 166-70. Amnesty International, "A Government Programme of Political Murder," 1976.

6 Wolfgang S. Hetnz, "Motives for Disappearances in Argentina, Chile and Uruguay in the 1970s," *Netherlands Quarterly Human Rights*, vol. 13, 1995, p. 51.

Sri Lanka, former Yugoslavia etc.[7]it was started in these countries to exterminate political dissidents, cover up all evidences and deny any knowledge about the victims.[8]It was reported that half a million people were reported missing in Iraq during the period of 2003 to 2010.[9]In 2007, it was reported that more than 51,000 people are forcefully missing from Columbia.[10]Argentina's National Commission on Disappeared People, established in 1983, has recorded 8960 cases of enforced disappearance and estimates that the actual figure could be higher.[11]In Sri Lanka, at the end of the war against the rebels, almost 1.06 Lakh people were reported missing.[12]

Misuse of special powers Acts were evidenced in India as well by the recent revelation of the Jammu and Kashmir Human Rights Commission's finding of more than 2156 unidentified dead bodies buried in un-marked graves near the line of control. The Association of Parents of Disappeared Persons (APDP), which estimates that around 10,000 people went missing during nearly two decades of separatist movement in the State of Jammu and Kashmir.[13]

This grisly practice has been continuing in many countries and the problem has far been solved so far.[14]In forced disappearances or people missing without explanations, states are liable for violating the basic rights of people if state machineries are involved in the act. Many people are killed by the act of state criminality. Disappearances are the cruelest form of government abuse causing not only the agony to the victim but also to his family and relatives.[15]It can take place at the time of war, internal conflict or peace time. The basic elements of the act can be separated into:

1. The detention or deprivation of personal liberty of a person;
2. Such detentions were carried out by state agents or with state acquiescence;
3. The denial of information about the victim or concealment of such detention;
4. Placement of the disappeared person outside the protection of the law.[16]

The Nuremburg and Tokyo War Crime Tribunal trails[17] signaled the international community's efforts to punish the culprits of international crimes against serious violations of civilized

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7 Nowak, M. Torture and enforced disappearance, In *International Protection of Human Rights: A Textbook*. Krause, C.; Scheinin, M. (eds.). Turku: Institute for Human Rights, Abo Akademi University, 2009, p. 152.

8 Claudio Grossman, "Disappearance in Honduras: The Need for Direct victim Representation in Human Right Litigation," *Hastings International & Comparative Law Review,* vol. 15, 1991-92, p. 363.

9 http://www.globalresearch.ca/index.php?context=va&aid=22164, Accessed on 05.01.2012.

10 http://www.usofficeoncolombia.org/docs/breaking-the-silence/press-release-forced-disappearance-report-final.pdf., Accessed on 05.01.2012.

11 Amnesty International, *Argentina: Investigation into Disappearances - A Step Towards Settling Outstanding Debt from 'Dirty War'* (1998) <http://web.amnesty.org/library/Index/ENGAMRI 30101998?open&of=ENG-ARG>Accessed on 1 January 2013.

12 The Indian Express Daily, December 12, 2012.

13 http://indiatoday.intoday.in/story/people-vanish-and-land-in-unmarked-graves-in-kashmir/1/149523.html, Accessed on 30.01.2012.

14 Matthew Lippman, "Disappearance: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances," *Connecticut Journal of International Law,* vol. 4, 1988-89, p. 121.

15 Reed Brody and Felipe Gonzalez, "Nunca Mas: An Analysis of International Instruments on 'Disappearances'," *Human Rights Quarterly,* vol. 19, 1997, pp. 365-405.

16 Similar ingredients can be found in Article 7(1)(i) and 7(2)(i) of the Rome Statute of the ICC 1988.

17 The first documented use of enforced disappearance was pursuant to the*Nacht und Nebel* (Night and Fog) Decree declared by the Nazi regime in 1941. *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No **1O:** Nuremberg, October 19, 1946- April 1949* (1951) vol. 3, 75.

norms of behavior and human dignity.[18]The United Nations (UN) General Assembly discussed the issue in 1978 itself and expressed its concern over the problem.[19] The next year the issue was included in the agenda of the UN Commission on Human Rights but it was given a low priority until 1980s.[20]TheEconomic and Social Council (ECOSOC) also requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider the subject of disappearances in order to make recommendations to the Commission on Human rights.[21]The civil society organizations are also reported cases of forced disappearances from many countries.[22] The UN Members were argued for a strong mechanism within the system to deal with forced disappearances. The US even comes out with a draft.[23] The Western block supported by the US, Canada, Netherlands and Australia defined disappeared persons as "those who cannot be located immediately or following a brief investigation once abduction was reported to the government."[24]

There was difference of opinion among different blocks to adopt the draft and some of the Non-Governmental Organizations like Amnesty International spoke about the urgency of the problem in the Commission.[25]The third world countries not supported the draft brought by the support of western nations. Finally a working group of 15 countries was formed in 1980 to look into the matter and submit a report to the commission.[26]The group collected information from various countries and groups on individual cases. The Group submitted various reports and asked the Commission to take immediate action in urgent cases of human right violations. A special rapporteur was appointed to assist the group on the work and he reported allegations of summary or arbitrary executions in 45 countries.In 1987 General Assembly of the Organization of American States (OAS) asked the Inter American Commission to prepare a first draft of an inter-American convention and in 1988 the Commission presented a draft text. Based on the draft the Commission on Human Rights adopted 1992 Declaration on the Protection of all Persons from Enforced Disappearance in accordance with Article 55[27] of the UN Charter.[28]In 1998 the Sub-commission for the Promotion and Protection of Human Rights adopted a 'Draft International Convention for the Protection of all persons from Enforced Disappearances. It was drafted in the Working Group of administrative justice. An Intercessional Open-ended Working Group to prepare a draft legally binding instrument was created in 2001. This Group worked until 2005 and a final draft was accepted. Finally the Convention was adopted in 30 December 2006.[29]Commentators termed the Convention as an International Habeas Corpus provision to find out the missing persons.[30]

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18 Fried Lander, "The Foundations of International Criminal Law: A Present Inquiry," *Case Western Res. J. of International Law,* vol. 13, 1983, p. 20.

19 United Nations, *General Assembly Resolution 173*, Official Records Suppl. 45 (A/33) 1978, p. 158.

20 Economic and Social Council, Commission on Human Rights, Decision 15(XXXV) Official Records Suppl.6 (E/1979/36, E/CN.4/1347) 1979, p. 137.

21 Economic and Social Council Resolution No. 34, Official Records Suppl. 1 (E/1979/79), p. 26.

22 Economic and Social Council, Commission on Human Rights (NGO/283) 1980.

23 U.S. Congress, House, Resolution No.285, 96th Cong., 2d sess., 1980.

24 David Kramer and David Weissbrodt, "The 1980 U. N. Commission on Human Rights and the Disappeared," *Human Rights Quarterly,* vol. 3, No. 1 (Feb., 1981), pp. 18-33.

25 Amnesty International, "The Question of Disappeared Persons: Oral Statement at the 36th Session of the U.N. Commission on Human Rights," 1980.

26 Berman and Clark, "State Terrorism: Disappearances,"*Rutgers Law Journal*, vol. 13 (1982), pp. 531-559.

27 Article 55 talks about promotion of universal respect for, and observance of, human rights and fundamental freedoms.

28 General Assembly resolution 47/133 of 18 December 1992.

29 http://www.icaed.org/the-convention/history-and-background-of-the-convention/, Accessed on 15.01.2012.

30 Nigel S. Rodley, "United Nations Action Procedures Against "Disappearances, Summary or Arbitrary Executions and Torture" *Human Rights Quarterly,* vol. 8, 1986, p. 700.

Article 2 of the International Convention for the Protection of all Persons from Enforced Disappearance, 2006 defines it as "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.The ramifications of enforced disappearances are severe. Those disappeared are often tortured and subjected to cruel, inhuman and degrading treatment.The victim is removed from the protection of the law, and is often subjected to torture and extrajudicial execution.In most of the cases of enforced disappearances, it is secretly done and the relatives may not know whether he is dead or alive.[31]

II International Human Rights Protection and Enforced Disappearance

Enforced disappearance is a serious human rights violation issue and got much attention around the world.[32]It is considered as a direct violation of human rights and dignity.[33]It also constitutes serious threat to personal safety, integrity and life of the victim.[34]The right to fair trail, protection against arbitrary arrest and due process are fundamental to protect human right. Widespread enforced disappearances cause confusion, insecurity and fear among the communities. The secrecy around the handling of such cases makes it difficult for anybody to extract information from the state authorities those who are involved. In most of the cases, the state denies its involvement and fixing state responsibility is a difficult task.[35]The inhuman nature of enforced disappearances constitutes various elements like: (1) deprivation of personal liberty against the will of the person; (2) involvement of government officials directly or indirectly; (3) refusal to acknowledge the detention and denial of information on the whereabouts of the person concerned.

The UN Charter affirms its faith in the dignity and respect for human rights.[36]The Universal Declaration on Human Rights (UDHR) proclaims the dignity along with equal and inalienable rights, the foundation of freedom and justice in the world.[37]The 1992 UN Declaration is the first instrument describes the essentialities of forced disappearances. The other agreement defines forced disappearance is the Inter-American Convention on Forced Disappearance of Persons 1994.[38]The 1992 Declaration, Article 1 perceives 'any act of enforced disappearance' as 'an offence to human dignity.' It is condemned as a denial of purposes of the UN Charter

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31 Kirsten Anderson, "How Effective is the International convention for the Protection of all Persons from enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance," *Melbourne Journal of International Law*, vol.17, 2006, p. 246.

32 Statement bythe UNWorking Group on Enforced Disappearances on the Occasion of the International Day of the Disappeared (29 August 2007);UNEconomic and Social Council, Commission on Human Rights, WGEID, *Report of the Working Group on Enforced or InvoluntaryDisappearances* UNDoc. E/CN.4/2004/58(21 January 2004).

33 ECOSOC, CHR, WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, para. 133, UNDoc. *E/CN.4/1983/14***,** 21 January 1983. See also Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*,(Martinus Nijhoff, Leiden, 2007), pp. 14-72

34 Khushal Vibhute, "The 2007 International Convention against Enforced Disappearance: Some Reflections," *Mizan Law Review*, vol.2, No.2, 2008, p. 288.

35 R. Brody and F. Gonzdlez, "Nunca Mas: AnAnalysis of International Instruments on 'Disappearances'", 19*Human Rights Quarterly* (1997), p. 366.

36 Preamble to the UN Charter.

37 Preamble 1 and 10 of the UDHR.

38 Article II Inter-American Convention on Forced Disappearance of Persons, **6** September 1994, entered into forceon 28March 1996.

and grave violation of the human rights and freedoms declared in the UDHR. The declaration requires the states not to practice, permit or tolerate enforced disappearances. It is the duty of the states to take administrative, judicial or other measures to prevent and terminate acts of forced disappearances. The Declaration prohibits the justification of forced disappearance by state machineries in any form and takes appropriate civil and criminal proceedings against them. The Declaration remains as a non-binding General Assembly resolution but, the UN Working Group annually reported the implementation of the Declaration by UN Members.

Direct provisions on enforced disappearances are not dealt in other human rights conventions like the Universal Declaration on Human Rights, 1948 and International Covenant on Civil and Political Rights (ICCPR), 1966. The European and American human rights conventions treat such incidents as sheer violation of human rights.[39]Torture and ill treatments are considered as violation of human rights and specific provision is provided in the ICCPR.[40]Article 9(2) of the ICCPR provides that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Torture Convention also provides protection from ill treatment, Detainees must be guaranteed a minimum period in which the grounds are promptly communicated to them, and be given information sufficient to permit the detainee to challenge the legality of his or her detention. The main issue in uninformed detention is that the state agencies ever acknowledge the arrest and detention of the person.

The UN Working Group on Enforced and Involuntary Disappearances recognized that the act of enforced disappearance as an *ipso facto* violation of the freedom from torture or other ill-treatment.[41]A person detained as "enforced disappeared" and consequent denial of information from his family members is violation of human rights laws. The prolonged isolation and detention breaches the right to human treatment and consequent violation of human rights.[42]The European Court considered the enforced disappearance as a violation of right to liberty.[43]The 1992 Declaration and other instruments failed to give an internationally binding legal solution for the problem of enforced disappearance.

III Convention on Enforced Disappearance

The International Convention for the Protection of all Persons from Enforced Disappearances was adopted by the Members on 20 December 2006 during the sixty-first session of the General Assembly in accordance with its Resolution No.A/RES/61/177. The Convention entered into force on 23 December 2010 and there are 91 signatories to the Convention and 30 countries only ratified it.[44] It is very interesting to note that most of the major powers are not signatory to the Convention like the US, Britain, China, Russia etc. India is the major

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39 *Bautista de Arellanav. Colombia,* Case No. 563/1993, UN doc. CCPR/C/55/D/563/1993**;** *Veldsquez Rodriguez v. Honduras;* IACHR (Judgment) 7 June 2003**,** *Juan Humberto Sdnchezv. Honduras;* ECHR (Judgment) 25 May 1998**,** Case No. 24276/94.

40 Article 7 of the Convention provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

41 ECOSOC,CHR, WGEID, *Report ofthe Working Group on Enforced or Involuntary Disappearances,* para. 131, UNDoc. E/CN.4/1983/14,21 January 1983.

42 Inter – American Court on Human Rights Judgment, 29 July 1988 in*Veldsquez Rodriguez v. Honduras,* para. 155.

43 Marthe Lot Vermeulen, "Living Beyond Death: Torture or other Ill Treatment Claims in Enforced Disappearances Cases," *Inter-American and European Human Rights Journal,* vol.1, 2008, p. 169.

44 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en, Accessed on 25.01.2012.

country signed the Convention but not ratified it. The convention is the first universally binding treaty that defines enforced disappearance as a human rights violation and prohibits it.[45] This Convention was awaited by the families of victims who have endured the distress of the uncertainty of the fate of their relatives.[46]

The Convention propounds that no reason can be cited whatsoever it may be for the enforced disappearances and also make it clear that such rights are non-derogable.[47]The recognition of this right in the declaratory language adopted in Article 1ofthe Convention is a significant advance in human rights law, even without thesubsequent obligations contained in the Convention.[48]

Under Article 3, it is the duty of the state to investigate the acts committed under the definition without the authorization or support of the government functionaries and brought them to the clutches of law. It is mandatory for the states to make it forced disappearance as a criminal offence at domestic level.[49]This provision matches to the provisions of the Torture Convention 1984.[50]The systematic practice of disappearance has to be treated as a crime against humanity and punished under international law.[51] Under the present international law, the crime against humanity may be tried in the International Criminal Court.[52] The people those who are ordering for such acts or commits or solicits forced disappearance should be hold criminally responsible for his acts.[53]A subordinate officer cannot escape liability on the ground of 'superior orders.'

The rights of the victims should be protected under international law. It acknowledges the right of the families to know the fate of their relatives, and also recognizes that victims of enforced disappearance have a right to reparation for the wrong that was done to them. This protection is over and above the protection available to victims under domestic law.[54] If any state found that a suspected person who committed such offence present in a state, state party may take custody of such person and brought him under law or he may be extradited to such a country where he is required to undergo legal proceedings for forced disappearances.[55] It is the obligation of the parties in case of mutual assistance in legal proceedings.[56]States should carry out an impartial investigation into the alleged forced disappearance and to protect the witnesses, complainant and relatives of the disappeared.[57]States has to take appropriate measures to ensure that the victims of enforced disappearance have the right to know the truth regarding the (a) circumstances of the enforced disappearance; (b) progress and result of

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45 http://www.icrc.org/eng/resources/documents/interview/convention-enforced-disappearance-interview-201206.htm, Accessed on 20.01.2012.

46 Susan McCrory, "The International Convention for the Protection of All Persons from Enforced Disappearance," *Human Rights Law Review,* vol.7, 2007, p. 545.

47 Article 1.

48 n.45, Susan, p. 549.

49 Article 4.

50 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46). The Convention entered into force on 26 June 1987 after it had been ratified by 20 States.

51 Article 5.

52 Article 7 of the Rome Statute.

53 Article 6.

54 Article 9.

55 Article 10 and 11.

56 Article 14 and 15.

57 Article 12.

the investigation and (c) the fate of the disappeared person.[58]The genetic data and other medical evidences cannot be used for other purposes than for the identification and search of the disappeared person. Each victim has the right to get prompt and adequate reparation.[59] The Convention will be administered by a Committee on Enforced Disappearances elected by its parties.[60] Parties are obliged to report to this committee on the steps they have taken to implement it within two years of becoming subject to it.The Committee has the emergency powers like:

(i) to invoke a sort of 'urgent or emergency procedure' to seek and find disappeared persons,[61] and

(ii) to bring cases of 'exceptional gravity' to the attention of the UN General Assembly.[62]

The Convention mandates the Committee to work with its Members until the fate of the person sought is resolved. It is interesting to note that countries like India, Iran, China and Angola argued that before invoking the emergency powers, local remedies should be exhausted. This was objected by many members and they argue that this will defeat the very purpose of the emergency provisions.[63]Any disputes between members should be subjected to arbitration.[64]

IV Indian Laws and Protection of Human Rights

There is no express prohibition of torture or inhuman treatment in the Indian Constitution. But the Supreme Court has interpreted the Constitutional provisions contained in Article 14 and 21. Referring to article 5 of UDHR and Article 7 of the ICCPR the Supreme Court held that "…any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law."[65]

The Indian Constitution in Part III and Part IV recognizes various inalienable rights of citizens of India. The fundamental rights in Part III provides basic civil and political rights and Part IV entitled 'Directive Principles of State Policy' enumerates the human rights which are generally categorized as socio, economic and cultural rights.[66] Part III are enforceable in court of law and Part IV should be considered as basic principles of governance when the states make policies.Directive principles are regarded as being 'fundamental to governance' and require the laws formulated by the state to be informed by these principles.[67]The Civil and Political Rights mentioned in the Constitution are:

1. Right to equality
2. Right to freedom
3. Right to freedom from exploitation
4. Freedom of religion

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58 Article 24.
59 Article 24(4) and 24(5).
60 Article 26.
61 Article 30.
62 Article 34.
63 n.33, Khushal Vibhute, "The 2007 International Convention against Enforced Disappearance: Some Reflections," Mizan Law Review, vol.2, No.2, 2008, p. 288.
64 Article 42.
65 Francis Coralie Mullin v. Administrator, Union Territory of Delhi.,AIR 1981 SC 746.
66 Article 37 of the Indian Constitution.
67 Ibid., A.37.

5. Cultural and educational rights
6. Right to constitutional remedies

These are fundamental rights recognized by the constitution under Part III. Protection of personal liberty and life is provided under Article 21 of the constitution. The expression 'personal liberty' in Article 21 has a very wide connotation, and covers a variety of rights that constitute the personal liberty of the individual.[68]Rights of the person arrested are laid down under right to life and personal liberty.[69]The National Commission to Review the Working of the Constitution (NCRWC) has recommended a constitutional amendment to Article 21 to include expressly the right against torture or cruel, inhuman, or degrading treatment or punishment.[70]The right to life and personal liberty cannot be suspended even during emergency. Enforced disappearance is considered as a crime and the Convention also in its preamble states that the Members should respect for and observe, human rights and fundamental freedoms.

Article 22 prescribes minimum procedural requirements that must be included in any law enacted by the Legislature in accordance with which a person may be deprived of his life and personal liberty.[71]Article 22 guarantee four rights on persons who are arrested for any offence under an ordinary law:

1. The right to be informed 'as soon as may be' of ground of arrest;
2. The right to consult and to be represented by a lawyer of his own choice;
3. Right to be produced before a Magistrate within 24 hours;
4. Freedom from detention beyond the said period except by the order of the Magistrate.

Article 22 is mandatory and directive in nature and the arresting authorities to disclose the grounds of arrest of a person immediately. If the grounds of arrest are delayed it must be justified by 'reasonable circumstances'.The right of being informed of the grounds of arrest is not dispensed with by offering to make bail to the arrested person.[72]This provision is similar to Article 10(3) of the Convention. The Supreme Court in a landmark judgment in *Joginder Kumar v. State of UP*,[73]it was laid down detailed guidelines governing arrest of a person during the investigation. This is intended to strike a balance between the needs of police on one hand and the protection of human rights of citizens from oppression and injustice at the hands of law enforcing agencies. The third report of the Police Commission pointed out that 60 per cent of the arrests are either unnecessary or unjustified.[74]The court laid down the following guidelines when making the arrest:

1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare

68 SAHRDC, *Human Rights and Humanitarian Law,* Oxford University Press: New Delhi, 2008, p. 239.
69 *D.K. Basu case* and *State of AP v. Challa Ramkrishna Reddy & Others* (2000) 5 SCC 712.
70 Report of the National Commission to Review the Working of the Constitution, Chapter 3 on Fundamental Rights, Directive Principles and Fundamental Duties.
71 Article 22 deals with detention under the law of 'Preventive Detention.' First two clauses of Article 22 deals with detention under the ordinary law of crimes and lay down the procedure which has to be followed when a man is arrested and the remaining clauses (3),(4),(5),(6) deal with persons detained under a preventive detention law and lay down the procedure which is to be followed when a person is detained under that law.
72 *State of MP v. Shobharam,* AIR 1966 SC 1910.
73 (1994) 4 SCC 260.
74 http://bprd.nic.in/writereaddata/linkimages/4097048343-THIRD%20REPORT.pdf, Accessedon 30.01.2012.

told as far as is practicable that he has been arrested and where he is being detained.

2. The Police officer shall inform the arrested person when he is brought to the Police station of this right.

3. An entry shall be required to be made in the diary as to who was informed of the arrest.

It is interesting to note that most of the provisions in the Convention were included by Indian in its Constitution itself so many years back. But the real question is whether it is implemented properly by the law enforcement agencies in India. Article 17(2)(d) of the Convention also stipulates that the detained person shall be communicated to his family counsel or his choice. Article 17 made detailed provision for the procedures and guidelines for the deprivation of liberty.

These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.Under Article 22(1) and (2) the arrested person has a right to be produced before the nearest magistrate within a period of 24 hours.[75]In *State of Punjab v. Ajab Singh,*[76] the SC held that a person taken into custody under the *Abducted Person (Recovery and Restoration) Act 1949* is valid and transferred him to the office-in-charge of the nearest camp. Likewise the removal of a minor girl from a brothel under *Bengal Suppression of Immoral Traffic Act, 1923,* was held not to constitute 'arrest and detention' under Article 22 of the Constitution.[77]

V Domestic Legislations and Possible Conflict

Article 22(7) of the Constitution empowers the Parliament to enact laws that may preventively detain persons beyond three months without securing the opinion of an advisory board. State legislatures have concurrent power to enact such laws for the security of the state, maintenance of public order or maintenance of supplies and services essential to the community.[78]India enacted the *Preventive Detention Act in 1950* to provide for detention with a view to preventing any person from acting in a manner prejudicial to the defense of India, the relation of India with foreign powers, the security of Indiaor state security or the maintenance of public order. Section 3 of the Act empowers the state governments or Central Government to order a detention on the above grounds. The Act was ceased to exist in 1951, but extended its validity till 1969. However, it is resurfaced in the name of *Maintenance of Internal Security Act, 1971*. This Act was in force till 1977. But this was again revived in the name of Prevention of Black Marketing and Maintenance of *Supplies of Essential Commodities Act.* Again the provisions were resurfaced in the form of *National Security Ordinance 1980* which was later replaced by an Act. This Act empowers detention of a person up to 12 months. In 1984 it was amended. An amendment was made to the Act, Section 14-A, increased the term up to two years and made applicable to Punjab and Chandigarh in order to counter the special situation prevailed there during that time. The amendment was held valid by the Supreme Court.[79] The amendment limits the scope of judicial review of preventive detention which directly infringes many provisions of the basic human right conventions. Article 17 of the Convention also prohibits anybody put on secret detention. The deprivation authority should be clearly

75 *C.B.I v. Anupam J. Kulkarni,* (1992) 3 SCC 141.
76 AIR 1953 SC 10.
77 *Raj Bahadur Singh v. Legal Remembrancer,* AIR 1955 Cal 522.
78 Entry 3, List III, 7th Schedule of the Indian Constitution.
79 *A.K. Roy v. Union of India,* AIR 1982 SC 710.

mentioned in the domestic legislation.[80] Such persons are also to be kept in authorized detention centers.

The Indian Government enacted the *Armed Forces (Special Powers) Act* 1958 (AFSPA) in order to counter the acute law and order situation in the border areas of north-eastern states. This Act was justified by the Indian Government under Article 355 of the Constitution which empowers the Central Government to protect the states from external aggression or internal disturbance. Under the Act, unbridled powers were given even to non-commissioned officers of the armed forces to shoot or kill[81] anybody on mere suspicion that it is necessary to do so in order to maintain the public order.[82] This law was branded as a 'draconian law' by many human rights organizations in the country and the Act is still enforced in the 'disturbed areas' like in the north-eastern states and Jammu and Kashmir.[83]Under the provisions of this law, any assembly of five persons can be fired at and killed, even on an unsubstantiated arbitrary suspicion. The security personal were protected from any action taken under the Act and a special permission from the Central Government is required for any such prosecution.[84] The Delhi High Court in *Indrajit Barua v. State of Assam* held that AFSPA is constitutionally valid.[85]

The *Jammu andKashmir Public Safety Act, 1978* is also brand as 'anti human rights legislation.' It allows preventive detention up to two years.[86] However, the Act stipulates that the grounds on which detention has been passed must be conveyed to the detainee within five days from the date of detention and a maximum of 10 days.[87]Section 13(2) of the Act shields the officers ordering detention to withhold any information on the ground that such disclosure would be detrimental to the public interest.[88]

Armed Forces (Punjab and Chandigarh) Special Powers Act of 1983 empowered security forces to search premises and arrest people without warrant. Section 4 gave them the power to shoot to kill a suspected terrorist,with prosecutorial immunity, as granted in Section 7. This Act was used by the security forces against the terrorist activities in Punjab. These provisions were used as a license to torture and kill people with impunity by the forces.[89]

The SC also upheld the validity of other so called 'draconian' legislations like the *Terrorist and Disruptive Activities Act,1985* (TADA-lapsed)[90] and the *Prevention of Terrorism Act, 2002* (POTA- repealed in 2004).[91]POTA was enacted by the government in accordance with the UN Security Council Resolution No. 1371 of 2001, calling upon all members to enact immediate legislations to counter terrorism. With the repeal of the POTA, a new legislation, *Unlawful Activities (Prevention) Amendment Act* (UAPA) was passed in 2005. The UAPA

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80 Article 17(2)(a).
81 Section 4 of the Act.
82 Section 13(2) of the Act gives freedom even not to disclose such facts which are considered to be against public interest.
83 The Act was made applicable to the state of Jammu and Kashmir in 1991
84 Section 7 of the Act.
85 AIR 1983 Delhi 513.
86 Section 8(2) of the Act.
87 Section 13(1).
88 This exception clause vitiates the very purpose of transparency clause of passing information about the detention to the relatives of the victim.
89 Jaskaran Kaur, "A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India," *Harvard Human Rights Journal*, vol. 15, 2002, p. 273.
90 *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569.
91 *People Union for Civil Liberties v. Union Territory of Delhi,* AIR 2004 SC 456.

lowered the detention period under POTA from 180 days to 24 hours from the arrest according to Section 167(2) of the Criminal Procedure Code.

Some of the State legislations like the *Gunda Niyantran Adhiniyam, 1970* of the State of UP and *Maharashtra Organized Crime Control Act, 1999* are providing enough space for the misuse of the powers under these laws on the pretext of combating terrorism and organized crimes in the States. With the lapse of POTA many states are enacting their own laws for dealing with situations specific to their territories.

Protection of *Human Rights Act, 1993*directly deals with human rights protection in India. The administrative system of National Human Rights Commissions and State Commissions were formed under the Act. Section 2(d) of the Act defines: 'human rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

In the recent past, there are number of 'Fake encounter' cases has been reported from India. These are extra-judicial killings by the police or paramilitary forces during an armed encounter.There are 1,502 encounter cases that the police have reported to the NHRC since its inception in 1993. Out of this, only 12 are claimed to be wrong and have awarded compensation to the victims' families. The State-wise break-up of this figure is as follows: Uttar Pradesh six; Tamil Nadu one; Andhra Pradesh two; Delhi one; Uttaranchal (now Uttarakhand) one; and Bihar one.[92]The reported fake encounters are 1,262 and the NHRC found substance only in 11 and awarded compensation to the families of the victims. The State-wise break-up of these cases is Uttar Pradesh six; Bihar two; Madhya Pradesh one; Maharashtra one; and Andhra Pradesh one.[93] It is reported from Gujarat that there are 22 shoot-out deaths from 2002 to 2006.[94]Fake encounters are nothing but intrusion into the liberty of persons. The Supreme Court of India recently ordered an investigation into all such killings in the State of Gujarat.[95]

It is true that the India has not ratified the Convention on Forced Disappearance and *per se* there is no obligation on the State to implement the provisions of the Convention at the domestic level now. But the Indian Constitution and the judgments from the apex court made it clear that any arrested person should be informed of the grounds of his arrest and informed to the family members.Most of the concepts of the Convention are already there in the Constitution and the interpretations of the provisions from time to time by the Supreme Court helped to clear the doubts and formulated guidelines at the time of arrest and detention.

VI Conclusion and Suggestions

The Convention is one of the strongest human right instruments adopted by the UN in the recent times. The Convention made not only the act of forced disappearance a criminal offence but also made it a crime against humanity. The Convention put specific obligations on parties and a reporting system is also established. Monitoring system at international level is made through the Committee on Enforced Disappearances. It also made provisions for receiving complaints from other parties on allegation of forced disappearances and to receive complaints from individuals. The emergency provisions were introduced to prevent forced disappearances

92 http://www.ndtvmi.com/b4/dopesheets/aastha.pdf, Accessed on 30.01.2012.

93 The complaints of fake encounters are increasing in the recent past.

94 http://www.indianexpress.com/news/probe-all-22-fake-encounters-between-2002-and-2006-sc-tells-gujarat-panel/903979/, Accessed on 30.01.2012.

95 www.the hindu.com/new/national/article2831280.ece, Accessed on 30.01.2012.

and draw the attention of the UN General Assembly on 'systematic practice of forced disappearance.' It also made provisions for the victims of forced disappearance to get reparation and fair compensation.

Some of the drawbacks of the Convention are as follows:

1. The Convention does not treat every act of enforced disappearance as a crime against humanity.
2. Only 'wide spread' or 'systematic practice' of forced disappearance as crime against humanity.
3. The activities of 'non-state actors' are not in the purview of the Convention.
4. The responsibilities of the states are not specifically imposed in the Convention on its implementation at the domestic level.

Most of the so called 'draconian laws' of India provides sufficient guidelines for arrest and detention of people under respective legislations. But the misuse of such provisions can be only prevented by adopting safeguards at the administrative level and awareness campaigns among the people as well as armed and paramilitary forces working in the disturbed areas. Most of these laws in one way or other wayprovide uncontrolled power to law enforcement agencies which always led to its misuse and consequent complaints of human right violations. 'fake encounters' are a new item in the list of human right violations. All the violations reported under domestic legislations are prohibited under international human right conventions.

India ratified the basic human rights conventions like the UDHR and ICCPR.[96]India signed the Torture Convention as well as Enforced Disappearance Conventions, but has not yet been ratified. India have problem mainly with the domestic laws like the *National Security Act*, AFSPA, *Jammu andKashmir Public Safety Act, 1978*and some of the State Acts dealing with terrorists or organized crimes. India has to take appropriate measures to legislate upon a new law to implement the provisions of the Enforced Disappearance convention and appropriate amendments to be made to the existing ones will enhance the credibility of India among the international community on its commitment to international human rights law.

[96] India Acceded to the Convention on 10th April 1979.

Kolkata Police: A Journey from Colonial to the Independence Era (1690 to 1947 A.D).

Dr. Arpita Mitra *

Abstract

Both Kolkata and the Kolkata Police owe its foundation to the English East India Company and they still bear a lot of reminiscences of the past mentor. It began on the 6th February 1704, after at a meeting at Fort William when the officers of John Company decided to set up a watch and ward unit to combat robbers, dacoits and thagi. From 1720 –1756 during the tenure of Babu Gobindaram Mitra who held the post of 'black deputy' that Kolkata was divided into thanas under thanadars subordinate to whom were paiks, naiks and naibs. Lord Cornwallis was the first governor general to place the responsibility of policing the country on the government. And subsequently, the policing system improved when Warren Hastings became the Governor (1772 - 1774). In 1800, Lord Wellesley appointed a committee to consider the policing of Calcutta and the result was the Regulation of 1806. Later, the recommendations of the Patton Committee resulted in the formulation of the Act XIII of 1856 which for the first time recognized the Calcutta Police as a separate organization under the government. From then till now the Kolkata police has traversed an eventful path and has established itself as a metropolitan police force with a strength of about 26,000 catering to the diverse needs of the citizens and trying to improve itself everyday.

I INTRODUCTION

Kolkata, a conurbation of dreams and aspirations, love and warmth, distress and dejection, paucity and squalor, affluence and splendor, is sparkling; always full of life and tradition- a colorful assortment of moods, styles, cultures, politics, industry and commerce. It may be noted in this context that the term Kolkata Police has been used throughout the study in view of its present name though originally it was known as 'Calcutta Police'. From inception to the present time, Kolkata as it is now called has survived several ups and downs and is rightfully called the cultural capital of India. In the year 2006 the Kolkata Police celebrated 150 years of its existence as a separate commissionerate and made several plans for making it more modernized, technologically updated with a people friendly attitude. The present study traverses down history to highlight the multi-faceted transitions Kolkata police have undergone from its inception, i.e. from the colonial rule to the year of Independence, 1947.

* Assistant Professor, School of Law, KIIT University available at: arpitaamitra@gmail.com

THE HISTORY OF KOLKATA POLICE: PRE REGULATORY STAGE (1690-1855)

II The Genesis

The history of the Kolkata Police would be incomplete without the history of Kolkata, the city, which it has to care for. Both Kolkata and the Kolkata Police are the creation of the English East India Company and they still bear a lot of reminiscences of the past mentor. According to Cotton, Kolkata for a century and a half she has been the central seat of the English Government. Circumstances have made her the pivot of the administration, and it cannot be denied that she is nobly symbolical of her high position. Kolkata happened to be the capital of India during the British rule till 1911. It was also an important seat of the nationalist movement and was bubbling with revolutionary ideas of freedom, liberty and equality. The supremacy of the enlightened intelligentsia and their vivid influence in the lives of not only the Kolkatans but also the whole of India cautioned the British of the impending danger and forced them to shift the capital to New Delhi.[1]

In the year 1679 a British Ship named the "Phakon" sailed up the river Hooghly and anchored off the area later known as Garden Reach. Captain Stafford, the commander of the vessel, sent out messages to the Bengali merchants in the area to develop trade contacts. It was a washerman named Ratan, who had some acquaintance with the English language, came to the aid of the Englishmen. The first "Kuthi"(Office) of the East India Company was subsequently erected at Garh Govindpore (South –West Calcutta) in the year 1680.[2] An Englishman, Job Charnock of Lancashire, Chief of British Factory of East India Company, founded Calcutta, now known as Kolkata, on *24th August 1690*. Azim uz Shaan, the grandson of Aurangzeb gave the British the right to purchase 3 villages in Bengal. Thus the Chaudhury's the then zamindars of the area, handed over 3 villages namely Sutanuti, Gobindapur and Kolikata to the British, which later formed a nucleus of a fortified military settlement and a prime location for the East India Company's operation in Bengal.[3] The previous two kuthis erected at Suttanutty had withered away and Charnock renewed the settlement of the English in 1690 and for the first time they thought of having a permanent trading post as well as a settlement of their own. They started constructing 'pucca ' brick buildings instead of mud huts and to have a protected place – a fort of their own.[4]

III Prevention and detection of Crime: Mechanism during Mughal Period

The Mughal government was responsible through the zamindar for the prevention and detection of crime. In Mughal system of administration the nizam, fauzdar, kotwal, daroga-I-adalat-alia, diwan, daroga-I-adalat-diwani, muhtasib, mufti and kanungo pertained more to the general administration than to the adminitration of justice. The fauzdar being the police officer entrusted with the maintenance of public peace was not vested with any judicial functions. The kotwal or the peace officer of the night was also not entrusted with any judicial functions. The adalat alia, the adalat diwani and the qazi dealt with only civil cases. However in Bengal in the latter part of Aurangzeb's rule, zamindars reigned supreme and were the dispensers of civil and criminal justice.[5]

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1 *Cotton, H.E.A.1909. Calcutta: Old and New: a Historical and Descriptive Handbook to the City. Calcutta: General. p. 195.*

2 *Roy, B.1982.Marshes to Metropolis (Calcutta 1481-1981).Calcutta: National Council of Education. pp.14-15.*

3 *Chatterjee, T. 1960. The Road to Plassey. Calcutta: Orient Longmans Pvt.Ltd. pp.1-18.*

4 *Op.cit. Roy 1982, p.20.*

5 *Griffith P. 1972. The History of Indian Police.Bombay: Allied. pp.7-17.*

On the 6th *February 1704*, after at a meeting at Fort William the officers of John Company decided to set up a watch and ward unit to combat robbers, dacoits and thagi.[6] It consisted of a head-peon, 45 peons, 2 chobdars (sceptre bearers) and 20 goalas or milkmen who were expert lathiyals. With their appointment was laid the foundation of Kolkata police. Within a span of a year the head peon was designated as the kotwal and the peons were renamed as paiks. They were armed with spears and staffs.[7] However in *1706*, when this unit failed to check crime, 31 more paiks were given the assignment to protect the life and property of the people. Night Patrolling started in 1710. The Fire Brigade was established during this period and the Kolkata Police also ensured to maintain the cleanliness of the city.[8] In 1720 the company officially appointed the zamindar of Calcutta as in charge of civil and criminal administration. Mr. Freke, the first zamindar of Calcutta, was to be assisted in the discharge of his functions by an Indian functionary known as the "black deputy". They drew only a very modest official salary, but the authority and influence that they exercised, brought many opportunities in their way, to augment their income by illicit levies on the people. They did not have an entirely free hand in this regard, as certain rules stated that the fines realized from natives in town area for criminal offences were to be used for such civic purposes as filling potholes and developing areas in and around the town.[9] This paved the way for the development of municipalities.

From *1720 –1756* Babu Gobindaram Mitra held the post of 'black deputy'. It was during his regime that Kolkata was divided into thanas under thanadars subordinate to whom were paiks, naiks and naibs. Moreover there were burkandazes, peyadas, peons and harkaras under the zamindars. Burkandazaes were the strong arm of the rural government; peyadas were used as labour force, peons for miscellaneous work and harkaras were responsible for distributing letters and dispatches.[10] The burkandazes were armed with rifles, the chowkidars carried staffs, and the night guards had swords while the harkaras were equipped with spears. There was a small River Police to provide security to riverine trade.[11] It was formed mainly because "between the years 1700-1790 trade expanded rapidly and industries began to develop. The buildings constructed by the Europeans for residential and business purposes were located chiefly in Suttanutty on the Eastern bank of the river and ran roughly in the shape of an arc, starting from Chitpore and Hatkhola in the north and ending in the vicinity of the present site of Fort William in the South".[12] Babu Gobindaram Mitra also created 3 posts of naib diwans with the following three assignments: (1) to maintain roads and ponds as well as cleanliness and sanitation in the township; (2) to look after the collection of ground rents and the supply of food, and (3) in charge of the police including the river police and the excise department.

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6 Thagis: An Indian network of secret fraternities who were engaged in murdering and robbing travellers, operating from the 17th century (possibly as early as 13th century) to the 19th century whose members were known as Thugs. Thagi groups practice large-scale robbery and murder of travellers. Their modus operandi was to befriend unsuspecting travellers and win their trust; when the travellers allowed the thugs to join them, the group of thugs killed them at a suitable place and time before robbing them. Their method of killing was very often strangulation. Usually two or three thugs were used to strangle one traveller. The thugs hid the corpses, often by burying them or by throwing them into wells. See: http://enclycopedia.thefreedictionary.com/Thagi visited on 15.12.08.

7 Roy, N.1994. Evolution of the Calcutta Police. Calcutta: Calcutta Police. p.2.

8 Gupta, D. 2002. Kolkatar Police.Calcutta: Jayasree Press. p.12.

9 Op.cit. Roy 1982. p. 26.

10 Chattopadhyaya, T. 1982. The story of Lalbazaar. Calcutta: Firma KLM Pvt. Ltd. p.21.

11 Op.cit. Gupta: 2002. p.13.

12 Op.cit. Roy 1982, p.32.

The fall of Calcutta in 1756 and its recapture followed by the battle of Plassey had its impact on the development of township. The policing of township had to improve with the collection and collation of intelligence in addition to the maintenance of watch on criminals. During the siege of Calcutta by Siraj ud daulah the Nawab of Bengal, the town guards stood well by their leader, but the over all performance of the police force was not satisfactory. The main problem of the police force in Calcutta was the shortage of manpower.[13]

IV Emergent of Policing during East India Company Rule at Calcutta

The capture of Calcutta by Siraj ud Daulah had left wide marks in the growth of Calcutta. After its recapture by Clive and Watson, the East India Company had to take a lot of initiative to get it back to its earliest form, if possible in a better form. According to Cotton "when Clive and Watson retook Calcutta in 1757 seven months after the sack, they found most of the best houses of the English demolished or damaged by fire. The greater part of the merchandise belonging to the Company, which was stored up in the Fort, was found untouched, for this part of the plunder had been reserved for the Nabob. Immediately after the receipt of the 'restitution-money', a Committee of the most respectable inhabitants was appointed to distribute it. They executed the office with much minuteness, if not also with discretion and equity. Commerce revived; the destroyed houses were re-built; in fact, we may date modern Calcutta from 1757".[14]

In *1765* when the East India Company acquired the diwani of Bengal, zamindars had the responsibility of maintaining law and order in their jurisdiction on behalf of the provincial government. Lord Cornwallis was the first governor general to place the responsibility of policing the country on the government. The policing system improved when Warren Hastings became the Governor (1772 - 1774). The Governor General in Council passed in 1778 a law providing for the appointment of a Superintendent and not fewer than 700 paiks under the supervision of 31 thanadars and 34 naibs. In 1780 the Commissioners were appointed from town, called commissioners of police, who were to look after the watch and ward of the town and were empowered to levy 2 annas per shop and one anna per house. The fund thus raised was meant for the cleanliness and improvement of the town. But this does not pose a problem for the maintenance of the police.[15] Calcutta was divided into two worlds: the southern or European and northern or native. There were vast differences between the European town and the 'black town". The houses in the European town were well-furnished, airy, well built and some of them equal to palaces. The black town was congested with people living in badly built unimpressive houses with a few exceptions.[16] On the *9th June 1785* a notice issued in the Calcutta Gazette by the Commissioner in charge of policing, divided Kolkata into thirty-one thanas each under a thanadar. Four constables were allotted for each thana in the English town while the two constables were appointed in each thana in the 'black' town. In case of grievance the inhabitants were exhorted to apply to the officers of the concerned thana and if they showed inability or neglect, they were to move the Superintendent of Police. In *1791* the city witnessed the appointment of two deputy superintendents to discharge the police functions. The district magistrate appointed Stipendiary thanadars or police station officers for each police station.[17]

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13 Biswas, O.1992. *Calcutta and the Calcuttans*. Calcutta: Firma KLM Private Limited. p. 246.

14 Op.cit.Cotton 1909. p.60.

15 Op.cit. Chattopadhyay 1982. p.35.

16 Mukherjee, S.N.1977.*Calcutta: Myths and History*. Calcutta: Subernarekha. p.4.

17 Op.cit. Biswas: 1992. p.246.

V. Impact of Great Famine in Reorganising Calcutta Police

The developments that took place in police administration in the later half of the period between 1750 to 1800 was mainly as a result of *the Great Famine* (Chhiattarer Manvantar) of 1770. About one third of the population of Bengal died and it caused immense unrest in the region. The discontent of the people due to the ruthless expropriation and exploitation of the British also led to Fakir (1771-'1800), Chuar (1795-1800) and the Sanyyasi (1855), rebellions in Bengal.[18] The famine carried off, according to Cotton, "no less than 76,000 souls in the town of Calcutta between 15th July and the 10th September. The very streets of Calcutta were blocked by the dying and the dead and the mortality among the Europeans alone was returned at 1500".[19] The unabated and reckless raising of land revenue by the East India Company in rural Bengal forced many impoverished men walk down the streets of Calcutta. The company's drive for extensive urbanization uprooted many residents of the three villages from their hearth and home. A large number of the city's unorganized poor precariously scraped a livelihood by means that were often ignoble and furtive, murderous and barbaric, creating an underworld of innovative tricks and plots, and ingenious devices of robberies and murders.[20] According to Chattopadhyay, "the period following the famine was marked by a high rate of violence and a overall decline in the law and order in Bengal. ... the unprecedented violence of the period was triggered off, in the main, by the simultaneous operation of two factors: ruthless expropriation of available social surplus characteristic of the predatory phase of the colonial rule in Bengal and the disappearance of the Mughal System, which had by and large successfully maintained the social equilibrium. While the first factor helps us to identify the new forces unleashed on the economy, the second prompts us to revise the rather simplistic suggestion that the traditional mechanism of police control broke down under the weight of corruption and inefficiency".[21]

VI Appointment of Justice of Peace under Regulation Act

In 1800 Lord Wellesley had appointed a committee to consider the policing of Calcutta and the result was the Regulation of 1806. The regulation provided for the constitution of Justices of the Peace as Magistrates within a radius of 20 miles from Calcutta. Justices were empowered to arrest persons suspected of committing offences in the city. The town guards recruited from the artillery formed an armed reserve and dealt efficiently with riotous sailors and deserters. The river police consisted of nine departments, eighteen peons and ninety two boatmen with bholio or covered boat for the magistrates and 9 chowki boats to patrol the river. The condition of the prison houses was satisfactory. The Chief magistrate looked after the repair of roads, the lighting of streets, the watering of roads, fire fighting, abatement of nuisance and prevention of encroachments on streets and markets.[22]

Between the years 1821 and 1837 the population of the city of Calcutta increased rapidly owing to the migration of people in search of jobs. This process continued till the middle of the 19th century and is symbolic of the growth of urbanization that had then started in Kolkata.[23] Calcutta came to be divided into two classes. "There was the *abhijat bhadrolok*, the big

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18 Chattopadhyay, B. 2000.*Crime and Control in Early Colonial Bengal*. Calcutta: K.P.Bagchi. pp. 2-15.
19 Op.cit. Cotton 1909. p. 67
20 Banerjee, S. 2006. *Crime and Urbanization: Calcutta in the Nineteenth century*. New Delhi: Tulika Books. pp.10-11.
21 Op.cit. Chattopadhyay 2000. p. 22.
22 Op.cit. Biswas 1992.pp.252-53.
23 Op.cit. Mukherjee 1977.pp.6-7.

zamindars, merchants and top administrators, who were the owners of land and capital (although as a capitalist class they were subservient to the British.) Then there were the dockers, the builders, the workers, the domestics, the palankin bearers and other wage earners- a large migrant labour force, some of whom came from Orissa and the north, who formed the class of producers. The relationship between these two classes was contractual and economic and was not determined by caste or custom."[24] In *1829*, the Magistrates of Justice were administering the Kolkata Police department. The Magistracy was divided into 4 departments: the Report, Felony (common law system for very serious crimes), Misdemeanor (common law system for less serious crimes), and Conservancy (a court or commission with jurisdiction over a river, port area of countryside etc.). The Report department constituted thanadari police, boundary Police and town guard departments. It was the forerunner of the present day office of the Commissioner of Police. The town guards acted as the reserve force and were subordinates to the town Major and sergeants who were recruited from the Company's artillery department. Calcutta was divided into forty thanas each having a thanadar, with a naib to act as his substitute and twenty to thirty chaukidars. There was also a patrol force in each thana divided into three parties each with two naibs and chaukidars. There was also a River Police and Boundary Police which were well armed and appointed from upcountry.[25] In *1845* a committee under J.H.Patton, which thereby brought vital changes, emulated the police organization on the London Metropolitan Police. The deficiencies of the police organization were brought to light and the necessity of promotions from the rank of burkandez to the rank of daroga was pointed out. A commissioner of police was appointed with powers of Justice of Peace, to preserve law and order and to detect crime and detain offenders.[26]

VII Police in 19th Century Calcutta

According to Mukherjee, "Calcutta in the 19th century was a peaceful city. It was then not plagued by the periodic riots, mob-violence, and political murders, as it has been in the 20th century. This does not mean that there was no violence in the city during the 19th century: in fact newspapers are full of reports of violent crimes, murders and armed robberies. But these were committed by individuals or groups of gangsters, which did not threaten the stability of social order".[27] There have been instances recorded in historical anecdotes, which expose the inefficiency of the Kolkata Police in the 18th and 19th centuries. Le Grandpe in *A Voyage in the Indian Ocean and to Bengal* has stated: "So considerable town ought to possess a vigilant police, but in this respect it is very defective. Those who disturb the public tranquility are indeed apprehended but the condition of the town is disgustingly unclean. I have seen an instance of this, where the body has remained two days without being taken away by the police" [28] Dacoity was common in the outskirts of Calcutta. In 1780 in a Calcutta paper it is stated "a few nights ago four armed men entered in house of Moorman near Chouringhi and carried off his daughter".[29] Again Huggins pointed out: "The police establishment of Calcutta is greatly complained of, and is very defective, both as regards surveillance and efficient useful regulations. The Magistrates are not civilians, possessing permanent appointments,

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24 Ibid.: 26.

25 Chatterjee, B.1973. Study in Police administration of West Bengal. Calcutta: Apurba. p.36.

26 Roy, N.1994. Evolution of the Calcutta Police. Calcutta: Calcutta Police. p.12.

27 Op.cit. Mukherjee 1977. p.62.

28 N Grandpe, L.'A Voyage in the Indian Ocean and to Bengal' in Nair, P.T. 1984.Calcutta in the 18th century: Impressions of Travellers.Calcutta: Firma KLM Private Ltd., pp.231-32.

29 Long, R. 1974. Calcutta and Its Neighbourhood, History of Calcutta and its People from 1690-1857.Calcutta: Indian Publications, p.132.

but persons who receive their situation from and hold them at the pleasure of the government. The police magistrates are personally acquainted with the most respectable inhabitants, and will undoubtedly favour their friends. In Calcutta the police regulations common to great towns are unknown. There is no registry of vehicles or conveyances for public accommodations such as hackries, palanquins, boats upon the river, which should be all under proper regulations. Police interference is confined solely to keeping peace and the removal of nuisances and in other respects it is not known".[30]

VIII KOLKATA POLICE: A COMMISSIONERATE (1856 -1947)

In modern India the process of urbanization was bound up with the growth of colonial administration and market economy. Calcutta was conditioned by the social mores of rural Bengal and there was no dichotomy between modernity and tradition in Calcutta but each influenced the other. Calcutta, the second largest city in the Empire and the capital of the British India, had close ties with its rural setting and simultaneously showed profound influence of the British capitalist system.[31] It gained immense prominence as the British Raj gained greater foothold on the Indian soil and greater developmental activities were carried out to make it the London of the East. The middle decades of the 19th century observed a greater systematization and institutionalization of policing in Kolkata. Policemen openly carried swords during this time and were prohibited from carrying anything other than batons.[32] The recommendations of the Patton Committee resulted in the formulation of the *Act XIII of 1856* which for the first time recognized the Calcutta Police as a separate organization under the government and S.Wauchope, the then Chief Magistrate of Kolkata, was appointed the first Commissioner of police. He handled the police during the Sepoy Mutiny, the First War of National Independence (1857). Every police officer, European or Indian, carried a regulatory staff and chowkidars carried light truncheons, thirty-three inches in length, which came handy during mob outbreaks and upsurges.[33] "The sepoy rebellion of 1857 did not touch Kolkata nearly, but the city shared, nevertheless, in all feelings of alarm and suspense which were the common lot of Englishmen in India during that terrible year. There were ominous threatenings of trouble in the winter of 1856 at Barrackpore sixteen miles from Calcutta, which was the headquarters of the Presidency Division of the Bengal army, and included four regiments of native infantry among its garrison".[34] As a result, the mutiny took the police organization off the rails. Even in Calcutta, Lord Canning (1856-1862) had to agree to the replacement of his native guards with European soldiers. The government machinery was dislocated during 1857 and part of 1858.[35]

IX Era of Criminal Legislation

During the tenure of V.H.Scalch, the Calcutta Police Act and the Calcutta Suburban Police Act were enacted in 1866. The Calcutta Police Act vested the administration of the police to the commissioner independent of the Inspector General of Police of the state. The Calcutta Suburban Police Act also entrusted the Commissioner of Police with the control of the suburbs.[36] In *November 1868,* Sir Stuart Hogg, the Commissioner of Police and the Chairman of Calcutta Municipal Corporation, first set up the Detective Department in Kolkata Police.

[30] Op.cit. Quoted in Nair 1989. pp.421-23.
[31] Op.cit. Mukherjee 1977. pp. 87-89
[32] Op.cit.Chattopadhyayay 1982. p.68.
[33] *Ibid*.:p.76.
[34] Op.cit.Cotton 1909.p.156
[35] Op.cit. Biswas 1992. p.259.
[36] Op.cit. Chatterjee 1973.p.13.

A.Younan was appointed the Head of the Department, which during M.B. Eliss's superintendentship, came to be known as Criminal Investigation Department.[37] In *1890*, Lord Lansdowne's government established the provincial training school at Barrackpore, which dealt with arming the police and training them in the use of firearms. In the same year the Port Police Force was made subjected to the provisions of the Calcutta Police Act of 1866.[38]

The subjugation of the people was the first priority of the police and this was evident in the Indian Penal Code and Criminal Procedure Code enacted in 1860-1861.[39] The Indian Police Act which was put into force in the year 1861 talked about police reorganization in India which differed from the policing systems which were being established in other colonies like Australia and Canada. It was primarily a mechanism to subjugate the people, and the traditional cooperation of the community was lost sight of the concerns for law and order. The imperative need was to develop a sense of fear of authority in the entire population, and it was achieved through this system of ruler's police. The police were to be shaped as an instrument of the Raj, one where men were disciplined, armed and without hesitation would follow British officer's orders. It was this police that would baton charge Gandhi's peaceful followers or shoot to death young people raising Indian flags.[40] Thus the police in the second half of the 19th century was mainly a weapon of the colonial rulers to oppress the common people and to crush rising feeling of nationalism in the minds of the people.

X Calcutta Police in the first half of the 20th century

The anti partition movement gave fillip to the freedom struggle. To cope with this certain measures were taken by the Government. Classes on unarmed combat were started on August 1908, where constables were chosen for the course. The revolver shooting was stressed. Secondly a surveillance scheme was prepared. In 1920 a special cell called the Goonda Department was created.[41] This showed that the Kolkata Police underwent rapid upgradation from the second half of the 19th century mainly to combat and counterfeit the rising nationalist movement. Sir Fredrick Halliday who was appointed the commissioner of police in *1906* is regarded as the father of Calcutta Police. He had a sense of history and tackled the problems of the swadeshi movement. He had to face terrorist organizations like Anushilan Samity and revolutionaries like Aurobindo Ghosh, Bagha Jatin, M.N.Roy and the like. In January 1908, Bandemataram was proscribed.[42] He initiated several changes in the administration of Calcutta Police including the system of running a Control Room and creating a Special Branch in *1909* to access prompt information about the revolutionaries. Traffic motorcycle patrolling was prevalent during this period. Calcutta Police was divided into 3 town divisions and 2 suburban divisions during his tenure. It was as a result of his prolonged effort that the Training School of the Kolkata Police was established on *October 1st, 1914* in the Dullanda Building (at present opposite the Race Course). Sir Charles Augustus Tegart, on whose report the special Branch of Kolkata Police was created, is another official whose name deserves mention. Both Detective Department and the Special branch were under Tegart who in 1923 was the first Indian Police officer to become the Commissioner of Police. He was notorious for his highhanded methods to suppress the freedom struggle. He reorganized the city police force and made it efficient.[43]

37 *Ibid*:p 47.
38 See www.kolkatapolice.org/servingkolkata/html,visited on 12.12.2011.
39 Das, D.K and A.Verma. 2003. Police Mission: Challenges and Responses. Oxford: Scarecrow.p.138.
40 *Ibid*.:p.138.
41 Op.cit.Biswas 1992. p.265.
42 *Ibid.*:p.261-62.
43 Op.cit.Roy 1994.p.16.

During the British rule dual control at the local level was introduced – one under the head of the police force in the district and the other under the chief executive of the district ie. the district magistrate. The commissionerate system of policing was introduced in certain metropolitan areas like Calcutta (Kolkata), Bombay (Mumbai), Madras (Chennai) and Hyderabad. Under this system the responsibility for policing the city area is vested in the Commissioner of Police.[44] The Kolkata Police establishment was housed at different buildings from time to time since 1720 in the Lalbazaar area. It was only in November 1918 that the new police office was completed. It being the headquarter, comprises the office of the Commissioner of Police, Additional Commissioner of Police, Joint Commissioners of Police, Deputy Commissioners of Police, Detective Department and the residences of the Deputy Commissioners of Headquarter and Detective Department of the Kolkata Police.[45] The Calcutta Police Directorate and the West Bengal Police Directorate operate under the State Home Department. To avoid squabbles between the Police Commissioner and the Inspector General of Police (which took place as their status was undefined), an amalgamation was administered in 1952 by the West Bengal Police Act. Transfer is possible between the West Bengal Police and the Kolkata Police. Joint training of both the forces was introduced in 1955 and the pay scale of the subordinate ranks of both the forces has been made the same.[46]

XI CONCLUDING REMARKS

In the post independence era the Kolkata Police has set for itself a mission for excellence that it seeks to achieve. The day-to-day policing of Kolkata is the responsibility of 65 local police stations, each under the supervision of one of the 8 units into which Kolkata is divided. It has a strength of about 26000 personnel and covers a territorial jurisdiction of about 89.55 sq.km. and 34.55 sq.km.water. In addition there are specialized units like the Detective Department, Head Quarter Force, Special Branch, Enforcement Branch, Traffic Police, Reserve Force, Wireless Branch, Security Control, Armed Police and Cyber Crime Police Station, Directorate, River Police etc. [47] It operates through 65 Police Stations which are under eight divisions.[48] The administration of the Kolkata police is carried out through the following personnel: Commissioner, Special Commissioners, Additional Commissioners, Joint Commissioners, Deputy Commissioners, Assisstant Commissioners, Inspectors, Sub Inspectors, Assistant Sub Inspectors, Head Constables and Constables.[49]

The Kolkata Police has initiated quite a few Community Policing programmes like Awareness Workshops, Campaign against Drug Abuse, Friendship Cup, Inter School Football, Nabadisha (for street children), Prabaha (blood donation camp), Bravery and Honesty Awards, Counseling Centres, Claude Martin Fund (for the release and relief of prisoners), Kiran (Computer training programme for under-privileged children), Pronam (helpline for senior citizens), Traffic Awareness Programmes, Medical Assistance Helplines, Diving Rescue operation, Bicycle Patrolling, Police Assistance Booths, Sampark (for youth awareness about law and order) etc. to uphold the values of Community Policing.[50] The police officers in the city of Kolkata are providing help when a) people lose their way, b) medical assistance sought by people in their helplines, c) senior citizen's helpline, d) relaying or transferring messages to the right department.[51]

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44 Police Organization in India, 2008; New Delhi;CHRI. pp. 9-22

45 *Ibid.*:p. 6

46 Op.cit. Chatterjee 1973.p.45.

47 See http://kolkatapolice.gov.in/Units.aspx visited on 26.12.13.

48 See http://kolkatapolice.gov.in/ShowContact.aspx#dc visited on 25.12.13.

49 Data on Police Organizations in India, June 2008. Bureau of Police Research and Development (BPR&D), India.p.69.

50 See http://kolkatapolice.gov.in/CommunityPolicing.aspx visited on 25.12.13.

51 The Statesman, Kolkata Plus,"*It's a cruel city for the elderly*",16.6.07,p.I.

The Kolkata Police has made a smooth transition from a low technology police force to a high tech one. In recent years, Information and Communication Technologies (ICTs) have been introduced as an aid to police work in Kolkata. The Traffic Computer Cell digitizes all traffic related data for analysis and action. All pending cases need to be checked by the computer cell before releasing a traffic case. It also gives information regarding all transport vehicles outside Kolkata. The Software Traffic Information and Infrastructure System maintain records of jurisdiction of traffic guards, traffic beats, traffic restriction, prosecution, collection of revenue, road condition, position of manhole and actions taken against encroachment by hawkers. Eleven close circuit televisions (CCTV) have been installed at major crossroads controlled by automatic / Manual Signalling Systems. Count Down Timers with signals have been installed at various crossing for better control and road management. Solar studs are used as road dividers to prevent accidents and collision of vehicles.[52] The city police has undertaken comprehensive traffic management project through sophisticated gadgets to ensure easy flow of traffic and nab offenders who violate traffic rules. Cameras and road censors are installed at selected crossings. Moreover there is CCTV based detection system for those who flout traffic rules. The registration number of vehicles are recorded and flashed. A GIS based vehicle navigation, distress management system and area traffic management system has been introduced since 2008.[53] The Kolkata Police official website also provides email id of all police officials from Police Commissioner to the local police stations to receive feedback from the people. Crimes can also be reported through the Internet as long as urgent response is not required. For immediate response phone calls can be made to the Control Room and toll free numbers are provided for emergency, information and traffic related issues. What is no less important is that the Kolkata Police maintains a specific web page on Computer and Internet Related Crime, which contains information about dos and donts and tips on cyber crime for the general public and those affected. There is also a Computer and Cyber Crime Police Station to handle cases arising out of the abuse of cyberspace. [54]

The steps taken by the Kolkata Police in recent years for the preservation of the natural environment deserves mention. The Kolkata Police is taking steps to check fuel emission from automobiles to reduce greenhouse effect. It has also prohibited the use of plastic bags in public places to prevent soil pollution. It has provided a helping hand to the West Bengal Pollution control Board in all its endeavors. It enforces the rules and regulations of the WBPCB regarding animal slaughter and the noise levels of loudspeakers and firecrackers.[55]

The recent upsurge in the rate crimes ranging from the traditional to the modern electronic crimes has thrown a challenge to the police in India. In this regard, the Kolkata Police should ensure precautionary measures to check sophisticated white collar crime, corporate crime, misuse of credit and debit cards, natural disasters, pollution and crimes against women, children and the elderly. The Kolkata Police should also take initiatives like the Sahayata[56] to help family members tide over their differences as an effort to improve police public relations. The measures initiated by the Kolkata Police is noteworthy but the modern police has to shoulder diverse responsibilities to make itself people-friendly and proactive. It has to improve and compete with itself taking into account and winning over all hurdles. Thus, greater transparency, prompt response and accountability can make the Kolkata Police a 21st century police force.

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52 Annual Review for the Year 2004. 2004. Kolkata Traffic Police.pp.35-45.

53 The Times of India, Times City, "*Cameras, road sensors to untangle traffic mess*", 1.1.08, p.3.

54 See http://kolkatapolice.gov.in/ComputerandInternet.aspx visited on 12.1.14.

55 The Statesman, Kolkata Plus, "*Plastic Purge*",dated 4.2.05, p. IV; The Statesman, Kolkata Plus "*Going, going, green!*", 23.6.04, p. IV.

56 Pawar, R.P .2001.'Sahayata- An Effort in Community Policing'; *The Indian Police Journal*, Vol.XLVIII N.3; 74-79.

The Indian Anti-Corruption Framework: Are We Prepared Enough to Combat the Menance?

Sunil Kumar Gupta *

Abstract

Corruption in general can be defined as lack of integrity in a human being. The problem with the corruption is that it is personally beneficial but collectively detrimental to the well-being and integrity of the country. The phenomenon of corruption is not a product of modernity, rather the concept of corruption is ancient and persistent. In the present society it is really tough to make people understand that any corruption is vicious for the growth of democracy. Because petty corruption may not have current effect but for long run the aggregate of these petty corruption may lead toward a state of anarchy. Though the existing legal and regulatory framework have gone a long way towards reducing corruption levels in India, but there still remain some areas that require change. Most basic problem in our system is that we lack efficient enforcement of existing laws.

In this paper the author dealt with corruption in Indian perspective, the historic background and for the better understanding of the present phenomenon of corruption, the author has also analyzed it under different loci of government i.e. legislature, judiciary and administrative sections. Further the paper seeks to evaluate adequacy of existing legal and regulatory framework to combat corruption in India, which is primarily based on statutory and common law. The paper concludes with some suggestions that may prove beneficial for creating a better environment for fighting with the menace of corruption.

I. INTRODUCTION

Corruption may manifest itself in similar ways across countries and over time – bribery, extortion, embezzlement, influence peddling, nepotism, and so on – but the underlying causes and the areas that corruption attacks can vary.[1] — UNAID

'Corruption', like electricity, is difficult to define but possesses certain qualities that make its presence in a system immediately detectable. As David H. Baley said that "*Corruption is a general term covering misuse of authority as result of consideration of personal gain, which need not be monetary.*"[2] Corruption may be defined as the deliberate and intentional exploitation of one's position, status or resources, directly or indirectly, for personal aggrandizement, whether it be in terms of material gain or enhancement of power, prestige or influence beyond what is legitimate or sanctioned by commonly accepted norms to the detriment of the interests

* The author is a fifth year student of law at School of Law, KIIT University (Bhubaneswar). The present paper is a modification on the winning entry of ITM Law School National Essay Competition, 2011 titled "Adequacy of Legal and Regulatory Framework to Combat Corruption in India". The author would like to thank Mr. Arkadeep Sarkar for his unconditional contribution in completion of this paper.

1 UNAID, Anticorruption Assessment Handbook, February 28, 2009, available at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anticorruption_handbook/Handbook_2009.pdf, (last accessed on September 15, 2013)

2 Quoted in Sadana, B.L., Public Administration in Theory and Practice at 769 (para-3), 45th edition, Kitab Mahal, Allahabad (2009)

of other persons or the community as a whole.[3] Thus in compact terms, it is the lack of integrity in a human being.

II. UNDERSTANDING CORRUPTION IN INDIA

Everywhere, we have corruption. Nothing is free from corruption. Everybody wants to loot this country. The only solution for this menace is to hang some people in the public so that it acts as a deterrent on others.[4] – Hon'ble Justice Markandeya Katju

India with the advancement of technology is entering into a new era of development. Unfortunately this change is marred by corruption as being an obverse side of such development. The increasing incidents of corruption unfold the flaws in governance. To further substantiate this analysis a report of the Ministry of Statistics and Programme Implementation can be referred to, wherein out of 866 projects, each costing Rs 20 crore or more, 297 projects spread over 13 Ministries are running deficiently and are much behind the schedule. To complete them, more than Rs 24,000-crore is required.[5] Another matter of grave concern is the hidden black money, as per a report (December, 2012) submitted to the central government, which speculated to have pegged the size of black economy at about 30% of India's gross domestic product (GDP) or about Rs. 25 lakh crore.[6] This amount is sufficient to wipe off the poverty and alleviate the sufferings of the farmers, who are becoming the victims of suicidal tendencies.

The various institutions under the government, since independence, had tried to curb the menace of corruption and for that purpose had also given suggestions. As the first five year plan aptly emphasized; [7]

The influence of corruption is insidious. It not only inflicts wrong which are difficult to redress, but it undermines the structure of administration and confidence of the public in the administration. There must therefore be continuous war against every species of corruption within the administration.

In the wake of recent Indian against corruption movement (2011-12), the government is thriving to achieve a transparent and corruption free environment in the country. Despite these attempts, India's ranking diminishes from 87th position in 2010[8] to 94th position in 2012 out of 176 countries surveyed in recent corruption perception Index, 2012 published by the transparency international. [9]

III. A HISTORICAL BRIEF

The phenomenon of corruption is ancient and persistent. History traces the battle against corruption to Rig Veda, a sacred Hindu text described as "*the oldest literary monument of the Indo-European races*", which discusses measures for prevention of corruption and extortion.[10]

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3 A. Awasthi and S. Maheshwari, Public Administration at 599 (para-1), 30th edition, Laxmi Narayan Agarwal Publication, Agra (2010)

4 PTI, Court: hanging in public only panacea for corruption, The Hindu, Mar 8, 2007 available at http://www.hindu.com/2007/03/08/stories/2007030820431400.htm, (last accessed on September 10, 2013)

5 C J Carira, The curse of corruption, available at http://www.rtiindia.org/forum/2082-curse-corruption.html, (last accessed on September 11, 2013)

6 Gaurav Choudhury, New estimate pegs India's black money at Rs. 25 lakh cr, Hindustan Times (New Delhi), January 26, 2013 available at http://www.hindustantimes.com/business-news/india-s-black-money-pegged-at-rs-25-lakh-cr/article1-1001949.aspx, (last accessed on September 12, 2013)

7 First five year plan (1952), Planning commission (New Delhi) at 115

8 See, http://www.transparency.org/cpi2010/results, (last accessed on September 13, 2013)

9 See, http://cpi.transparency.org/cpi2012/results/, (last accessed on September 13, 2013)

10 Pallavi Shroff, International Corruption at 192 (para-7- 02), edited by Paul H. Cohen & Arthur Marriott QC, Sweet & Maxwell, London (2010)

Kautilya, the author of Arthashastra, refers in cynical mood to various forms of corruption and even its inevitability. The genius, though his long vision, had aptly observed;[11]

Just as it is impossible, not to take honey that finds itself at the tip of the tongue, so it is impossible for a government official not to it up, at least a bit of king's revenue.

As India transit through ancient to medieval period, the integrity in the system of administration deteriorated. In medieval India corruption was enhancing its scope especially during the Sultanate and Mughal periods. The most spoilt event of this era was the invention of *Baksheesh,* [12] which legitimized corruption in the Mughal era. The corner stone of British rule in India was itself laid on corruption. A glaring example of this was the visit of Sir Thomas Row to the court room of Jahangir with a huge amount of liquor and gifts, which was used as a bribe to get the license for trading in India. As the East India Company started flourishing in India, the company officials started accumulating money and power through corrupt practices. In 1765 Lord Clive, the Governor-General of East India Company, described servants of company as corrupt and selfish.[13] The most lucid illustration for this would be the impeachment of the governor general of East India Company, Warren Hastings, in Britain on charges of corruption and maladministration in India.[14] So logically we could deduce that the corruption reached a new heightening position under the British Raj system.

IV. DIFFERENT LOCI OF CORRUPTION IN INDIA

In contemporary world the exercise of power is mostly followed by the menace of corruption, because some unethical people at the helm of authority are exploiting and misusing their power for achieving their own vantages through their ill means. The system of governance established by the Constitution is based on distribution of powers and functions amongst the three organs of the state i.e. executive, legislature and judiciary. So for proper understanding of corruption, it would be better to study it severally under the three heads of governance. Thus the different loci of corruption in India are as follows:

Corruption in Legislative Affairs: This section of the government is responsible for law making functions, while taking into consideration the need of society. This is the body of politicians that knows the pulse of society. These politicians are considered as the voice of the people, and this voice is the soul of democracy. Political corruption is the abuse of trust by political leaders for private gain, with the objective of increasing power or wealth.[15] The most remarkable political scams are V R Kishna Menon scandal,[16] bofors scandal,[17] fodder scam,[18]

11 A. Awasthi and S. Maheshwari, Supra n. 3 at 600 (para-3)

12 Baksheesh means a practice of rewarding government employees even for routine tasks and favors. See, http://mw1.merriam-webster.com/dictionary/baksheesh, (last accessed on September 14, 2013)

13 R.K. Arora & R. Goyal, Indian Public Administration: Institutions and Issues at 596 (para-4), 2nd edition, Wishwa Prakashan, New Delhi (2005)

14 Alan Cowell, The World; Impeachment: What a Royal Pain, The New York Times, February 07, 1999 available at http://www.nytimes.com/1999/02/07/weekinreview/the-world-impeachment-what-a-royal-pain.html, (last accessed on September 15, 2013)

15 See, http://www.transparency.org/publications/gcr/gcr_2004#download, (last accessed on September 16, 2013)

16 Post-independence, the first major corruption scandal related to V K Krishna Menon, the then Indian High commissioner to UK. Available at http://www.southasiaanalysis.org/papers32/paper3113.html, (last accessed on September 16, 2013)

17 The Bofors Scandal was a major corruption scandal in the 1980's when the then prime Minister Rajiv Gandhi and several other were accused of receiving payments from M/S AB Bofors for winning them a bid to supply India's 155 mm field howitzer. available at http://amreekandesi.com/2009/05/07/a-brief-history-of-the-bofors-scandal/, (last accessed on September 16, 2013)

18 In September 2005 Lalu Prasad, the then Railway Minister, was charged with misappropriating state funds in the long running fodder scam. For which he was recently convicted for 5 years after a trial which lasted

cash for vote scandal,[19] 2G spectrum scam[20] and the latest being Coalgate scam.[21]

Corruption in Administrative Affairs: When a person seeks a service from the government employee, they routinely expect that they will have to negotiate corruption at all levels of bureaucracy. Everything from obtaining birth certificate to death certificate generally requires some sort of payment in addition to the office fee. For illustration, while observing on the state of affairs in getting a government approval in real estate sector, a leading business figure commented;[22]

Corruption is rampant in the sector. There is multiplicity of approvals and at each approval stage if you have to pay, the ultimate product is going to be more expensive. As buyers, we are paying for it ……. Rooting out corruption could help lower home prices by as much as 20%.

Apart from abovementioned petty incidences rampant in almost all the government administrative wings, it is also marred by several notorious scams which had further shattered the public trust. The few mentionable infamous administrative scams includes CWC scam in which 8000 crore rip-off in allocation of the rights, procurements of material by Suresh Kalmadi (erstwhile Chairman, CWG committee),[23] The recent FIR filled by CBI against P.C. Parakh, former coal secretary, for his alleged involvement in Coalgate is a matter of grave concern.[24]

Corruption in Judicial Affairs: The character of a judge is one seamless whole and the public can have no confidence in a judge, who in his administration capacity makes personal gain by abusing his power and authority. This would lead to a certain conclusion that such a judge might sell justice for personnel gain.[25] The claim advanced by senior advocate Shanti

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for around 17 years, See, The Timeline of Multi Crore Fodder Scam, Bihar Prabha, Sep. 30, 2013 available at http://news.biharprabha.com/2013/09/the-timeline-of-multi-crore-fodder-scam/, (last accessed on September 30, 2013)

19 In 2008 Three MPs displayed inside the house bundles of currency notes, allegedly paid to them from abstaining from the trust vote; Ashish Khetan, Cash-for-Votes Scandal: A trap. And a cover-up, Tehelka Magazine, Vol 8, Issue 13, Apr 02, 2011 available at http://www.tehelka.com/story_main49.asp?filename=Ne020411Coverstory.asp (last accessed on September 30, 2013); See, similar cash for vote scam had also came into public eye way back in 1993 involving the JMM MPs. See generally, http://www.hinduonnet.com/fline/fl1509/15090220.htm, (last accessed on September 20, 2013)

20 Rs 1,70,000 crore notional loss after A Raja's telecom ministry undersells spectrum to Shell companies. (See OUTLOOK, November 22, 2010 at 35)

21 Aman Malik, Coal block controversy: A news round-up, Live mint & The Wall Street Journal, Sep 6 2012 available at http://www.livemint.com/Politics/HcnZRB2kNvhmjZV8O34jXJ/Coal-Scam—Full-Coverage.html, (last accessed on September 20,2013)

22 Kailash Babar, Realty prices may come down by up to 20% if corruption is reined in: HDFC chief Deepak Parekh, The Economic Times, Dec 24, 2013 available at http://articles.economictimes.indiatimes.com/2013-12-24/news/45540232_1_deepak-parekh-ulc-real-estate-regulatory-bill, (last accessed on December 25, 2013)

23 NDTV Correspondent, Top 10 facts about Kalmadi's Commonwealth Games scandal, January 19, 2012 available at http://www.ndtv.com/article/india/top-10-facts-about-kalmadi-s-commonwealth-games-scandal-168481, (last accessed on September 24, 2013)

24 Neeraj Chauhan, Kumar Birla, former coal secretary named in new Coalgate FIR, Times of India, Oct 16, 2013 available at http://timesofindia.indiatimes.com/india/Kumar-Birla-former-coal-secretary-named-in-new-Coalgate-FIR/articleshow/24214074.cms, (last accessed on October 28, 2013)

25 1 H.M. Seervai, Constitutional Law of India at XVII (para-1), 4th edition, Universal Law Publishing, New Delhi (reprint 2008)

Bhushan, claiming that eight former CJI's were corrupt, had created a sensation in the country.[26] The most infamous judicial corruption ever includes the corruption charges on justice V Ramswami, former judge Supreme Court of India, who faced first ever impeachment proceeding against a judge in 1991 though the proceeding defeated.[27] The second person was Justice Soumitra Sen, a former judge of Calcutta High Court, who was impeached by the Rajya Sabha, but when the matter was to be taken up by the Loksabha, he tendered his resignation and escaped the impeachment.[28] The next in queue was Justice P.D. Dinakaran, who had resigned before Rajya Sabha was about to start with the impeachment proceedings against him.[29] Further in judicial corruption political power plays a significant role in the appointment, promotion and conditions of service of judges there is a risk that judicial candidates, as well as sitting judges, will feel compelled to respond positively to the demands of the powerful.[30] But the scenario might change after the recent development of Judicial Appointment Commission (JAC) that will ensure that the appointments to the higher judiciary are more participatory, transparent and objective. The Judicial Appointments Commission Bill, 2013 has been introduced in conjunction with the Constitutional (One Hundred and Twentieth Amendment) Bill, 2013, which inserts Article 124A, providing for the setting up of a Judicial Appointments Commission, and is pending before Parliament. The Bill provides for the composition, functions and procedure of the Judicial Appointments Commission. The Commission is sought to be established for the purpose of recommending persons for appointment as Chief Justice of India and other Judges of the Supreme Court, and Chief Justice and other Judges of High Courts.[31]

V. GENESIS OF ANTI-GRAFT LEGISLATIONS

In India, the legal framework for curbing and controlling corruption is primarily based on statutory and common law. While existing legislations and executive orders have gone a long way towards reducing corruption levels in India, there still remain some areas that require change.[32] The legislation drafted in form of Indian Penal Code (1860) was the cornerstone of anti-corruption laws in India. The provisions dealing with the corruption relating to public servants was enumerated under Chapter IX (Sections 161 to165A) of the Indian Penal Code (1860). Further through an amendment Chapter IX (consisting of sections 171A to 171-I), which deals with criminalization of corruption during elections, was inserted by an act of 1920. In 1988 Sections 161 to 165A were omitted by new anti-graft legislation.[33]

The Second World War concluded in a chaotic administration throughout the nation. The administrative corruption became a public concern for the first time during second world war (1939-45). To cope up with the problem of corruption, the Government of India made its

26 OUTLOOK, October 4, 2010, at p. 30

27 V. Venkatesan, Judging the judges, Frontline, Vol. 14, No. 20, Oct. 4 - 17, 1997 available at http://www.frontline.in/static/html/fl1420/14200180.htm, (last accessed on September 21, 2013)

28 Lok Sabha drops impeachment proceedings against Justice Soumitra Sen, The Indian Express, September 05, 2011 available at http://indianexpress.com/article/india/latest-news/lok-sabha-drops-impeachment-proceedings-against-justice-soumitra-sen/, (last accessed on September 22, 2013)

29 Dhananjay Mahapatra, Finally, Justice Dinakaran resigns, The Times of India, Jul 30, 2011 available at http://articles.timesofindia.indiatimes.com/2011-07-30/india/29832583_1_justice-dinakaran-sikkim-high-court-thiruvallur-collector, (last accessed on December 22, 2013)

30 See, http://www.transparency.org/content/download/19487/269469, (last accessed on September 21, 2013)

31 See, http://www.prsindia.org/billtrack/the-judicial-appointments-commission-bill-2013-2906/, (last accessed on September 22, 2013)

32 See, http://www.cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf, (last accessed on September 25, 2013

33 Prevantion of Corruption Act, 1988

earliest attempt by enacting the Special Police Establishment Act, 1941.[34] This followed the enactment of Delhi Special Police Establishment (DSPE) Act, 1946 to provide for a special police force in Delhi for investigation of certain offences in the union.[35] Though due to some circumstances the force referred in DSPE Act was set up only in 1963. This force is non-other than India's most coveted force 'the Central Bureau of Investigation'. The major breakthrough in quest for curbing corruption came in 1963 i.e. the constitution of Santhanam Committee by the central government with the task of reviewing existing laws and institutions combating corruption in India.[36] After finding the lacunas in the existing system the committee suggested the creation of an adequate high level watchdog. Accordingly the Central Vigilance commission, the apex body to fight corruption, was established.

With the passage of time previous anti-corruption laws became obsolete, hence the parliament felt the requirement of enacting a new legislation. Thus the new law came in form of The Prevention of Corruption Act 1988. This new act repealed the Prevention of Corruption Act 1947 along with Sections 161 to 165A of the IPC, and incorporated those provisions within it. At present this is the law for curbing corruption in India.

VI. ANALYSIS OF THE REGULATORY FRAMEWORK FOR COMBATING CORRUPTION

Integrity is an integral part of all government institutions. Anti-corruption measures are the moral responsibility of both Central and state Governments. Towards this end the Government had set up the following departments:

- **Central Vigilance Commission (CVC):** The Central government had set up the CVC in 1964 on the recommendation of the Santhanam committee. CVC is conceived to be the apex vigilance institution, free from control of any executive authority, monitoring all vigilance activity under the central government and advising various authorities in central government organizations in planning, executing, reviewing and reforming their vigilance work.[37] The CVC Bill was passed by both the houses of Parliament in 2003 and the President gave its assent on September 11, 2003. The Central Vigilance Commission Act 2003 came into effect from that date. Central Vigilance Commission works as the statutory "Designated Agency" to receive written complaints for disclosure on any allegation of corruption.[38]
- **Central Bureau of Investigation (CBI):** The CBI is the prime investigation agency of the Central government and owes its origin from The DSPE Act, 1946. The CBI is placed under the Ministry of Personnel, Pension and Grievances, and consists of three departments among one of which deals with case of the corruption by public servants.[39] Recently the credential of CBI as an anti-graft monitoring agency was questioned by the hon'ble Supreme Court, while dealing with a PIL filed on Coalgate scam, the apex court had called it a "caged parrot speaking in its master's voice".[40] In response to this, the central government filled an affidavit in the aforesaid matter informing the apex court that the

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34 A. Awasthi and S. Maheshwari, Supra n. 3 at 611 (para-2)

35 Preamble, Delhi Special Police Establishment Act, 1946

36 Pallavi Shroff, Supra n. 9 at 193, (para-7- 03)

37 See, Background, http://cvc.nic.in/cvc_back.htm, (last accessed on September 27, 2013)

38 See, http://cvc.nic.in/whistle.pdf, (last accessed on September 27, 2013)

39 Pallavi Shroff, Supra n. 9 at 216 (para- 7-30)

40 CBI a 'caged parrot', 'heart' of Coalgate report changed: Supreme Court, The Times of India, May 8, 2013 available at http://articles.timesofindia.indiatimes.com/2013-05-08/india/39116066_1_cbi-probe-cbi-director-ranjit-sinha-law-minister-ashwani-kumar, (last accessed on September 29, 2013)

CBI will be given functional autonomy and its Director and other officers will be appointed by a committee comprising the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India or a judge nominated by him.[41]

- **The office of the comptroller and Auditor General:** The objective behind setting up the office of the comptroller and auditor general was to enhance the accountability of the government, to the parliament and state legislature by caring out audits in the public sector.[42]

- Chief Information Commission (CIC): The Right to Information Act, 2005 (RTI Act) has been one of the key initiatives of the Indian government for preventing and curbing corruption. However, one of the major criticisms of the RTI Act has been the availability of a number of grounds for exemption from providing information. In this regard, reference may be made to Sections 8(1)(e) and 8(1)(j) of the RTI Act, 2005 which provide broad exemptions from disclosure.[43]

- Lokpal & Lokayukta: The Administrative Reform Committee (1966) of government of India in its interim report under the chairmanship of Morarji Desai recommended the Idea of setting up the Ombudsman institution to be known as Lokpal (for center) and Lokayukta (for state).[44] Lokpal or Lokayukta is an institution establish by a statute headed by an independent , high level, public official who receives complaints from aggrieved persons against government servants, employees and officials or who acts on his own motion and has the power to investigate and recommend corrective action and issue reports.[45] Many states had enacted legislation for the establishment of Lokayukta. Though the Lokpal Bill was first mooted in 1968 and then revived in 1971, 1977, 1985, 1989, 1995, 1998, and 2001,[46] but never converted in to an act, though in the wake of India against corruption movement under immense pressure from the civil society the government was compelled to pass bring the historic legislation. After eight unsuccessful attempts over the last five decades, India on December 18, 2013 took the historic step of enacting the Lokpal law by which an anti-corruption watchdog would be established that will have in its purview even the office of the Prime Minister.[47]

- Serious Fraud Investigation Office: This committee was set up by the Ministry of corporate Affairs and started functioning on October 1, 2001. It was set up in the backdrop of the Stock market scams, failure of non-financial banking companies on the recommendation made by the Naresh Chandra committee.[48]This had been given statutory back through

41 J. Venkatesan, CBI will be given functional autonomy, Centre tells SC, The Hindu, Jul 4, 2013 available at http://www.thehindu.com/news/national/cbi-will-be-given-functional-autonomy-centre-tells-sc/article4876706.ece, (last accessed on September 29, 2013)

42 Vision and mission of CAG, available at http://cag.gov.in/, (last accessed on September 29, 2013) [7] Supra n. 31

43 R.R. Jha, The Lokayukta Experience in Bihar, Indian Bar Review, Vol.XIII(2) 1986, BCI Trust, p.146, para-1

44 M.L. Sharma, Lokayukta: Doctor for Social Health, Indian Bar Review, Vol.XIII(2) 1986, BCI Trust, p.167, para-2

46 A. Awasthi and S. Maheshwari, Supra n. 9 at 615 (para-4)

47 Lokpal Bill passed by Parliament; Anna Hazare breaks fast, cold-shoulders AAP, The Times of India, Dec 18, 2013 available at http://articles.timesofindia.indiatimes.com/2013-12-18/india/45336734_1_jan-lokpal-lokpal-bill-jokepal-bill, (last accessed on December 25, 2013); the act got presidential nod on eve of new year i.e. January 1, 2014

48 See, http://www.sfio.nic.in, (last accessed on September 30, 2013)

Companies Act, 2013, which will certainly strengthen its position in tackling the rampant corruption in corporate sector.[49]

VII. THE WAY FORWARD

For the preceding discussion it is evident that there are sufficient laws and institutions in place for fighting corruption. The enactment of a further law will only spread complexity in fighting corruption. The need of the hour is the strict implementation and enforcement of the existing laws. As due to less efficiency of our enforcement mechanism the trial of Mr. Lalu Prasad Yadav took about 17 years for such a gigantic scam and he was convicted inly for 5 years,[50] in comparison to this, for illustration, in the US on a similar charges against former county Commissioner Jimmy Dimora, the court had convicted him for 28 years in a trial lasting for around one year.[51]

Further the conduct of private entities is primarily regulated by their internal code of conduct and ethics, but there is no adequate framework which can handles the present situation. The UNCAC had laid down a global Anti-corruption guideline providing for the ways to handle corruption in Public as well as private sector.[52] For that purpose the author would like to request the concerned authorities in order to bring the Indian Anti-corruption laws in line with the UNCAC, either incorporated the relevant provisions in the existing law or to enact a new law to handle private sector corruption.

Unfortunately corruption in judiciary is increasing with the passage of time. The need of the hour is fostering a culture of independence and impartiality. This step would be a vital one in ensuring the integrity of judiciary as an esteemed institution. A committee should be appointed by a joint effort of the Bar and Bench, so that even the lawyers without any fear could complaint against a member of judiciary on the ground of corruption. Further for a better future before admitting any candidate into judicial services, there should be a mandatory interview to check the Integrity of the person and a person with immoral character should not be allowed to join the bench.

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49 Companies Act, 2013, Section 211

50 Lalu Yadav convicted: Key highlights, Business Standard, Sep 30, 2013 available at http://www.business-standard.com/article/politics/lalu-yadav-convicted-key-highlights-113093000206_1.html, (last accessed on September 30, 2013)

51 Rachel Dissell, Jimmy Dimora sentenced to 28 years in prison, defense attorney calls it a 'death sentence', The Plain Dealer, July 31, 2012 available at http://www.cleveland.com/metro/index.ssf/2012/07/jimmy_dimora_sentenced_to.html, (last accessed on September 30, 2013)

52 See, http://www.unodc.org/unodc/en/treaties/CAC/index.html?ref=menuside, (last accessed on October 2, 2013)

"Return of Property" Claims By a Third Party Financer In Cases Concerning Seizure Under Forest and Mining Laws: An Analysis.

Somrita Ray & Agni Som *

Abstract

This paper attempts to analyze through decided case laws whether custody of a vehicle which has been seized by forest authorities and mining authorities in a case involving an offence under various state legislated Forest Acts, Mines and Minerals Act etc. could be handed over to a financier who is third party to the criminal proceedings and who claims his right of possession under independent loan agreement entered into between the financer and the owner of the vehicle. The author has divided the paper into 6 parts. Part 1 deals with the introductory note and elaborates on the provisions of Code of Criminal Procedure attracted in dealing with disposal of property. Part 2 shall deal with the scope and application of Section 451 and 457 of the Criminal Procedure Code. Part 3 deals with seizure of vehicles involved in forest and mining offences. Part 4 discusses the remedies for seizure and confiscation for forest offences. Part 5 discusses about the approaches adopted by a financer in 'return of property' cases. Part 6 will conclude the paper.

I. Introduction

Chapter XXXIV of the Code of Criminal Procedure, 1973 deals with disposal of property. Sections 451 to 459 deal with the powers of court on that behalf. The nature of the order and the applicability of the appropriate section depend on the circumstances in which the property was seized or produced before it. Sections 451 and 452 deals with cases which have come up before criminal courts for inquiry or trial. While section 451 enables a Magistrate to provide for the interim custody of goods pending the conclusion of the inquiry or trial, section 452 provides for the disposal of property after inquiry or trial is over. In connection with orders under section 451 there necessarily lies no appeal because the order is not a final order and is subject to revision when the case is actually disposed of by the criminal court, such fresh consideration of the matter will be under section 452. Therefore, only an order under section 452 is appealable. Where there has been no inquiry or trial in a criminal court, the proper section to apply will be section 457, whichever may be the Act under which the offence might have been committed and whatever happens in connection with seizure of property by the police during investigation without any inquiry or trial by the Magistrate. However the scope of this paper has been confined to sections 451 and 457.

II. Scope and application of Sections 451 and 457 of Criminal Procedure Code, 1973

SECTION 451: This provision enables a Magistrate to provide for the interim custody of goods pending the conclusion of the inquiry or trial. Section 451 speaks of property regarding which

* The authors are V Year law students pursuing B.B.A LL.B (Hons.) program from School of Law, KIIT University, Bhubaneswar. The authors can be reached at ray.somrita@gmail.com and agnisom@gmail.com respectively.

any offence appears to have been committed or which appears to have been used for the commission of any offence and which is produced in criminal court during any inquiry or trial. The words 'any property', when considered along with the further qualifying clause 'which is produced before any criminal court' would show that the property contemplated is movable property. That section can give no jurisdiction to the Magistrate to pass orders in respect of immovable property. Immovable property cannot, by its very nature, be produced before a criminal court. The expression 'produced' would mean 'physically produced' or at the most would be taken to mean 'capable of being physically produced'[1]. The section empowers the court to sell or otherwise dispose of the property regarding which an offence appears to have been committed when the court considers it expedient to do so. Before an order under section 451 can be made, three conditions must be fulfilled: (1) the Magistrate must have reason to suppose that an offence has been committed; (2) that the property in question must be produced before the court; and (3) that there must be an inquiry or trial pending at the time.[2]

If the property is subject to a speedy or natural decay, it is open to the court to make an order for its sale or disposal, but if the property does not answer this description, the court can only make an order for its custody pending the conclusion of the inquiry or trial. In actual practice, an order for custody of property is confined only to articles such as animals, vehicles and perishable goods, for the court has no funds for feeding the animals, no accommodation for keeping motor vehicles and no arrangement for preserving the goods which are perishable. If any such articles come into the possession of a court, it is open to the presiding officer to provide for their safe custody until such time as the case is concluded. Provision can be made only for their custody and not for their conversion. In regard to a motor vehicle in respect of which offence is committed, it would be prudent and in consonance with the provisions of Motor Vehicles Act to allow such motor vehicle in possession of the person in whose name the certificate of registration stands.[3]

Section 457: Section 457 can be invoked only when three facts are established (1) seizure of the property by police officer, (2) report of seizure to the Magistrate under the provisions of Cr.P.C. and (3) such property is not produced before a criminal court during an inquiry or trial. The first information report is not a report within the meaning of section 457. The words "such property is not produced before a criminal court during an inquiry or trial" in section 457 merely refer to the stage of investigation and not the stage of inquiry or trial. Where the factum of seizure has been reported to a Magistrate and the property seized has not been produced during an inquiry or trial but at the stage of investigation, the essential ingredients of section 457 are fulfilled. Section 457 should be liberally construed so as to be applicable to all cases where there has been no inquiry or trial and consequently, where the police submits a final negative report stating that no offence has been made out, the Magistrate is competent to pass appropriate orders for disposal of the property under section 457.

Section 457 is more or less a residuary provision dealing with property not covered by sections 451 and 452 and is applicable when (1) the property has been seized by a police officer, (2) such a seizure is reported to the Magistrate and (3) the property is not produced before a criminal court during an enquiry or trial. The words "is not produced etc." have reference to

1 Amrit Lal Kumawat v. State of Rajasthan, 1998 Cr LJ 3032 (Rajasthan).
2 Ramchetsing Arjunsing vs. Deoji Kalyanji, AIR 1942 Bom 42.
3 Nandiram v. State, 1967 Cr LJ 483 (Guj); Umaram v. State of Rajasthan, 1997 Cr LJ 2793 (Raj).

the point of time when the Magistrate is called upon to make an order for disposal of the property. There is nothing in the language of section 457 which takes away the jurisdiction of the Magistrate until trial or inquiry is held and the property is actually not produced in the court or during investigation of the case.[4] Only two conditions have to be fulfilled for acting under section 457 that seizure of the property is reported to the Magistrate and that the property is not produced before the criminal court in an enquiry or trial. If these conditions are satisfied, irrespective of the question whether the property is produced before the Magistrate or not and whether he is competent to hold inquiry or trial of the case or not, the Magistrate can at the stage of investigation itself pass order under section 457.[5]

The discretion conferred to a Magistrate under section 457 by the words 'such order as he thinks fit' is limited to one of the two alternatives- (1) to return it to the person entitled to it, or (2) to dispose it off. In the second case he has got the widest discretion. In the first case when he decides to deliver it to a person, he must deliver it to the person entitled to the possession thereof. He has got no discretion in the matter.[6] Without giving a finding as to the person who is entitled to the possession of the property, any order passed by the Magistrate would be illegal. The section does not contemplate an interim order.[7] In case of a motor vehicle, before proceeding to release vehicle court should hold inquiry about entitlement of person to get vehicle. In its absence order will be illegal.[8] When the vehicle was purchased from the petitioner under hire-purchase agreement and the purchaser defaulted in paying the installments, the order of the Magistrate giving custody of the vehicle to the purchaser is wrong. Taking into account the defaults, the custody should be given to the petitioner.[9] The question whether a person is entitled to possession of the property under section 457 cannot be decided without having reference to the ownership of the property.[10] The actual possession of the property at the time it was seized may be a relevant factor but not conclusive to determine the entitlement of possession under section 457, the test is as to who is entitled to lawful possession. The expression "entitled to possession" in section 457 is the *sine qua non* for the delivery of property under that section.[11] Where the property is recovered from the possession of a person, a court for the purpose of an order under section 457 must hold that he is entitled to its possession.[12] The Magistrate has to decide one way or the other as regards the person who is entitled to be in possession of the property between the accused and the complainant.

Section 457(1) is wide enough to cover an order of confiscation of property, and there is nothing to prevent a Magistrate from passing an order of forfeiture of the property to Government. However for a forest offence, the vehicle can be seized either by the forest officer or the police officer and if proceedings are initiated by the authorized officer for confiscation as mandated by the respective Forest Act and of that intimation is sent, the jurisdiction of the Magistrate concerned or the Sessions Judge to pass order under sections 451 and 457 will stand ousted.[13]

4 Ajai Singh v. Nathi Lal, 1978 Cr LJ 629 (All).
5 P.V. Joseph v. State, 1978 Cr LJ 1206 (Ker).
6 Purshottam Das Banarsidas vs State, AIR 1952 All 470.
7 S. Rajendran v. K.A.S. Rama, 1982 Cr LJ 86 (Kant).
8 Anup R. Kantak v. State, 2000 Cr LJ 1078 (Bom).
9 Ph. Arunachalam v. State, 1989 Cr LJ 739 (Ori); Jagdeesan v. State, 1978 Cr LJ 1546 (Kant), where vehicle was seized from the possession of the financier.
10 Yousoof Marakair v. State, 1969 Cr LJ 757 (Mys).
11 A.S.S. Ahmed Sahib v. Commissioner of Police, 1970 Cr LJ 1016 (Mad).
12 Zafar Ali v. Tansik Hasan, 1971 Cr LJ 986 (All).
13 State v. Rakesh Kumar, 1995 Cr LJ 1037 (MP).

If the property is subject to speedy or natural decay, it is open to the Magistrate to make an order for its sale or disposal.[14]

III. Seizure of vehicles involved in forest and mining offences

Remedies for seizure and confiscation for Mining Offences: Whenever any person raises, transports or causes to be raised or transported, without any lawful authority, any mineral from any land, and, for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral, tool, equipment, vehicle or any other thing shall be liable to be seized by an officer or authority specially empowered in this behalf.[15] Any mineral, tool, equipment, vehicle or any other thing so seized shall be liable to be confiscated by an order of the court competent to take cognizance of the offence and shall be disposed of in accordance with the directions of such court.[16]

High Courts often take the view that neither police nor revenue officials can keep in their custody vehicles seized for alleged violations of the provisions of Mines and Minerals (Development and Regulation) Act, 1957 without obtaining necessary orders for confiscation from the Judicial Magistrates concerned. This is very clear from the statutory provision. The power of the officials was limited to the extent of seizing the vehicles and producing them before the jurisdictional Judicial Magistrates. On such production, it is up to the Magistrates to decide whether to release the vehicle subject to certain conditions or to keep it in custody until completion of confiscation proceedings. While taking such decisions, the Magistrates need not even wait for the officials to lodge a formal complaint against the accused under Section 22 of the 1957 Act[17]. The Magistrates has the authority to order release of the vehicle under the Mines and Minerals Act as well as Section 457 of the Code of Criminal Procedure which could be invoked in cases booked under Section 379 (theft) of the Indian Penal Code for having allegedly stolen the minerals without a valid permission. Henceforth, all those who were aggrieved against seizure of their vehicles either by the police or the revenue officials in mining cases, can move the jurisdictional judicial magistrate concerned seeking release and on receipt of such applications, the Magistrates should take minimum time in passing necessary orders. The officials are expected to lodge complaints under Section 22 of the Mines and Minerals Act with the judicial magistrates within seven days of seizure. Any delay in lodging the complaint would vitiate the criminal proceedings and pave way for the accused to go scot free, he cautioned.

Section 21(4) of the Act is specific on the point that a competent court i.e. Magistrate is competent to confiscate the vehicle and is also competent to dispose it of in accordance with directions given by it. The power of confiscation is reserved for the Court, which is competent to try the case after a complaint in respect of which has been filed by the Mining Officer. In view of the above, it cannot be said that the Magistrate has no jurisdiction to release the vehicle pending trial. Even under section 451 Criminal Procedure Code, the learned Magistrate had the jurisdiction to release the tractors-trolleys in favour of its registered owners since there is no other provisions in either the act or the rules for release of the vehicles. The learned Magistrate has ample authority to release the vehicles under section 21(4A) of the

[14] In re. Siyaram Hanuman Prasad, (1963) (2) Cri LJ 219 (MP).

[15] Mines and Minerals (Development and Regulation) Act, 1957 § 21 (4).

[16] Mines and Minerals (Development and Regulation) Act, 1957 § 21 (4A).

[17] Mines and Minerals (Development and Regulation) Act, 1957 § 22.- No court shall take cognizance of any offence punishable under this Act or any rules made there under except upon complaint in writing made by a person authorized in this behalf by the Central Government or the State Government.

Act as well as under section 451 of the Criminal Procedure Code. Thus, tractor/trolleys/ vehicles can be released on *supardari* in favour of the registered owners subject to their furnishing bonds to the satisfaction of Chief Judicial Magistrate.

Therefore we see that the registered owners can very well get their vehicles released under the provisions of Code of Criminal Procedure and Mines and Minerals (Development and Regulation) Act. There are cases wherein a buyer defaults in paying the installments to a financier who has extended a loan or financed the vehicle to the buyer thereby entering in a loan-cum-hypothecation agreement wherein as a consequence of any default, the financier/ lender is entitled to take possession of the financed vehicle which is kept as a security against the loan extended by the lender/financier. When such a vehicle is involved in a mining offence and is seized by an authorized officer, the financier can make an application to a Magistrate having jurisdiction to release the vehicle under section 22 of Mines and Minerals (Development and Regulation) Act or can also make an application under sections 451 or 457 of Criminal Procedure Code as the case may be providing all necessary documentary evidence satisfying the Magistrate the financier's lawful entitlement to the property so seized.

IV. Remedies for seizure and confiscation for Forest Offences:

Apart from the principle Forest Act i.e. the Indian Forest Act, 1927 there are several regional forest Acts and Regulations[18] which contemplates seizure and confiscation of vehicles involved in forest offences. There are several case laws that can provide us with a clear understanding as regards the view taken by the Apex Court as well as the High Courts on return of property involved in forest offences.

In State of Karnataka Vs K. Krishna[19], the Hon'ble Supreme Court laid down that the forests are not only the natural wealth of the country but also protector of human life by providing a clean and unpolluted atmosphere. When any vehicle is seized on the allegation that it was used for committing a forest offence, the same shall not normally be returned to a party till the culmination of all the proceedings in respect of such offence, including confiscatory proceedings, if any. Nonetheless, if for any exceptional reasons, a Court is inclined to release the vehicle during such pendency, furnishing a bank guarantee should be the minimum condition. No party shall be under the impression that release of vehicle would be possible on easier terms, when such vehicle is alleged to have been involved in commission of a forest offence. Any such easy release would tempt the forest offenders to repeat commission of such offences. Its casualty will be the forests as the same cannot be replenished for years to come. From the above dictum of the Supreme Court, it can be said that when a vehicle is involved in a forest offence the same is not to be released to the offender or the claimant as a matter of routine till the culmination of the proceedings which may include confiscation of such vehicle. Release of such vehicle during the pendency of the proceedings though permissible, same should be done for good reasons and that also upon a minimum condition of furnishing bank guarantee.[20]

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18 The Indian Forest (West Bengal Amendment) Act, 1988; The Orissa Forest Act, 1972; The Orissa Forest Produce (Control of Trade) Act, 1984; The Bihar Forest Produce (Regulation of Trade) Act, 1984; The Assam Forest (Removal & Storage of Forest Produce) Regulation Act, 2000; The Assam Forest Regulation, 1891 etc.

19 State of Karnataka Vs K. Krishna , AIR 2000 SC 2729.

20 Section Forestor & Anr v. Mansur Ali Khan, [2003] INSC 621.

In a case[21] concerning an offence under the Orissa Forest Act, 1972 the Orissa High Court took the view that even if a vehicle was seized in connection with its use in commission of a forest offence by a Police Officer and the fact of seizure was reported to the Magistrate concerned, the Magistrate cannot invoke his power under Section 457 Cr.P.C. after the said vehicle was produced before the Authorized Officer for initiation of a confiscation proceeding. Such a view was taken in support of the decision of Divisional Forest Officer, Angul v. Acharya Charan Choudhury and Ors[22] where it was held that *"If the seizure is made under the provision of Section 56 of the Forest Act and the property seized is produced before the Divisional Forest Officer for initiation of a proceeding of confiscation, then merely because the factum of seizure is reported to the Magistrate, the Magistrate will have no jurisdiction to invoke the provisions of the Criminal Procedure Code for interim release of the property in question."* A similar view has been upheld in Jagabandhu Mohanta v. Bijaya Kumar Kar and Anr.[23] It was held that once a vehicle was seized in connection with a forest offence whether by a Police official or Forest official and the vehicle was produced before the Authorized Officer to initiate a proceeding under Section 56 of the Orissa Forest Act, even though the fact of seizure was reported to the Magistrate, he ceased to have any authority to invoke the provision under Section 457 Cr.P.C. and as such cannot release the vehicle in Interim custody of its owner. In this case, since the vehicle has already been produced before the Authorized Officer for Initiation of a proceeding under Section 56 of the Orissa Forest Act, the Revision is devoid of merit. The Orissa High Court in Sarat Kumar Malu v. State of Orissa[24] has held that when any forest produce together with the vehicle used in committing any forest offence is seized by any forest officer in exercise of his powers. Under Section 56 of the Act, the power to release the property seized lies with the authorities prescribed in the four corners of the provisions of the Act and not with a Magistrate in exercise of his powers under the provisions of the Code of Criminal Procedure.

After considering all the above mentioned decisions, since the Magistrate has no jurisdiction to entertain an application for release of the vehicle either under Section 451 or 457 of Cr.P.C, according to me the financier can approach the confiscating authority authorized under the provisions of the particular Forest Act for the release of the vehicle by establishing to the satisfaction of the confiscating authority the loan-cum-hypothecation agreement, defaults committed and right of possession of the vehicle by the financier by virtue of the same agreement.

V. Practical problems Faced By Financier In return Of Property Cases And Approaches

Return of property petitions filed by the financier is often rejected by courts on the following grounds:

- The financier is not the registration certificate holder and the name of the financier is only endorsed as a financier under the loan-cum- hypothecation agreement and that being so the financier cannot be treated as a legal owner of the vehicle.
- The rights flowing from the contract between the financier and the buyer has to be worked out in a civil forum and such a right cannot be enforced through a criminal court.

21 Shri Aswini Kumar Patra v. State Of Orissa, 2005 1 OLR 402.
22 Angul v. Acharya Charan Choudhury and Ors, 70 (1990) CLT 371.
23 Jagabandhu Mohanta v. Bijaya Kumar Kar and Anr, 2003 (24) OCR 802
24 Sarat Kumar Malu v. State of Orissa , 1994 (1) OLR 296.

- Criminal courts cannot adjudicate upon the dispute regarding liability and the extent of liability of the buyer to the financier. Therefore, neither section 451 nor section457 can be used by a party to a civil contract to short circuit civil remedies.

The abovementioned challenges can be negated by the fact that remedy as regards *disposal of property* even though provided under the code of criminal procedure can very well be used for both civil and criminal matters. Moreover, the Supreme Court has provided certain guilelines as regards disposal of property in the renowned case of Sunder Bhai Ambalal Desai Vs. State of Gujrat[25]. The Apex Court has held that the concerned Magistrate should take immediate action for seeing that powers under Section 451 Cr.P.C. are properly and promptly exercised and articles/vehicles are not kept for a long time at the police station as that may result in the vehicle becoming junk. Criminal Courts should follow the decision of Sunder Bhai Ambalal Desai Vs. State of Gujrat in true letter and spirit[26]. In addition to this, In Shriram Transport Finance Co. Ltd. v. Khaishiulla Khan[27], the Apex Court has held that Courts should give effect to agreements without encouraging open breach thereof and it is the duty of financier to prima facie establish hire-purchase agreement, defaults committed and right of seizure. It is the duty of Criminal Courts to satisfy itself with the rights & liabilities under agreement. The financier would be entitled to possession of the vehicle under the agreement on the happening of an event stipulated in the agreement. Application of this yardstick is necessary to determine whether the seizure by the financier was with an intention to cause wrongful loss to the hirer and wrongful gain to himself. Who is entitled to possession shall be decided by the Courts keeping in view facts of each case and the basis of the claim made.

VI. Conclusion

At the closing it can be concluded by saying that the loan-cum-hypothecation agreement entered between the financier on one hand and the borrower and guarantor on the other hand having clear provisions for security by hypothecation of asset, events of default and provisions for taking possession, seizing, recovering, appointing a receiver, removing the asset from its place of standing or selling the asset by public auction or private contract at best available prices at the prevailing market conditions as a consequence of any default in making payments of the installments or any other default stipulated by the agreement is the best available weapon in the hands of the financier to realize its claims in respect of the loan extended. Therefore, custody of a vehicle seized by police or forest authorities and mining authorities in a case involving offence under Forest Acts, Mines and Minerals Act etc. could be handed over to the financier who is third party to the criminal proceedings and who claims his right of possession under independent loan agreement.

Another significant defense that can be taken by a financier in a petition for zimma or return of property is the execution of the final and binding arbitration award in favour of the financier. The loan agreement entered between the financier and the borrower always contains an *arbitration clause*. All disputes, differences or claims arising out of the loan agreement are settled by arbitration wherein an independent and neutral third person who is appointed as an arbitrator decides the matter. Thus an award in favour of the financier's custody of the financed vehicle can prove to be a strong ground for claiming the seized vehicle and to avoid irreparable loss and injury that it may face in case the vehicle in question is seized.

25 Sunder Bhai Ambalal Desai Vs. State of Gujrat , 2003 (46) ACC 223.
26 Sundaram Finance Ltd v. State Of Tamil Nadu, 2011 (1) MWN (Cr.) 437.
27 Shriram Transport Finance Co. Ltd. v. Khaishiulla Khan , 1993 Cr. L.J. 1069.

The financier can also claim return of vehicles and sale thereof. In a recent case[28], a petition was filed under Section 482 of the Code of Criminal Procedure, praying to call for the records on the file of the Judicial Magistrate, Krishnagiri with records on the file of the Kaveripattinam Police Station, Krishnagiri and set aside the conditions imposed in the order made therein and modify the same by granting permission to the petitioner to sell the vehicle *'Swaraj Pickup LCV'* by public auction or on private treaty. This petition and several other petitions of similar nature raise a genuine concern on the general hesitancy displayed by the lower courts exercising criminal jurisdiction in permitting return of vehicles and sale thereof. In this case, the Court was of the firm opinion that:

"Return of vehicles and permission for sale thereof should be the general norm rather than the exception it is today. The clear dictate of the Hon'ble Apex Court in this regard is followed more in the breach than in observance. Given the facilities of the modern day, there hardly is any scope to think that evidence relating to vehicles cannot be held in altered form. Causing of photographs and resort to videography, together with recording such evidence as befits a particular case would well serve the purpose. In cases where return of vehicles is sought and the claim therefor is highly contested, resort to sale of vehicle and credit of the proceeds in fixed deposits pending disposal of the case would be to the common good. None gain when the mere shell or the remnants of the vehicle are returned to the person entitled thereto, after completion of the trial. It would be no surprise to find that several vehicles have not been so much as claimed after completion of trial, because of the worthless state they have been reduced to. It is but natural to expect that a person eventually entitled would rather have the sale proceeds together with interest, than nothing at all."

In a subsequent case[29], the Court held that in the light of the Sundaram Finance Case, it is expected that the Courts below will make all out efforts to avoid holding of vehicles at Courts and Police Stations and dispose of petitions seeking return of vehicles in such a manner as is found most feasible in the facts of a particular case. The same may be by ordering of return in favour of the owner or insurer or even by sale and deposit of the proceeds. It was held that the Courts below shall effect return of the vehicles to the revision petitioners after causing necessary photographs and panchnama. The panchnama shall be drawn up by an Officer of the Court in the presence of two panchayatdhars and in the immediate presence of the Presiding Officer of the Court. The Registry is directed to circulate a copy of this order to all Sessions/Metropolitan/ Judicial Magistrate Courts.

[28] Supra note 26.
[29] Selvam and Anr v. State by Inspector of Police and Anr, 2012(2) CTC 549.

Recent Trends in Aviation Law: Its Safety and Security

Shristi Roy *

Sibani Panda *

"The common concern of all the states should be to work together, so that air may be used by humanity, to serve the humanity"

Abstract

The Aviation sector is one of the most important sectors which is expanding proportionately for serving the growth and progress in the developed and emerging economies of the world. Nowadays the popularity of aviation sector is tremendously increasing in India, so the Aviation safety and security is often perceived as a technical matter and a closer scrutiny reveals that safety is not the exclusive domain of this technical sector but it has policy and legal dimensions also. Safety and security entails obligations. In a positive sense, a State is under a duty to promote aviation safety and in a negative sense, it shall refrain from doing anything that is likely to endanger safety. Aviation safety and security are also the raison d'etre of **ICAO**, a global inter governmental organization that became a specialized agency of **United Nations** in 1947.

Civil aviation in itself is not inherently dangerous, but it must resist man made dangers, threats, acts of unlawful interference and terrorist attacks, as evidenced by abhorrent attack on **World Trade Centre complex** on **11th September 2001**. The relation between civil aviation and military activities represent a crucial aspect of security and safety of aviation sector. The greatest risk posed by military activities has been demonstrated by occurrences of civil aircraft being shot down deliberately or by mistake, causing numerous fatalities. The duty to provide safety, to refrain from the use of weapons against civil aircraft in flight and to prevent and punish the acts of hijacking and sabotage are the trio obligations which are emerging as obligations

Erga Omnes.

In our paper we will be dealing with various aspects of the **safety and security** of the **Aviation sector** in detail.

I. INTRODUCTION:-

The Aviation sector is one of the most important sectors which is expanding proportionately for serving the growth and progress in the developed and emerging economies of the world. The huge growth in air travel has made every Airport a potential terror target and it is now a key area where intense security is an absolute requirement.[1] Aviation security and safety go hand in hand. One cannot be safe without being secured and vice versa.

"Aviation in itself is not inherently dangerous. But to an even greater degree than the sea, it is terribly unforgiving of any carelessness, incapacity or neglect."

— Captain A. G. Lamplugh,

British Aviation Insurance Group, London. c. early 1930's.

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* The authors are fourth year student of law at School of Law, KIIT University (Bhubaneswar).

1 http://www.aviationwatchindia.com/SafetyandSecurity2012.aspx, 20th April 2013, 9:00 a.m.

Aviation Safety primarily deals with the means to minimize dangers, risks, and hazards associated with air travel, by setting safety standards and updating them periodically based on technological innovations in aircraft operations whereas, Aviation security involves the protection of persons and cargo in carriage by air facilities and related auxiliary support activities. Air transportation is by far the safest mode of travel, as measured by the ratio between the number of accidents and that of passenger kilometers,[2] it is susceptible to inherent risk of flights, the use of force, and, more dangerously, terrorist acts. From time to time, when major aviation-related accidents or tragic events take place, the whole world is shaken, like,

- The tragic event on 11 September 2001, in which four aircrafts where hijacked in the United States, two of which were used for suicidal attacks to destroy the World Trade Centre, then the Highest building of New York, killing thousands of innocent people and causing immeasurable damage to the world economy.
- The bombing of 'Emperor Kanishka', an Air India Boeing 747 over the Irish coast when a bomb concealed in the hold baggage of the aircraft exploded killing all 329 passengers and crew on board, the discovery of a 'crude, bomb-like device' in the cargo hold of an ATR aircraft (IT 4731) of the Kingfisher airlines on March 21, 2010 at Thiruvananthapuram airport has revived chilling memories of that horrific incident.

It is also the raison d'etre of The International Civil Aviation Organization (ICAO) which was established in 1944 with an objective to have a global body to regulate and maintain safe and secured air travel all over the World.

ICAO has set rules and guidelines to be followed in varied aspects affecting air safety and security such as Aerodromes, Personnel licensing, rules of air, unlawful interference, environmental protection, air navigation, Search and Rescue, Air traffic services, aircraft telecommunication, operation of aircraft etc, that are implemented globally by all ICAO contracting states and these regulations are updated when required as well.

II. Historical development on Aviation Safety and Security Regulation in India

The history of aviation is the history of improving safety. The earliest legislation on record focused more on aircraft impact on ground, rather than safety on board.[3] In 1819, France enacted a law which required that man-flight balloons should be equipped with parachutes, thus extending the scope of its law-making activities by covering not only safety on the ground but also safety on board aircraft. Many important safety related issues, such as the nationality and registration of aircraft, airworthiness and personnel licensing, were covered by these provisions, which were inherited in both substantive content and drafting style by the 1919 Paris Convention and the 1944 Chicago Convention. The safety framework laid down by the Paris Convention was subsequently inherited by the 1944 Chicago Convention with modifications. The latter remains valid today with its much more flexible system of Annexes, which has overcome the weakness of its predecessor. Paris convention did not get universal acceptance but eventually, it was ratified by 32 states including India. On 12 October 1929, an important convention in the sphere of private international air law, namely, the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, was concluded in Warsaw. By imposing a presumption of fault on the carrier in the case of an accident causing death or injury to a passenger, the Convention has placed a heavy responsibility on

[2] ICAO News Release, PIO 5/02, 9th April 2002 and ICAO Doc. 9876, Annual Report of the Council (2006), 27.
[3] Colegrove, K.W., International Control of Aviation (Boston: World Peace Foundation, 1930) at 2.

the carrier to do its utmost to protect the safety of the passengers. Since the pilots and engineers have to testify before the court that they have taken all necessary measures to prevent the accident, this will lead them to exercise more care in their work, and to discover and cure the mechanical defects and human errors. On December 7, 1944, The Chicago Conference successfully ended with the adoption of the *Convention on International Civil Aviation*. The Conference immediately established the Provisional International Civil Aviation Organization (PICAO) which was succeeded by ICAO in 1947 when the Chicago Convention came into force. As international civil aviation developed, new safety issues emerged, which had not been foreseen in 1944. To cope with the new situation, certain amendments to the Chicago Convention were made, including Article 83 *bis*, and Article 3 *bis*, which prohibit the use of weapons against civil aircraft in flight. Since the 1960s, civil aircraft have become the prime targets of terrorist attacks. Fights against terrorism have become a new dimension of safety considerations. During the Second World War many initiatives were taken place and as a result of these initiatives, safety regulation at the regional level has become more institutionalized and forms an important and integral part of the global efforts to promote aviation safety.

III. Renewed importance of aviation safety and security in contemporary society:

In the present era, the concern over aviation safety is stronger than ever and it relates to the public perception of aviation safety, which is shaped essentially by the news reports of aircraft accidents and other tragic events.[4] The accidents in civil aviation give rise to much more anxiety than other transportation accidents.[5] In India, there are several factors responsible for such perceptions of the people travelling in flights like -

- There is an inherent fear of travelling in a hostile environment.
- The degree of fatality associated with aircraft accidents further intensifies such a fear.

The combined effect of all these statistics and factors makes the safety issue a prime focus of public attention. In addition to such perception of the public, another emphasis on aviation safety has emerged due to the important position which civil aviation has achieved in contemporary society. Today, aviation is no longer reserved for the privileged class; it has become a daily means of mass transportation as it is a fundamental feature of today's society.

Enhancing safety is important because civil aviation not only has to deal with natural or inherent hazards of flights, such as technical failures or human errors, but also has to deal with the threat of premeditated, organized and sophisticated attacks by terrorists. As Dr. Assad Kotaite, then the President of the ICAO Council, stated: "The shadowy and elusive nature of an adversary with potential to wreak great destruction will warrant all the efforts and resources that we can muster."[6] We came to the conclusion that these factors have further elevated aviation safety from national community concern to the concern of the global community.

IV. Aviation safety – The Raison D'etre of ICAO

From the history of civil aviation, one could observe the clear and continuous movement

4 ICAO Working Paper, DGCA97 – WP/1 " Safety Oversight Today", 1 October 1997.

5 Torkington, C., "Aviation Safety in an International Environment", in Soekkha, H., (ed.) Aviation Safety (Utrecht: VSP BV, 1997) 545 at 552.

6 Opening Address and Overview by the President of the Council of the International Civil Aviation Organization (ICAO), Dr. Assad Kotaite, to the High-level, Ministerial Conference on Aviation Security, Montreal, 19 February 2002.

from national to international regulation. Due to the changes that have taken place, ICAO has become of paramount importance and under the Chicago Convention, in line with the principle that every State has complete and exclusive sovereignty over the airspace above its territory,[7] each contradicting State is responsible for safety oversight within its territory. It also includes the expansion of the international civil aviation community, the liberalization of the aviation industry, the introduction of new technology, and the existing as well as the new and emerging threats by terrorism, aviation safety has already become a global issue and could not be adequate and effectively addressed within the limits of national boundaries. Confronted with this challenge, the ICAO has taken some initiatives which seek to regulate aviation security. It is critical to do this since certain national initiatives, especially in India, are based on ICAO policies and directives. These initiatives include:

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft signed in Tokyo in 1963[8]
2. Convention for the Suppression of Unlawful Seizure of Aircraft signed in Hague in 1970[9]
3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montréal in 1971[10]
4. Annex 17 to the Chicago Convention, 1944, read with select provisions of Annexes 6[11], 9[12], 13[13], 14[14] and 18[15].
5. The Security Manual for Safeguarding Civil Aviation against Acts of Unlawful Interference[16]
6. European Convention on the Suppression of Terrorism signed in 1977[17]
7. Joint Statement on International Terrorism signed in Bonn in 1978[18]
8. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Montréal Convention, 1971, signed in Montréal in 1988[19]
9. Convention on the Marking of Plastic Explosives for the Purposes of Detection signed in Montréal in 1991[20]

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7 Article 1, the Chicago Convention.

8 Convention on Offences and Certain Other Acts Committed on Board Aircraft signed in Tokyo in 1963, International Civil Aviation Organization Doc. 8364 [Tokyo Convention, 1963].

9 Convention for the Suppression of Unlawful Seizure of Aircraft signed in Hague in 1970, International Civil Aviation Organization Doc. 8920 [Hague Convention, 1970].

10 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montréal in 1971, International Civil Aviation Organization Doc. 8966 [Montréal Convention, 1971].

11 International Standards and Recommended Practices: Operation of Aircraft; Annex 6 to the Convention on International Civil Aviation, 8th ed. July 2001.

12 International Standards and Recommended Practices: Facilitation; Annex 9 to the Convention on International Civil Aviation, 11th ed. July 2002.

13 International Standards and Recommended Practices: Aircraft Accident and Incident Investigation; Annex 13 to the Convention on International Civil Aviation, 9th ed. July 2001.

14 International Standards and Recommended Practices: Aerodromes; Annex 14 to the Convention on International Civil Aviation, 4th ed. July 2001.

15 International Standards and Recommended Practices: The Safe Transport of Dangerous Goods by Air; Annex 18 to the Convention on International Civil Aviation, 3d ed. July 2001.

16 International Civil Aviation Organization, Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference 6th ed. 2002, ICAO Doc. 8793.

17 European Convention on the Suppression of Terrorism signed in 1977, 15 I.L.M.1272 (1975).

18 Joint Statement on International Terrorism signed in Bonn in 1978, 17 I.L.M.1285.

19 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Montréal Convention, 1971, signed in Montréal in 1988, International Civil Aviation Organization Doc. 9518 [Montréal Protocol, 1988].

20 Convention on the Marking of Plastic Explosives for the Purposes of Detection signed in Montréal in 1991, International Civil Aviation Organization Doc. 9571.

V. REGULATION OF AVIATION SAFETY AND SECURITY BY MEANS OF A TECHNICAL SAFETY CODE

In an effort to assist the states to protect the aviation safety, ICAO has developed international standards and regulatory material encompassing virtually the entire spectrum of aviation activities with a view to achieving uniformity of safety regulations. ICAO has developed an aviation safety code which comprises of different kind of regulatory material, some having binding force and others being, purely guidance material. The implementation of safety code has been strengthened through the establishment of various kinds of audit programmes. Underlying, it is the consensus of the international community that the aviation safety is a matter of global concern and therefore should not be left within the exclusive domain of domestic jurisdictions. But the main problem in this sector is that there is no clear guideline as to whether ICAO should or should not regulate purely domestic aviation operations. As the institutional power of ICAO is likely to grow in the future, it may be necessary to regularize the regulatory functions of ICAO in order to ensure justice and fairness in its decision making process.

VI. CIVIL AND MILITARY AVIATION

Some of the airspace used for civil aviation is also used for military purposes. On one hand, many military activities are used for legitimate purposes like self defense which is an inherent right under Article 51 of the charter of the United Nations. Through this, they try to represent a fundamental value of the principle of sovereignty. On the other hand, military activities may associated with some unlawful acts like deliberate act of aggression or an unintended act of destroying civil aircraft in flight. So with regard to the military activities, the work of ICAO is aimed at sustaining equilibrium between safety of civil aviation and legitimate military activities. ICAO takes an action against unlawful military acts for the purpose of protecting the safety of civil aviation. Safety requirements on the part of the military activities not only restrict some freedom on the high seas but also impose limitations on the sovereign right of the state to use weapons against civil aircraft in its flight in the territorial airspace. ICAO activities are subject to its constitutional constraint that the Chicago convention does not apply to the aircraft used in military services. A further constraint lies in the provision of Article 89 of the Convention, which states that, in case of war, the convention does not affect the freedom of action of any of the contracting states affected.

In some areas of civil and military aviation, the principle of safety is still developing. Coordination between civil and military authorities is essential for maintenance of safety of civil aviation.

VII. ADDRESSING THREATS AFTER 11TH SEPTEMBER 2001

The treaty making activities of ICAO has strengthened the paramount consideration of aviation safety and limited the scope of traditional freedom of action by states. The international community has expanded in its efforts to curb terrorism and other acts of unlawful interference. At the initial stage, the protection of treaties was expanded to aircraft in flight, as provided in Tokyo and Hague conventions, but at a later stage, treaty protection was expanded to aircraft in service and air navigation facilities under the Montreal convention, and also later it was extended to airports serving International civil aviation and aircraft not in service under the supplementary protocol. After the 11th September, 2001 case, it has been recognized that preventive action is more important than punitive action ex post facto. Consequently, international regulation has been extended to such areas like the areas of manufacture of

plastic explosives. So these all developments have led to the increasing presence of the international community in the traditionally exclusive domain of sovereign states, thereby reinforcing the belief that the safety of international aviation is a common concern.

VIII. OBLIGATION ERGA OMNES:

Obligation *erga omnes* includes the duties of a State to provide safety oversight, to refrain from the use of weapons against civil aircraft in flight, and to prevent and punish certain acts endangering the safety of civil aviation. These obligations are laid down not for the interest of an individual State, but for a higher purpose: safe and orderly development of international civil aviation. The trio-obligations mentioned above have become the concern of all States and are emerging as obligations *erga omnes*.

One of the characteristics of obligations *erga omnes* is their universality and non-reciprocity. They are obligations of a State "towards the international community as a whole", which are "the concern of all States".[21] They exceed the reciprocal legal relations between pairs of States, and all States have a legal interest in their observance.8 These obligations "are grounded not in an exchange of rights and duties but in an adherence to a normative system". Obligations *erga omnes* may contain both negative and positive obligations.

Obligations *erga omnes* imply that all States can be held to have a legal interest in their protection.

5.1 Significance of Erga omnes obligations

- They establish important rights which are different from certain rights typically arising from treaties and customs which means, the rights involved with obligations erga omnes are the rights of the international community and must be universally respected with no exception.
- Obligations erga omnes also give rise to the need of the machinery for their protection. It is generally recognized that when a State commits a breach of an obligation erga omnes, all States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State.

IX. CONCLUSION

Now looking back several hundred years at mankind's efforts and experiences in the achievement of flight, one notices that the material scope of safety regulations has been expanded along with aviation development. Regulations began by focusing on the safety impact of aviation on the ground, then extended to airborne activities themselves, such as in-flight operation, and subsequently covered ground activities which impact safety in the air, such as air traffic services and airport security screening procedures. As for the geographical scope of the regulations, history has demonstrated a trend to move from national regulation to international regulation. One valuable consideration to be drawn is the importance of achieving universal participation and representation in International civil aviation. The divergent systems illustrated by the Paris, Madrid and Havana Conventions did not survive the test of time, whereas the flag of universality carried by ICAO is still waving today as the final measures of safety lies in the hands of ICAO's standard and recommended practices (SARP's) at global level. Due to the changes that have taken place since the conclusion of the Chicago Convention,

[21] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) [1970] ICJ Reports at 32.

including the expansion of the international civil aviation community, the liberalization of the aviation industry, the introduction of new technology, and the existing as well as the new and emerging threat by terrorism, aviation safety has already become a global issue and could not be adequately and effectively addressed within the limits of national boundaries. It is the consensus of the international community that aviation safety is the matter of global concern and therefore should not be left with the exclusive domain of domestic jurisdiction.

According to our view, some further steps which should be taken for Aviation Safety:

- Since safety of air navigation is and will remain the overriding priority for traveling public, operators, States and international organizations. States have to agree with ICAO in further advanced international safety standards.
- Compliance with standards has to be strictly audited by ICAO mechanism and / or by international regional organizations.
- Investigations into accidents should lead to effective corrections of any faults in Technology, procedures or human conduct.
- Continuing vigilance to check unlawful acts against safety of aviation is unavoidable.
- Good order on board is essential to prevent unruly passengers causing danger to safety of flight.
- International & national legal steps need to be taken to keep aviation drug free by enforcing pre-employment, periodic, post accident and random testing of aviation personnel.
- More conventions are needed to bring decline in incidents of unlawful acts against aviation.
- Safety management courses need to be introduced, where ever not existing at present.
- ICAO as the worldwide governmental organization for international civil aviation needs to take a more proactive role in enhancing aviation safety.

If we follow these steps in a proper and efficient manner then this will result in result in more uniform safety inspections, fostering investment in emerging markets and widening access to critical safety resources.

"Foreign Direct Investment and Indian Economy"

Ankur Gupta *

Abstract

One of the maximum remarkable growths for the duration of the previous two decades is the outstanding development of FDI in the globe. This unparalleled development of global FDI in the 1990s around the biosphere makes FDI a significant and vital constituent of growth policy in both developed and developing countries and strategies are contrived in order to arouse inward flows. The character of FDI in the development course has been a scorching subject of debate in numerous nations including India.

This paper makes an effort to give an analysis of FDI in India and its influence on development. It also focuses on the elements and requirements of FDI, sources of FDI and explanations. One of the economic features of globalization is the concept that cumulative investments in the form of foreign direct investments. In the current periods due to the global depression most of the nations have not been capable to draw investments. India has been capable to fascinate better FDI's than the developed nations even during the recent worldwide depression. Particularly in the recent years the FDI in India has been succeeding an optimistic development ratio. The administration has focused on liberalization of strategies to welcome foreign direct investments. These investments have been a significant carter for stimulating the economic evolution concluded employment generation, technology transfer, global capital, and developed access to managerial expertise, product markets and distribution network. FDI in India has empowered to accomplish a positive amount of economic stability; evolution and growth to sustain and participate in the global economy.

I.Introduction

The starring role of FDI in the progress procedure has been a piping hot issue of argument in numerous nations as well as India. FDI is a dynamic component of the globalization struggles of the God's creature's economy. The progress of global creation is ambitious by monetary and industrial services. It is as well ambitious by the continuing relaxation of FDI and trade procedures. Investment has continuously been a problem for the emerging financial prudence such as India. The biosphere has been globalizing and entirely the nations are relaxing their strategies for friendly asset from nations which are plentiful in capital wealth. The nations which are established and come together on novel souks where there is availability of plentiful efforts, possibility for crops, and extraordinary revenues are accomplished. Consequently

* Ankur Gupta is a 3rd Year B.B.A LL.B student at School of Law, KIIT University, Bhubaneswar (Odisha). He can be contacted at ankurgupta.bballb@gmail.com.

FDI has become a combat reason in the evolving souks. The impartial overdue permitting FDI is to accompaniment and increment national investment, for accomplishing an advanced level of monetary growth and given that occasion for industrial up progression, such as access to international professional expertise and rehearses.[1]

FDI refers to asset in actual resources like transactions agencies, factories, delivery stations etc. by external investors. The economy ideally keeps an eye on import exchange and careful external capital[2] entry, both concluded assortment speculation and FDI method. This rehabilitated fundamentally with the liberalization procedures publicized in 1991.[3] FDI asset in India consist of reserves in the organization progress scheme as well as creation of bridge and flyovers, economic subdivision together with investment and protection facilities, actual country estate progress and retail division etc. The amplified movement of FDI[4] in Indian economy is rising at an express speed with buyers having great purchasing power. With a vigorous economy and relentless progress, India has exerted an appeal and a desirable inducement to firms observing to increase their opportunity. The genuine influx of the FDI into the Indian budget had continued an inconsistent and tottering trend for the duration of post liberalization age. When it derives to national economy it consists of the state economy too. Regional government is also unrestricted to invite FDI within the state. To attract external asset in MP, the regional government in connotation with FICCI, prepared a *Global investors Summit*[5] in Bhopal. The most important influence of FDI on Indian's budget has been on amplified rivalry among the public and private sub-divisions of the nation. This has obligatory impacts on the homegrown and national corporations to raise the facility delivered to their customers in comparison to the international companies. FDI inflow assistances the evolving nations to grow a see-through, extensive, and operative strategy situation for asset problems as well as, constructs human and organization measurements to perform the equivalent.

II. FDI Policy Outline in India

There has been a deep modification in India's attitude to foreign investment starting in the early 1990s when it initiated fundamental commercial improvements surrounding virtually all the sub-divisions of the economy.

III. Pre-Liberalization Era

Traditionally, India had kept an eye on a tremendously vigilant and discerning attitude while framing FDI procedure in interpretation of the supremacy of 'import-substitution strategy' of economic growth. With the impartial of flattering 'self-reliant', there were twofold natural

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1 Indian Current Affairs, Growth in Employment and Foreign Exchange due to FDI, http://indiacurrentaffairs.org/growth-in-employment-and-foreign-exchange-due-to-fdi/ (last visited January 17, 2013).

2 'Capital' means equity shares; fully, compulsorily & mandatorily convertible preference share; fully, compulsorily & mandatorily convertible debentures. See also Taxmann's Guide to Foreign Direct Investments in India 1.11 (Taxmann Publications 2011)

3 The New Oxford Companion to Economics in India 259 (Kaushik Basu ed., Oxford University Press 2012).

4 The Foreign Direct Investment definition says that direct investments in and productive assets in a country by and foreign company are called Foreign Direct Investment or FDI. See also Ajay Kumar Tomar, Foreign Direct Investment in India 90 (Kunal Books 2012).

5 Madhya Pradesh Facilitation Centre for NRI, Welcome Address by Dr Amit Mitra, Secretary General, FICCI, http://mpnricentre.nic.in/4th-august-activities1.htm#top (last visited January 17, 2013).

surroundings of procedure purpose – FDI concluded foreign collaboration was received in the regions of extraordinary skill and great priority to construct domestic skill and hopeless in small skill regions to shield and encourage national trades. The supervisory outline was associated complete the portrayal of *Foreign Exchange Regulation Act (FERA), 1973*[6] in which foreign justness croft in a united project was permissible merely up to 40 per cent.[7] Afterwards, several immunities were prolonged to foreign firms betrothed in transfer oriented trades and great skill and main concern parts as well as permitting parity assets of concluded 40 per cent. Additionally, portrayal from accomplishments of other nation capabilities in Asia, Authority not only recognized special economic zones but also intended abundant strategy and delivered inducements for encouraging FDI in these regions with an opinion to encourage distributes. As India sustained to be extremely defending, these processes did not improve considerably to distribute affordability. Identifying these restrictions, fractional liberalization in the line of work and asset program was presented in the 1980s with the impartial of attractive distribute attractiveness, innovation and marketing of trades concluded Trans-national Corporations. The declarations of Trade Procedure (1980 & 1982) and Technology Procedure (1983) delivered for an abundant approach near foreign reserves in terms of ups and downs in program guidelines. Subsequently after 1985, the Indian economy was slowly freed up and became efficient. Economic improvements have been described by liberalization and explanation of governmental interference, phased outline of national and ingress rivalry, expedition of sharing by the private sector, public sector change in economic structure, and the complete outcome was optimistic.[8] The public sector banks and old private sector banks supported the traditional working method in India.[9] Nearby 1990 there was an abundant traditional back in Indian economy due to economic disaster.[10] The Indian economy grieved from small per head revenue, long-lasting redundancy, little capital creation, amplified craft arrears, small ordinary of existing, low frame progress, low fitness and cleanness average, little evolution in GDP and NDP, etc., during the pre-liberalization era.

IV. Post-Liberalization Era

India economic restructurings technique posterior in 1991 has produced durable importance in foreign investors and revolving India keen on one of the desired terminuses for international FDI movements. Consorting to A.T. Kearney,[11] India's position is third in the Realm in standings of allure for FDI. Correspondingly, UNCTAD[12] World Investment Report, 2012 reflects India as the third greatest gorgeous terminus between the TNCS. Trade procedure restructurings regularly detached boundaries on asset schemes and industry growth on the one pointer and

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6 R. KRISHNAN, FOREIGN COLLABORATIONS AND INVESTMENTS IN INDIA 638 (6th ed. Commercial Law Publishers 2009).

7 Industrial and Foreign Investment Policy, http://www.indianembassy.it/commercial14_1.htm (last visited January 24, 2013).

8 SHARAD KUMAR CHATURVEDI, FOREIGN INVESTMENT LAW AND ITS IMPACT ON LABOUR 15-16 (Deep & Deep Publication 2007).

9 Ravi Kumar Jain & Ramachandran Natarajan, Factors influencing the outsourcing decisions: a study of the banking sector in India, 4 Strategic Outsourcing: An International J. 294-322 (2011).

10 A S Shiralashetti & S S Hugar, Foreign Direct Investment and Economic Development of India: A Diagnostic Study, 7 The IUP Journal of Managerial Economics 55-64 (2009).

11 A.T. KEARNEY, INVESTING IN A REBOUND: THE 2010 FDI CONFIDENCE INDEX 3 (January 27,2013), http://www.atkearney.com/site-search?q=indian+fdi+rank+in+world&submit=Search

12 United Nations Conference on Trade and Development (UNCTAD), World Investment Report

tolerable amplified entry to foreign knowledge and backing on the further. A sequence of procedures that were focused in the direction of liberalizing foreign asset involved outline of double way of agreement of FDI and RBI reflex way and Government sanction direction, reflex consent for knowledge contracts in great priority trades and exclusion of limitation of FDI in little knowledge regions as well as liberalisation of expertise accesses, consent to NRI and Overseas Corporate Bodies to finance up to 100 per cent in great supremacists areas, ramble in the foreign justice contribution restrictions to 51 per cent for present corporations and liberalisation of the custom of external 'brands name' and validation the Agreement of *Multilateral Investment Guarantee Agency*[13] for security of foreign investments. These struggles were increased by the performing of *Foreign Exchange Management Act, 1999* that exchanged the *Foreign Exchange Regulation Act, 1973* which was less rigid. This beside with the consecutive economic division restructurings covered approach for better capital version liberalisation in India. Asset offers dropping below the involuntary direction and substances linked to FEMA are distributed with by RBI, while the Authority grips asset through consent direction and problems that relay to FDI procedure *per se* complete its three organizations, *viz*., the Foreign Investment Implementation Authority, the Foreign Investment Promotion Board and the Secretariat for Industrial Assistance.[14]

FDI below the involuntary direction does not need any previous endorsement either by Authority or the RBI. The depositors are individual mandatory to advise the worried local headquarters of the RBI inside 30 days of delivery of inner transfers and sleeve the obligatory papers with that headquarters inside 30 days of issuance of dividends to foreign shareholders.[15] Below the endorsement way, the suggestions are measured in a time-bound and obvious custom by the FIPB. Endorsements of compound suggestions linking foreign asset and foreign technical alliance are also approved on the approvals of the FIPB.

V. The Scenario of FDI in India

Subsequently financial restructurings originated in 1991, legislature of assembly has reserved numerous programs to attract FDI influxes, to progress the Indian finance. An essential impartial of endorsing FDI in India and supplementary emerging nations has been to endorse competence in creation and growth trades. Though, a few rises in fairness pale of the foreign investors in current combined projects or acquisitions of a share of impartiality by them in national companies would not mechanically alter the direction of the industries. That is the purpose of FDI stockholders would be to profit from the revenue received in the Indian souk. As, an outcome, in such luggage FDI influxes essential not be escorted by any considerable growth in distributes, whether such asset information to innovation of national dimensions or not. Consequently, it is an experiment for an emerging nation like India to guide its wealth arrival through FDI into a probable cause of output increase for national companies. As an outcome,

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2012,22(January 27,2013), http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx

13 The World Bank, Multilateral Investment Guarantee Agency, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,, contentMDK:20040648~pagePK:64257043~piPK:437376~theSitePK:4607,00.html (last visited January 13, 2013).

14 Welcome NRI, SIAhttp://www.welcome-nri.com/SIA.htm (last visited January 13, 2013).

15 Consulate General of India Shanghai, FDI Policies & Procedures http://www.indianconsulate.org.cn/page/display/20/95 (last visited January 13, 2013).

India has established whole FDI of US$ 180,034 million commencing the time 1990-91 to 2009-10 which is outstanding to the inventiveness occupied by the Government of India in enticing FDI influxes in India. The FDI arrivals have given away a going up drift from 1991-92 to 1997-98 due to the genuine programmers of basic liberalization and open souk restructurings. The increase in drifts of FDI till 1997 was owing to not only of the liberalization procedure but similarly owing to the shrill growth in the international measure of FDI discharges through the 1990s. Alternative fundamental issue may have been the retrieval of the Latin American markets, which had instigated to occur starting the Debt Crisis of the 1980s.[16] Then later through 1998-99 and 1999-00 here was failure in FDI influx which was owing to the failure in manufacturing evolution amount in the economy and similarly owing to the outcome of the East Asian economic disaster. In 1998 and 1999, the government of India publicized an amount of restructurings intended to inspire FDI and current a golden situation for depositors.[17] But then again in the next year, foreign venture started to spring back. Throughout 2002-03 and 2003-04, another time there was decrease in movement of foreign direct venture which was due to the company of International Collapse on the Indian economy. The FDI Fairness influxes through the 5th years 2005-06 to 2009-10 presented an enormous growth of more than 7th periods than those of the earlier year's 1991-92 to 1999-00 and 2000-01 to 2004-05. This growth was owing to the studied FDI Strategy in March 2005, a vital component of the procedure was to permit FDI up to 100% foreign impartiality below the involuntary way in settlements[18], built-up structure, and housing and construction-development schemes.

VI. The Impact of FDI on Indian Economy

FDI have aided India to achieve an economic constancy and monetary progress by way of reserves in dissimilar subdivisions. FDI has improved the financial existence of India. Later liberalization of Profession plans in India, there has been an optimistic GDP evolution speed in Indian budget. FDI supports in emerging the economy by producing occupation to the without a job, Producing incomes in the procedure of excise and revenues, Economic stability to the authority, progress of infrastructure, regressive and on relations to the national organizations for the supplies of uncooked resources, utensils, commercial structure, and action as sustenance for economic scheme. Onward and vertebral area associations are industrialized to sustain the external firm with the help of ores and other necessities. It benefits in age group of occupation and aides deficiency abolition. There are several industries or persons who would produce their sparkling cover through the foreign reserves. There are permissible and economic advisers who also leader in the initial period of creation of firm. It is the biosphere's major democracy and peak at an imposing amount of terminated 6 percent, on an ordinary each annum in the previous decades. The amount of suggestion was permitted by the external asset panel from the dated of February 2003 to December 2009 were 3511 proposals[19] and the future arrivals of FDI is Rs.194708.83 crores. Through 2009 only FIPB

[16] GRIPS, Debt Crisis of the 1980s, http://www.grips.ac.jp/teacher/oono/hp/lecture_F/lec10.htm (last visited April 27, 2013).

[17] G.V.Bhavani Prasad & E.Hari Prasad Sharma, Impact Of FDI On Economic Development Of India 2 International J. Of Marketing and Technology 133 (2012).

[18] Press Information Bureau, Government of India, 100% FDI to be allowed on automatic route in number of sectors, http://www.pib.nic.in/newsite/erelease.aspx?relid=15119 (last visited April 27, 2013).

[19] Ganesh Adgaonkar and V.N Joshi, Role of FDI in Economic Development of India 2 Golden Research Thoughts (October, 2012)

permitted 300 suggestions with FDI influx of Rs.404111 crores. In the 13th corpulent subsequent quarter of economic year 2011 of the expert predictors study directed by the RBI, presumes the actual GDP evolution to be slightly advanced at 8.5 percent[20] in economic year 2011 from the previous study.

VII. Global Experience in terms of FDI: A comparative study between India and China

India and China are two developing financial colossi of the emerging biosphere, both in Asia. China has been getting considerable FDI associated to India. China has applied exposed ingress plans during 1980's but India liberalized its strategies in 1991. Earlier pre-liberalization India shadowed traditional strategies to defend the original venture capitalist and owner. The financial evolution has not been attained. In 1991, the then legislature of assembly had applied liberalization plans to reorganize the Indian economy.[21] FDI in China rose from US$3.5 billion in 1990 to US$52.5 billion 2002; without round-tripping, china FDI influxes could drop to US$40 billion. Those to India grew from US$0.4 billion to US$3.45 billion in the course of the similar period. Even with these changes, China engrossed around 15 times extra FDI than India in 2002.[22]

In 1980, the sphere break down of China's economy was like this; Industry 49%, Agriculture 30%, and Services division 21%, in excess of the subsequent 20 years until 2003, the portion of Agriculture drop while Industry and Service sector rose. Particularly notable was the evolution of Industry from 1990 to 2003, it rose from 42% to 53%. The Indian sphere image creates for learning in difference, while the portion of Agriculture drop from above 40% to 23% from 1980 to 2003 it was not the Diligence that acquired this portion;[23] rather the Facility subdivision convert leading division causal over partial of India's revenue. This is a shrill difference with China where over partial the current revenue accumulates from Business. FDI influxes are a pointer of the external depositor group's durable risks in the host economy. In 2009, emerging financial prudence of Asia accounted for about 27 per cent of entire international FDI influxes. China has been the major receiver of FDI arrivals amid evolving financial prudence of Asia with its segment in total FDI of this financial prudence growing from 43 per cent in 1996 to virtually 46 per cent in 2001. However, it has been reduced to 24 per cent in 2007; it has slightly better at 31.5 per cent in 2009. India, however approach in arrears China in enticing FDI arrivals, has slightly better its portion in total FDI arrivals of evolving financial prudence of Asia from 2.7 per cent in 1996 to 11.49 percent in 2009.[24] In contemporary years, India is dropping its magnetism as FDI terminus. From a situation of 8th rank in 2009 India has fallen to 14th position among nations interesting major FDI, according to World Investment Report 2011 by UNCTAD. China is enticing a greater FDI arrival than India. An amount of revisions and intelligences highlight the faintness of India as a dropping FDI terminus. In the newest revision from World Bank Comfort of Liability Commercial in

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20 Rediff Business, RBI forecasters see GDP growth at 8.5%, http://www.rediff.com/business/report/rbi-forecasters-see-gdp-growth-at-8-point-5-percent/20101117.htm (last visited January 13, 2013).

21 Syed Azhar & K.N.Marimuthu, An Overview of Foreign Direct Investment in India 2 International Journal of Multidisciplinary Management Studies, 202 (January, 2012).

22 Bachelors in Financial Markets, Comparative Study of FDI between India and China, http://bfm.co.in/comparative-study-of-fdi-between-india-and-china/ (last visited January 28, 2013).

23 A Comparative Analysis of FDI in India and China 29 European Journal of Social Sciences 27 (2012).

24 S. N. Babar, Structure of Foreign Direct Investment in India during globalization period 2 Indian Streams Research J. (April, 2012).

India 2011 India is ranked as 134 out of 183 nations.[25]

The strategies of India and China concerning FDI have converted meaningfully further liberal during the previous numerous centuries. The contrast of two nation's strategies in enticing foreign investment stretches us reasonable impression to designate the details for the variances in arrivals of FDI and will allow us to propose how India can recover its venture environment.

VIII. Conclusion

FDI as a planned constituent of investment is desirable by India for its continued financial development and progress over and done with establishment of occupations, growth of current industrial productions, small and extended period assignment in the field of healthcare, schooling, research and development etc. legislature assembly should make the FDI strategy such a method where FDI arrival can be exploited as means of ornamental national manufacture, investments and transfers over and done with the reasonable delivery amid states by given that much liberty to states , so that they can appeal to FDI arrivals at their personal level. FDI can assist to increase the production, efficiency and transfer at the sphere level of the Indian economy. Nonetheless, it can experiential the outcome of sphere level production, output and transfer is negligible owing to the little flow of FDI into India together at the function level as well as at the sphere level. Consequently for additional inaugural up of the Indian frugality, it is sensible to expose up distribute concerned with subdivisions and greater evolution of the economy could be attained over and done with the progress of these subdivisions.

[25] Sarbapriya Ray, Impact of Foreign Direct Investment on Economic Growth in India: A Co integration Analysis 2 Advances in Information Technology and Management 190 (2012).

Judicial Interpretation on Trap Cases Under Prevention of Corruption Act: A Study of Supreme Court Cases

V. Ramya *

Abstract

Controlling Corruption is essential for good governance but menace of corruption is a challenge in India today. The Prevention of Corruption Act, 1947 was promulgated by Government in India to prevent and control corruption by the public servants but it spread like a fire in jungle. One of the important provision in the said law is trapping of corruption cases and prosecution of the accused. In this article the author attempted an analysis of judicial interpretation of trap cases as held by Supreme Court of India.

I Introduction

The menace of Corruption is an important issue that is bothering the policy makers, administrator and the general public for a long time. There is an emerging global consensus that fighting corruption and building 'good governance' is essential for the socio-economic development of any nation. The corruption essentially undermines the credibility and effectiveness of the State and its instrument.[1] Justice K. T. Thomas of Supreme Court of India observed that, "Corruption in a civilized society is like cancer, which if not detected in time is sure to maligns, the polity of country leading to disastrous consequences. If it is detected as a plague, which is not only contagious, but if not controlled, spreads like a fire in jungle. If it is detected as a virus, it is compared with HIV leading to AIDS, being incurable. It has also been termed as royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight."

II. Payment and receipt at the time of laying trap

***I**n M. Radhakrishna Murthy v. State of A.P.* [2], it was held that "the case of the prosecution is that there was a demand and an amount of Rs. 2,000/- from PW1 on 19-6-1989, which has not at All been proved; and with regard to the trap conducted by the prosecution while the AO was receiving Rs. 2,000/- from PW1 on 19-6-1989 Also, even assuming that the trap is proved beyond All reasonable doubt, the case of the prosecution cannot be upheld in view of the judgment of the Supreme Court AIR 1976 SC 1489. Even otherwise, as already stated, the trap was not proved beyond all reasonable doubt in view of the evidence of DW3 and the explanation of PW1. PWs 1 and 2 are interested in each other, and therefore, there is every

* Lecturer ,Velore Law College & Ph.D. Scholar KIIT School of law

1. Valedictory address by M Veerappa Moily, Union Minister for Law and Justice, in a National Seminar on Fighting Crime related to Corruption held at 13.09.2009.
2. 2001 (2) ALD (Crl.) 339 (AP) = 2001 (2) ALT (Cri) 203(AP).

likelihood of tainting the Exs. P2 and P4 papers and particularly when the said papers were not tested by the ACB Officials, it is not ruled out the said papers have been tainted with phenolphthalein powder. The case of the prosecution appears to be unnatural. They have projected only interested persons PWs. 1 and 2, who were doing toddy business particularly under TFT Scheme. According to the prosecution case, the cot was in front and thereafter the AO and DW3 were sitting on chairs and drinking liquor. DW3 stated that the cot was behind them and they were sitting on two chairs and taking liquor just before taking lunch.

It is also not believable whether the AO has taken the money in front of another Excise Officer openly in the presence of DW2 and other Excise Constable and PWs. 1 and 2. Even if he has received, he could not have kept it openly on the cot. The story of the prosecution that there was a demand of Rs. 4,000/-, out of which, an amount of Rs. 2,000/- was paid on 13-6-1989 and said to have been accepted by the AO admittedly has not been proved; and even the second part of taking the illegal gratification, i.e., the bribe amount of Rs. 2,000/-, for helping PW1 for not implicating him in the criminal case (Ex. P13) is Also not fully proved beyond All reasonable doubt and there is some force in the defence of the AO in explaining that tainting of challan forms (Ex. P4) and paper cutting (Ex. P2) is not ruled out; and therefore, in the absence of any full truthful case of taking gratification other than the legal remuneration by the AO, the question of drawing the legal presumption under Section 20 of the Act does not arise. In the light of the unnatural story built up by the prosecution, it is difficult to uphold the judgment.

III. Nature of proof of illegal gratification in Trap cases

In V. K. Mannan v. State rep. by Inspector of Police[3]1. AIR 2010 SC 166. , it was held:"In the instant case, the appellant had clearly demanded the amount from PW1. The relevant portion of the statement of the complainant reads as under:

"……. He is the Proprietor of OLOHV Engineering Services and the above company was doing contract work for the Railways. From the year 1993 to 1997, he has completed the contract work for Rs. 1 Crore. The Site engineer will sign in the measurement book. The payment will be made by cheque. The contract work was completed in the year 1997 and there was a balance of Rs. 9 Lacs due to PW.1. During that period, the accused was the Site Engineer and he has to verify the measurement and entry to be made in the measurement book. The accused informed that P.W. 1 has to return the unused materials to the Railway Department. On 1.4.1998, at about 9.30 a.m. the accused demanded a bribe amount of Rs. 5000/- to be paid to clear the final bill."

According to Balachander PW2, the money was handed over to the appellant in his presence. Immediately after the bribe amount was handed over to the appellant, he started counting the currency notes. At the time Balachander PW2 came out and gave the pre-arranged signal. Soon thereafter the Inspector and the trap team entered into the above room and the appellant was arrested. The Sodium Carbonate solution was prepared and Phenolphthalein test was conducted on both the hands of the appellant separately. There was colour change in the solution and they were preserved in separate bottles.

Balachander PW2 is an independent witness and he has corroborated the evidence of the complainant PW1. Therefore, the court held that in the facts and circumstances of this case, it is difficult to accept the submission of the appellant that there was no demand and acceptance

3. AIR 2010 SC 166.

of the bribe amount. Both the Trial Court and the High Court rejected the defence version of the appellant.

IV. Pre-trap panchanama

In Becharabhai S. Prajapati v. State of Gujarat [4] The Court observed: :"It is to be noted that both the trial Court and the High Court have analyzed the evidence in great detail and have found that the appellant had demanded and accepted a sum of Rs. 200/- from the complainant for Allowing the luxury bus to go to the destination. The tainted currency notes were recovered from the appellant. The test of anthracite powder was carried out of the hands of the raiding party under ultra violet lamp but no marks of anthracite powder was found. Similar test was carried out on the hands of the complainant. On the accused appellant's trouser presence of anthracnose powder was noticed. It has also been established that the numbers of the currency notes were matched with the denominations mentioned in the pre-trap panchanama."

"The alternative submission relates to the harshness of sentence. The occurrence took place nearly seven years back. It is stated that the appellant has suffered custody for more than six months. Taking into account all these aspects, we feel interest of justice would be best served if the sentence is reduced to the period undergone, while maintaining the conviction. It is to be noted that the minimum sentence prescribed under Section 7(2) of the Act is six months".

V. Seizure of Currency notes in Trap cases

In *State of West Bengal v. Kailash Chandra Pandey* [5] it was held that "a survey of this evidence shows that a trap was laid and how the currency notes were seized from the accused. On this evidence, the Trial Court convicted the accused but the Appellate Court i.e., the learned Single Judge reversed the finding for the reasons mentioned above. We will examine each of the reasons given by learned Single Judge of High Court to find out whether they are substantial or not so as to render the prosecution story improbable. The first reason given by Learned Single Judge was that no signature of the accused was taken on the seizure list. It has been stated by the prosecution witnesses i.e., by the Investigating Officers that the accused refused to sign on the seizure list. No accused can be forced to put his signature and the prosecution cannot force him to append his signature on the seizure memo if he refused to sign. . Therefore, just because the accused did not append the signature on the seizure memo that cannot be a ground to reject the prosecution story. Similarly, another reason assigned by the learned Single Judge was that the currency notes and pant of the accused were not sent to F.S.L. for chemical examination. When the currency notes which were mixed with the phenolphthalein powder were handled by the accused the hands of the accused was washed in a water bowl, the colour of the water turned pink. Likewise, the pant pocket of the accused was also washed and the colour of the water turned into pink and the hand and pant wash which was kept in bottles were sent for chemical examination that is sufficient to connect the accused with the commission of the crime. Just because the notes were not sent for F.S.L. examination, it cannot be a ground to disbelieve the prosecution story. The pant of the accused was produced and exhibited in the Court and the pant has been identified by P.W. 15, Sanjay Kumar as Ext. V. It is very strange that the pyjama which was given to the accused to wear that was not required to be seized produced before the Court because the accused could not be permitted to go naked without wearing anything since his pant was already seized. Therefore, non-seizure of the pyjama is not fatal to the prosecution. Another ground has been given that

4. 2009 Crl. L.J. 1158 = 2008 (11) SCC 163 = 2008 (2) Supreme 209.
5. AIR 2005 SC 119 = 2005 Crl. J 135 = 2004 (12) SCC 29 = 2004 (8) Supreme 530.

when the money was allegedly received by the right hand of the accused, how it was kept in the left hand pocket but hand wash was taken of the right hand only. This is no reason to disbelieve the entire prosecution story when a man accepts anything in the right hand in normal course of human conduct and if he has kept the money in the left hand pocket the prosecution cannot be held responsible. The accused has received the currency notes and the hand wash of the water turned into pink and the left hand pocket of the trouser was also washed and the colour of the water also turned into pink, therefore, putting these two evidence together, there remains no doubt about the prosecution case. It was submitted by learned Counsel for the respondent that the bills of the complainant for the period in question have already been passed and payments made. That may be so, but this is not a ground to disbelieve the prosecution case. In fact, the objections were raised and deductions were made in bills and money was being demanded from Shri Sengupta so that his bills are not objected or delayed and no deduction be made in future. The money was paid to the accused for the safe passage of his bills. Therefore, nothing turns on this ground that the bills were passed prior to the tendering of the money to the accused. It was only meant to facilitate smooth release of the money as per the bills. Therefore, it is not a ground do disbelieve they prosecution story that the bills in question were passed prior to the alleged tender of the money to the accused. Lastly, a very vague ground has been given by learned Single Judge that the envelope which contained the currency notes had not been produced. Nothing turns on non-production of the envelope. What is material is the acceptance of money by the accused which is more than apparent from the evidence of the prosecution witnesses that the money was recovered from the accused and the accused's hand which accepted the currency notes was washed and the hand wash turned into pink colour water and likewise the accused's pant pocket which was washed, the water also turned into pink.

VI. Evidentiary Issues in trap cases

In Kishore Bhagtani v. State of Rajasthan.[6] It was observed:

The learned counsel alleged that the trial court erred in allowing the alleged tape recording of phones by CBI, which is direct contravention to the Indian Telegraph Act and the Judgments of Apex Court on the subject. According to which no conversation on telephonic call can be taped without permission of the specified authority. As such the alleged act of taping call by CBI is itself illegal. The trial Court erred in not appreciating the fact that the alleged voice test report produced by CBI is in itself inconclusive and not definitive. It merely states that the alleged voice in the taped call and the alleged specimen voice sample are probably the same. This meek evidence produced by CBI with regard to the voice test is hit by various decisions of Supreme Court from time to time cautioning heavily before relying on expert evidence and not basing the decisions merely on the expert opinions. The trial Court while framing charge against the petitioner Kishore Bhagtani for criminal conspiracy has no t considered the basic fact that in the present case the prosecution has not presented a single direct or circumstantial evidence prior to the date of occurrence of the event or prior to the date / time of the registering the case by the CBI, wherein it has been alleged that the conspiracy was conceived or hatched at all. The legal position consistently taken by Hon'ble Court is very clear that statements made by the conspirators after they are arrested cannot be brought within the ambit of Section 10 of the Evidence Act, because by that time the conspiracy would have ended. The sole evidence for alleging such a conspiracy is the allegations by co-

6. 2009 Crl. L. J. 1172 (Raj)

accused O.P. Garg and S.K. Meena and the alleged taped conversation. Both of these aspects constitute circumstances after they have been trapped and nabbed by the CBI i.e., after the conspiracy has ended. It has been clearly established that both the alleged circumstances are marred by several glaring infirmities and irregularities.

The learned counsel for the petitioners relied on Section 10 of the Evidence Act, which reads as under:

S.10. *Things said or done by conspirator in reference to common design* – where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it".

On the other hand Mr. Kamalakkar Shgarma, learned Special Public Prosecutor contended that there is no doubt regarding evidence against the petitioners, which do not discharge the petitioners at the stage of charge. There is satisfactory evidence against the petitioners, at the stage of charge. There is satisfactory evidence against the petitioners, and the trial court after appreciating the evidence framed charge against the petitioners. There are two types of charge against the accused in the present case. Since substantive charge is not likely to be proved against the petitioners the trial court framed the charge against the petitioners with the aid of Section 120 B, IPC read with Sections 7 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. This shows that the trial Court after scrutiny of evidence formed the opinion. All these evidence can be considered in detail during trial and not at the stage of framing charge.

I have gone through the cases relied upon by the learned counsel and the arguments raised by the learned counsel for the petitioners as well as learned Special Public Prosecutor. But the Apex Court in *Omwati v. State*.[7] Observed it would not be safe at this stage to deprive the prosecution in proving its case on the basis of direct evidence, the statement of the deceased claimed to be admissible under Section 32 of the Evidence Act and the other documents including the inquest report allegedly disclosing the infliction of injuries on the person of the deceased which resulted in his death. The acceptance of the opinion of the doctors, as incorporated in the post mortem report for the cause of death of deceased being hepatic failure following viral hepatitis cannot be accepted on its face value at this stage. Therefore the order of the High Court would be illegal and liable to be set aside."

The Supreme Court reminded the High Courts of their statutory obligation to not to interfere at the initial stage of framing the charges merely on hypothesis, imagination and farfetched reasons which in law amount to interdicting the trial against the accused persons, unscrupulous litigants should be discouraged from protecting the trial and preventing culmination of the criminal cases by having resort to uncalled for an unjustified litigation under the cloak of technicalities of law.".

VII. Sufficient proof

In *S. Siddaramegowda v. State of Karnataka*, [8] it was held:

7. AIR 2001 SC 1507 : (2001 Crl. L. J. 1723)
8. 2009 Crl. L. J. 2158 Kara.

"The learned counsel relied upon the decision of the Hon'ble Apex Court reported in (Pannalal Damodar Rathi v. State of Maharashtra[9]) wherein the Apex Court held that in the absence of corroboration of the evidence of the complainant regarding the demand for money by the police, his evidence alone cannot be accepted. The Hon'ble Apex Court has considered this aspect in paras 9 and 10 of the judgment and held that it is unsafe to base the conviction on the sole testimony of the panch witness as P.W. 3. In the said case there was no mention about the appellant asking the complainant whether he had brought the money asked for. *In G. V. Nanjudiah v. State (Delhi Administration),* [10] where the allegation was that the accused received the money with his left hand and transferred it to his right hand and thereafter put it into the pocket of the bush shirt, it was held that it is an unusual circumstance, particularly, when stated by an unreliable witness. The hon'ble Apex Court suspected the evidence of the witnesses and granted an order of acquittal. Placing reliance on these decisions, the counsel contended that the evidence of the complainant has not been supported and there is no mention of demand by the accused in the evidence of P.W. 2 and therefore, he contends that the evidence creates doubt about the trap laid by the Lokayuktha Police. Now it is relevant to note that though, P.W. 2 in the chief examination did not say anything as regards the demand of the accused. The contents of the complaint reveal demand by the accused and if on the earlier day a demand was made and on the next day when the amount is given to the accused and he receives the same, it amounts to acceptance of the amount paid in pursuance of the demand made earlier. It is in reality an implied demand and acceptance, otherwise there was no reason for the accused to receive the money. If the conduct of the accused is looked into in the context of the contents of the complaint, Ex. P. 1, the evidence of P.W. 1 and the fact that the complainant had gone on many occasions to the office of the accused with a request for the copy of the lay out sketch and at the fag end, the accused agreed to give the sketch only after the payment of Rs. 150/-, the conduct of the accused itself proves the implied demand and in addition to this so far as P.W. 2, the shadow witness, though in the chief examination he did not tell about the demand made by the accused, in the cross examination after treating him hostile admits to have made a statement about the demand, and the complainant having paid the amount of Rs. 150/- after the demand. So, in view of the fact that P.W. 2 also supports the version of P.W. 1 and that the evidence of the witnesses was recorded after 7 years of trap, it may be that P.W. 2 initially had forgotten about the details of the happenings at that time and was recollected when his statement was brought to his notice. Hence, I am of the opinion that the evidence of P.W. 2 supports the version of P.W. 1 and it cannot be said that there is no corroboration of the evidence of P.W. 2. The facts in the decisions referred to supra differ a lot from the facts on hand and therefore, the principle laid down by the Apex Court do not squarely apply to these facts.

The learned counsel for the respondent has placed reliance on the decision of the Hon'ble Apex Court reported in 1998 SCC (Cri) at page 456: (AIR 1998 SC 1474), wherein it is held that so far as testimony of the bribe given is concerned, it cannot be rejected merely because he is aggrieved by the conduct of the accused and it is also said that his evidence requires scrutiny with great care. So also, the Apex Court has held that mere acquaintance of the witnesses with the police officers would not make a witness non independent. It further observed that every citizen is presumed to be independent until proved to be dependent on police for any purpose whatsoever. So, in the context of the principles laid down in this

9. AIR 1979 SC 1191
10. 1987 (Supp.) SCC 266: (AIR 1987 SC 2402).

decision, it cannot be said that P.W.s 2 and 4 had any interest and merely because that they were working in some office itself is not a sufficient circumstance to discard their evidence. Furthermore, the learned counsel also relied upon the decision reported in (2008) 3 SCC (Cri.) 855, wherein the accused during his cross examination under S. 313, Cr.P.C. has given the version for the first time during the examination stating that the bribe money was forced into his hands and the Hon'ble Apex Court held that such a stand is not acceptable in view of other evidence against him. So also, the hon'ble Apex Court taking into consideration the presumption under S. 20 of the Act held that the infirmities found are unrealistic and the complainant's evidence clearly supported the prosecution story and the conviction by the trial Court was upheld. The perusal of the facts in the decision and the facts on hand would reveal that the version of the accused before P.W. 8 is altogether different from the version of the accused during his statement under S. 313, Cr.P.C. The accused stated before P.W. 8 that the complainant paid the money for the expenses of the surveyor and that he forcibly kept the money on the table and left the place and that after the complainant went away, he kept the money in his pocket. Now as could be seen from his statement under S. 313, Cr.P.C. except denying the prosecution version and the incriminating evidence, the accused has not stated anything before the Court. In that view of the matter, except the minor discrepancies stated above, I do not find any such material discrepancy or contradiction in the evidence led by the prosecution.

P.W. 3 is an official working in the office of the Tahsildar, who speaks about the register, Ex. P 10 and also Ex. P. 1, the application filed by the accused for copy of the lay-out sketch. P.W. 7 is the police constable who assisted the investigation. P.W. 8 is the investigating officer and P.W. 9 is the District Magistrate (Deputy Commissioner) who issued Ex. P. 23, the sanction for the prosecution on the basis of the report, ex. P 22. Though, the copy of the charge sheet and the statements are not referred to in Ex. P. 22, it is relevant to note that all the facts pertaining to the trap are contained in the report, Ex. P. 22 and on the basis of the said facts contained P.W. 9 has issued the sanction. He has stated that he has been satisfied that there is prima facie material to prosecute the accused. In the circumstances I do not find any irregularity even in the sanction granted by P.W. 9 to prosecute the accused.

Both the law and dharma have been developed with the roots of ethics, moral values and humanity. Though, the Courts feel satisfied that the criminal is punished in the cases like this, wherein the paltry amount of Rs. 150/- was received and that the accused has to undergo the sentence. If we consider the material life as the sea or ocean, the trap laid is just like catching a fish in the sea, wherein the whales live comfortably by swallowing many more fishes and are not brought under the clutches o flaw or it can be said that the existing law is not sufficient to bring the whales in the web. Hence, the Government has to bestow its attention towards the whales and amend the law. So that, whales are also brought within the clutches of law and save the people from the harassment and create an atmosphere of secured feeling. But the fact that there is no such law at present cannot be a concession in this case, where from the evidence the crime under the existing law is proved.

VIII. Accused caught red handed

In *State of A.P. v. R. Jeevaratnam*,[11] it was held that the Court is now set out briefly the evidence in the matter. P.W.1 i.e., the Complainant, has deposed about the demand made on 23rd December, 1991 and it being repeated on 30th December, 1991 when the respondent

11. 2004 (5) Supreme 686=2004 (2) ALD (Cri.)486 (SC)=2004 (2) ALT (Cri.) 283 (SC)

asked him to pay at least Rs. 10,000/- on 31st December, 1991 in a hotel in Hotel Apsara. He has deposed that he made a complaint to CBI and that CBI arranged the trap. The Complainant deposed that he had booked the room and he and P.W.2 went into the Room No. 202 was waiting. He deposed that he introduced P.W.2 as the group Financial Manager who had come from Bombay. P.W1 deposed that the respondent then asked whether he had brought the money demanded as a bribe. He deposed that he opened a rexin bag and offered the marked currency amounting to Rs. 10,000/- but that the respondent asked him to put the money into the briefcase and, therefore, he put the amount into the briefcase. PW.1 deposed that thereafter the respondent took the briefcase and was about to leave the room when he gave the prearranged signal and CBI nabbed the respondent. In cross-examination this version of P.W.1 could not be shaken at all. This evidence clearly established demand and acceptance of money.

This version is supported by the deposition of P.W. 2 was at that time the Assistant Director of Post Office at Visakhapatnam. He was asked by his Superior Officer to go to the CBI Office. He did not know the Complainant or the respondent. He deposed that P.W.1, himself and the CBI Officers along with marked currency went to Room No. 202 in Hotel Apsara. He deposed that a phone call was received from the reception and P.W1 went out and brought the respondent into the room. He deposed that he was introduced to the respondent as a Group Finance Manager of the Company. He deposed that P.W.1 mentioned that as agreed earlier money had been brought for payment of the first installment and that the rest of the amount would be paid afterwards. He deposed that P.W.1 asked the respondent to clear the file. He deposed that the respondent thereupon assured P.W.1 not to worry about the file and that he (the respondent) would see to it that the file is cleared within one month. P.W. 2 deposed that P.W.1 offered the money to the respondent, but the respondent asked him to place the money into his briefcase. He deposed that P.W.1 therefore placed the money into the briefcase and the respondent then picked up the briefcase and was going out of the room when he was apprehended pursuant to a pre-arranged signal.

The respondent was thus caught red-handed with the marked money in a briefcase carried by him. The presumption under Section 20(1) thus arose. The High Court unfortunately overlooks this aspect.

Even otherwise, the high Court was entirely wrong in coming to a conclusion that there was no proof of demand. The evidence of P.W.s 1 and 2, to the effect, that when the respondent came into the room he was told that P.W.2 was the group Finance Manager, who had brought Rs. 10,000/- as demanded and the further evidence that the respondent assured that the file would be cleared clearly establish that there was a demand and receipt of the money was as a bribe. On this evidence which has not been shaken in cross-examination, the offence under Section 13(1) (d) read with Section 13(2) had also been made out."

IX. Evidence doubtful

In *T. Ramesh Reddy v. State of A.P.,*[12] it was held that:

"The application, if any, to be filed by PW1 for the purpose of sanction of loan for purchase of electrical motor has to be processed through the Mandal Parishad Development Officer and on his instructions only the Inspecting Officer has to inspect the concerned land and verify the contents with reference to the applications and submit the same to him. Therefore, the approach of PW1 directly to the appellant cannot be said to be proper procedure, and the

12. 2010 (1) ALT (Crl.) 38 (AP) = 2010 (1) ALD (Crl.) 342 (AP) = 2009 (4) APLJ 244

case of PW1 that he went and approached the appellant for the purpose of getting signature on the application form, appears to be highly improbable in view of the fact that there was no direction / endorsement from the Mandal Parishad Development Officer to the appellant to inspect the land in question. There is no documentary evidence to show that either PW3 or PW5 directed the appellant prior to the date of trap to inspect the land of PW1 and submit a report. That procedure was not followed by PW1 and submits a report. That procedure was not followed by PW1. After the trap also PW1 and submit a report. That procedure was not followed by PW1. After the trap also PW1 had not obtained signature of concerned official directly without due process. There is evidence on record that after the trap, an endorsement was made by PW3 on a fresh application of PW1 directing the Village Development Officer for inspection and submit a report, and in pursuance of the written instructions, the concerned Village Development Officer inspected the land of PW1 and recommended for the loan.

Furthermore, if really the appellant demanded the amount for the purpose of signing on Ex.Pl-application, he would have accepted the money when offered by PW1 in the house located in the first floor of the building. When the doors of the house of the appellant were opened by his wife, the accused came sometime later and specifically questioned PW1 whether he brought the amount. When PW1 nodded his head in affirmative, he would have accepted the money then and there. There was no need for him to go into the house, take some files and come down to ground floor. That apart, the place where PW1 and the appellant were standing was visible to the trap party who were in vantage positions. This was admitted by PW2 that the movements of PW1 were visible from the vantage positions taken by the trap party. In such a case, PW1 keeping the amount in the dash board of the scooter, would be visible to the trap party members. But, PW2 categorically stated that none of the trap party members witnessed the alleged transaction of the accused opening the dash board of the scooter and directing PW1 to keep the amount in it. Similarly, Pw1 also admitted that Anti Corruption Bureau people were able to see while he was talking with the appellant near the scooter, such is the case, PWs. 2 and 6 would have definitely stated that the accused opened the dash board and kept some papers and thereafter PW1 kept MO5 in the dash board. The conversation between PW1 and the appellant might not be audible to them, though the scene was visible. Further, it is in the evidence that in the first instance, the appellant kept some papers in the dash board and thereafter PW1 kept the amount in the dash board. But, all the currency notes were found in the middle of the papers as seen from ExP8 – post trap panchanama as well as the evidence of PW2 coupled with the evidence of PW6. It is not the case of PW1 that he kept MO5 currency notes in the middle of the papers.

Another important aspect is that if really PW1 kept the amount in the dash board at the instance of the appellant, the appellant would have signed on the application then and there itself or at any rate PW1 would have insisted the appellant to sign on the application After keeping the amount, he gave pre-arranged signal and the trap party took the appellant to his house. At that time, he would have informed to the trap party including PW2 and others, about his keeping the amount in the dash board of the scooter at the instance of the appellant. He did not inform the same to the trap laying officer. Instead, he allowed them to go to upstairs of the residential building of the appellant. So, all these circumstances indicate that the sequence of the events allegedly took place, appears to be improbable. If really the accused had received the amount, his conduct and behavior would be otherwise. On the hand, the spontaneous explanation given by him would clearly go to show that he-does not have any knowledge about the currency notes that were found in the dash board.

X. Standard of proof in trap case for taking bribe

In State of Kerala v. C.P. Rao.,[13] it was held:

"In the background of these facts, especially the non-examination of CW!, was found very crucial by the High Court. The High Court has referred to the decision of this Court in Panalal Damodar Rathi v. State of Maharashtra,[14] wherein a three-Judge Bench of this Court held that when there was no corroboration of testimony of the complainant regarding the demand of bribe by the accused, it has to be accepted that the version of the complainant is not corroborated and, therefore, the evidence of the complainant cannot be relied on. In the aforesaid circumstances, the three-Judge Bench in Panalal Damodar Rathi case, held that there is grave suspicion about the appellant's complicity and the case has not been proved beyond reasonable doubt.

In *C.M. Girish Babu v. CBI*[15]*2.*

(2009) 3SCC 779; (2009) 2 SCC (Cri) 1.

this Court while dealing with the case under the Prevention of Corruption Act, 1988, by referring to its previous decision in Suraj Mal v. State (Delhi Admn.),[16] held that mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of eh prosecution against the accused. In the absence of any evidence to prove payment of bribe or tow show that the accused voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

In a subsequent decision of this Court also under the Prevention of Corruption Act, in A. Subair v. state of Kerala,[17] this Court made certain pertinent observations about the necessity of the presence of the complainant in a bribery case. The relevant observations have been made in paras 18-19 which are quoted below:

"18. The High Court held that since the special Judge made attempts to secure the presence of the complainant and those attempts failed because he was not available in India, there was justification for non-examination of the complainant.

19. We find it difficult to countenance the approach of the High Court. In the absence of semblance of explanation by the investigating officer for the non-examination of the complainant, it was not open to the courts below to find out their own reason for not tendering the complainant in evidence. It has, therefore, to be held that the best evidence to prove the demand was not made available before the Court."

Those observations quoted above are clearly applicable in this case. In the context of those observations, this Court in SCC para 28 of A. Subair, made it clear that the prosecution has to prove the charge beyond reasonable doubt like any other criminal offence and the accused should be considered innocent till it is proved to the contrary by proper proof of demand and acceptance of illegal gratification, which is the vital ingredient to secure the conviction in a bribery case. In view of the aforesaid settled principles of law, we find it difficult to take a view different from the one taken by the High Court.

13. 2011 (6) SCC 450.
14. (1979) 4 SCC 526; 1980 SCC (Cri.) 121
15. (2009) 3SCC 779; (2009) 2 SCC (Cri) 1.
16. (1979) 4 SCC 725; 1980 SCC (Cri.) 159
17. (2009) 6 SCC 587; (2009) 3 SCC (Cri.) 85

In coming to this conclusion, we are reminded of the well-settled principle that when the Court has to exercise its discretion in an appeal arising against an order of acquittal, the Court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in an order of acquittal has been very succinctly laid down by a three – Judge Bench of this Court in Sanwat singh v. State of Rajasthan,[18] Subba Rao . J (as His Lordship then was) culled out the principles as follows (AIR pp 719-20 para 9).

The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarupa case, Sheo Swarup v. King Emperor,[19] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (I) 'substantial and compelling reasons', (ii). 'good and sufficiently cogent reasons', and (iii). 'strong reasons', are not intended to curtail the undoubtedly power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified.

XI. Concluding Remark

The foregoing cases reveal that there this is a long-drawn legal process to punish the offender under the PC Act. However the seeds of change have already emerged, spawning new political alternatives such as the "India against Corruption" movement. The ultimate result is the new Legislation The Lokpal and Lokayuktas Act, 2013 assented by the President on 1st January 2014[20]. Which The country needs a speedy overhaul of its archaic laws combined with installation of a robust machinery to strictly implement the laws. This step also involves strengthening the oversight and investigative bodies such as Central Bureau of Investigation, the state anti-corruption bureaus etc., along with changing their reporting structure through a standard procedure. It is painful to note that in India in spite of having resource of potential and dedicated persons, combating against the prevalent corruption is very dismal.

18. AIR 1961 SC 715 (1961) 1 Cri. L.J. 766 (1961) 3 SCR 120, At SCR p. 129
19. (1933-34) 61 IA 398
20. Act No 1 of 2014..The Bill passed by Lok Sabha on 27th December,2011 and Rajya Sabha on 17th December,2013 and amendments made by Rajya Sabha agreed by Lok Sabah on 18th December,2013. The new Act yet to be enforced by the Central Government by Notification in the Official Gazette

Copyright Protection with Reference to the Music Industry in the Light of the Amendments in the Indian Copyright Act, 2012

Manveen Singh *

"Music is spiritual. The music business is not."

-Van Morrison

Abstract

The issue of Musical Copyright has become one of the breakthroughs in the recording technologies in the 21st century. The creative minds behind musical works are often deprived of their fair share of royalties generated via means of incorporation of their work in cinematographic films or through life performance. This paper is an attempt to look into recent amendment of The Copyright Act in the year 2012 in the line with WIPO.

I. INTRODUCTION

Music is a quintessential copyright industry resting on the pillars of creative talent and highly specialized assets. Although the modern music industry can be traced back to the turn of the twentieth century when breakthroughs in recording technology meant that live performance was in line to be replaced by reproduction as the heart of the industry, its existing shape can be attributed to the soaring incomes and personal experimentation in the post-war globalized era.[1]

The entertainment industry dating back to 1896 in New Orleans, (Louisiana) in the USA has come a long way. The first permanent movie theatre in the world, the Vitascope Hall remained open for two years. That was followed by China in the form of Daguanlou movie theatre in Beijing which is still in operation; thereby making it the world's longest running theatre. India, too, within the first decade of the twentieth century, had a bourgeoning music industry.[2] The entitlement of music composers being initially limited to the live performances of their work changed over the course of the twentieth century with the technological developments taking shape.[3] Neighbouring copyrights were issued in the form of sound recordings and the musical copyright having been originally designed to accord protection to sheet music expanded to embrace mechanical rights in sound recordings and synchronization rights in cinematograph films and video soundtracks, in addition to performance rights. It is these neighbouring rights

* Senior Research Fellow, Jindal Global Law School, Sonipat (Haryana).

1 Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul-Wright, 'Copyrights, Competition and Development: The Case of the Music Industry' (2000) UNCTAD / OSG / DP / 145 <http: // unctad.org / en / docs / dp_145.en.pdf > accessed 10 July 2013.

2 Jon M Garon, 'The Heart of the Deal: Intellectual Property Aspects in the Law and Business of the Entertainment' (2012) 17 Journal of Intellectual Property Rights 443.

3 Andersen, Kozul-Wright and Kozul-Wright (n 1) accessed 10 July 2013.

that form the basis for the collection of royalties.

The exclusive control over the reproduction and distribution rights in a musical copyright usually vests in the author but it might be subject to a transfer. A musical composition, therefore, might see a transfer ownership in the original composition to a publisher or in the case of a sound recording, to a record company. The future income flows are contingent upon the popularity of the musical composition. Copyright in music, therefore, is reflective of a complex case of joint ownership involving the authors or the music composers, the publishers, the record labels and other similar entities leading up to the commercialization of the musical product. Although such an arrangement might aid in maximizing rents, it also gives rise to problems with regard to the unequal sharing of benefits.[4]

More often than not, the creative minds behind musical works are deprived of their fair share of royalties and revenues generated via means of incorporation of their works in cinematograph films or via live performances. This is attributable to the assignment of copyright in such underlying works in cinematograph films and sound recordings by the lyricists and the composers.[5]

The copyright laws of the most nations have long been favouring the film producers and the record labels as opposed to the lyricists and the song composers; India being one of them up until recently when it amended its *Copyright Act* in the year 2012, bringing it in line with the World Intellectual Property Organization (WIPO) copyright treaties as well as declaring the song creators as owners of copyright; in the process putting an end to the practice of assignment of copyright in the underlying works in films and sound recordings.[6]

The latest amendment in the *Indian Copyright Act*, 2012 in terms of the distribution of royalties and the introduction of the Digital Rights Management (DRM) protection measures forms the main focus of this paper. The paper also seeks to examine and to explain the existing state of copyright protection for the creative artists in the Indian music industry, in the light of the amendments made in the *Indian Copyright Act*, 2012 with the provisions relating to royalty distribution and Digital Rights Management being at the heart of the analysis.

II. THE INDIAN COPYRIGHT LAW AND MUSICAL WORKS

India is home to one of the oldest and the biggest music industries in the world with an estimated size of almost Rs. 1000 Crores. Despite its huge size and hefty revenues, the financial turnover of the industry has witnessed a rampant decline in the recent times, largely attributable to the piracy plaguing the industry. The music industry's revenues in 2007 were to the tune of $ 606 million, in stark contrast to the Indian film industry which is valued at a reported $2 billion. The two industries combined form the backbone of the entertainment industry and also, are interlinked amongst themselves. Within the music industry, operate lyricists and composers who come up with songs that form the lynchpin of Indian films. Up until the latest amendment in the *Copyright Act*, composers and lyricists received a negligible share of the royalties for the work they did for Indian films. In the landmark case *IPRS* v. *Eastern Indian Motion Pictures Association and Ors.*[7] (also known as the "*Eastern Indian Motion Pictures*

4 Ibid.

5 Vidhi Agarwal and Annu Sharma, 'The Copyright (Amendment) Act, 2012 < http:// www. legalera.in / news-deals / articles - of - the - week / item / 6853 - the - copyright -amendment - act - 2012> accessed 13 November 2013.

6 Nyay Bhushan, 'Indian Copyright Act Amendments Give Music Artists Ownership Rights' (billboardbizz, 25 May 2012) <http: // www. billboard. com / biz / articles / news / global / 1095517 / Indian - copyright - act - amendments - give - music - artists -ownership - rights> accessed 10 October 2013.

7 1977 AIR 1443.

Judgment"), the Hon'ble Supreme Court of India had held that: "the producers of a cinematograph film are the first owners of the copyright in the musical and lyrical works and no copyright subsists in the composer of the lyric or music so composed, unless there is a contract to the contrary between the composer of the lyric or music and the producer of the cinematograph film." The authors had not been getting their dues and neither was their work being accorded the recognition that it deserved. Besides hiking the royalty rate for authors, composers and lyricists, this latest amendment also comes in conformity with the international treaties so that Indian Copyright stands to be protected abroad.

Though there had been amendments brought about in the *Indian Copyright Act* in the past to keep up with the technological changes, some of the biggest names in the Indian film and music industry, most notably, renowned lyricist and screenwriter Javed Akhtar[8], had expressed their discontent at the way music copyright infringement had been dealt with. With the growing passage of time, the top brass in the Indian music and film industry became more aware of the copying of previously copyrighted songs and peers no longer seem to be holding back from voicing their concern regarding the increasing violations. The coming to light of the fact that existing works are being infringed by collaborators casted a negative shadow of the creative output of the Indian composers and further strengthened the view that profit is more important than producing an original and creative piece of work. The increasing awareness regarding copyright infringement in the Indian film industry triggered the need to inject some originality in Indian film music.[9]

It was felt that the growing awareness of copyright infringement in the Indian film and music industries would give some much needed impetus to the importance of copyright protection and thereby allow the law enforcement officials and agencies to safeguard the artists' interests but it failed to yield the desired outcome. Furthermore, the producers' lobby has been standing in continuous opposition of the 2012 Amendment. Even though the latest amendment has been successful in bringing about positive effects for the creative artists as well as confirming to international standards, the term "equal rights" to lyricists and composers and with respect to royalties when there are different owners to a single piece of work has been defined very vaguely by the amendment. Not only are there problems with respect to the 2012 Amendment but also the Indian legal structure which does not enforce the copyright laws in the most stringent of ways.

The monitoring of copyright infringement is one of the most important aspects of copyright protection but more often than not the copyright infringers have been successful in escaping from the clutches of criminal enforcement agencies. Furthermore, the courts in India consider the IPR cases as low-priority offences and the entertainment industry is at liberty to do business on its own terms. That has caused major impediments in the government's efforts to enforce intellectual property rights and even though copyright infringement is enlisted as a criminal offence under the *Indian Copyright Act*, the ineffective enforcement of property rights has halted the entire process.[10] It shall, therefore, be pertinent here to undertake a detailed analysis of this latest amendment in the *Indian Copyright Act* and how it stands to effect the existing

[8] Javed Akhtar is a member of India's Upper House of Parliament and has been instrumental in lobbying for the amendments.

[9] Harini Ganesh, 'The Need for Originality: Music Infringement in India' (2011) 11 John Marshall Review of Intellectual Property Law 169.

[10] ibid.

state of things in the Indian entertainment industry and more so the Indian music industry.

III. THE *INDIAN COPYRIGHT ACT*- THE AMENDMENT OF 2012

Digitization was a global phenomenon and by the end of the twentieth century, India, too, felt its impact. Developments in information technology coupled with the availability of digitized works made it necessary for copyright owners to protect their works by resorting to new and effective mechanisms.[11] In the light of the fact that songs have for long dominated the Indian Film Industry, the *Copyright (Amendment) Act*, 2012 aims to correct the imbalance in the existing copyright law which has long been favouring film producers and record labels as opposed to the song creators and bringing it in harmony with international as well as World Intellectual Property Organisation (WIPO) norms. In other words, bring it in conformity with the "Internet treaties", that is, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Over the course of history, film producers in India had been working on a work-for-hire basis and the song-writers, composers and singers were hired for set fees which deprived them of the revenues and income from other supplementary sources such as cover versions and ringtones. However, under the *Amended Act*, the authors or song creators have been declared as owners of the copyright and it can no longer be assigned to the producers. Furthermore, each time a work of art is broadcasted, the radio and TV broadcasters are to mandatorily pay a royalty to the copyright owners.[12]

The amendments also had the backing of CISAC - the International Confederation of Societies of Authors and Composers, with its President, the late Robin Gibb issuing an appeal to the Indian Government. In a statement issued in 2010, Gibb said-

> "Movie music in India is a big business and it's unacceptable that the composers and lyricists who make the music don't benefit from the success of their works because of an out-dated system. Indian producers and record companies clearly don't want to share their royalties with creators, but the Indian Parliament needs to know that this is not the norm elsewhere."

Commenting on the latest amendment in the existing copyright law, the President of Sony Music for India and the Middle East said in a statement-

"This Amendment is an extremely positive move and we are very supportive of this bill[13]. We are delighted that going forward the composers and lyricists will get a share in royalties. This was long awaited and we believe this will help the overall artist development and align us with global practices . . . This is a matter between two businesses and should be negotiated between themselves."[14]

The scope of the latest amendment extends well beyond the internet treaties and is bound to have a revolutionary impact on the music and film industry.[15] The music-related amendments can be classified into the following categories:

(i) Amendments relating to rights in cinematograph films and sound recordings.
(ii) Amendments relating to WCT and WPPT.
(iii) Amendments pertaining to authors' rights with respect to mode of assignment of

[11] Arathi Ashok, 'Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment' (2012) 17 Journal of Intellectual Property Rights 521.
[12] Bhushan (n 6) accessed 10 September 2013.
[13] The Copyright Amendment Bill, 2010.
[14] Bhushan (n 6).
[15] Agarwal and Sharma (n 5) accessed 22 October 2013.

copyright and the right to royalties.

(iv) Amendments relating to the protection of technological measures.

(v) Amendments relating to protection of Digital Rights Management Information.[16]

The above changes brought about by the latest amendment in the Copyright Act are dealt with in detail below.

IV. Rights in Cinematograph Films and Sound Recordings

The amendment has affected a lot of changes lending clarification to the rights in cinematograph films and sound recordings. Under Sections 14(d)(i) and 14(e)(i) of the Act, it has been made clear that the right to make copies includes 'the storing of the work in any medium by electronic or other means.' The right with respect to the storage of work becomes even more relevant in the present state of digital technology that involves transmitting digitized works over the internet resulting in the creation of transient copies at several different locations including in the user's computer. In essence, the 'right to storing' of works has been brought under the scope of copyright protection.[17]

Another significant change incorporated in the existing Act has been the addition of the word 'performance' to the definition of 'communication to the public'[18]. It flows as a consequence of the new rights granted to the performers and is instrumental in protecting works on the web and this protection has now been extended to performances as well.

V. Amendments Relating to the WIPO Copyright Treaty and the WIPO PPT

Under Section 14 of the Amended *Copyright Act*, the word 'hire' has been replaced by 'commercial rental' in the provisions relating to cinematograph films and sound recordings so as to allow the 'meaning of copyright' to include within its ambit, both selling and rental rights of copies of films and sound recordings. 'Commercial Rental' rights have been provided for under the various treaties; Article 11 of the TRIPS Agreement, Article 7 of the WCT and Article 9 of the WPPT, had all made it obligatory to provide for 'commercial rental' rights. Up until the latest amendment, Section 14 of the *Copyright Act* provided only for the commercial rental of computer programmes. The term has now been extended to both sound recordings and cinematograph films. The insertion of the term 'commercial rental' has elucidated the fact that this right does not stand applicable to non-commercial activities of giving on 'hire'. This has proved to be instrumental in providing better access to works.[19]

VI Assignment of Copyright and the Right to Royalty

It has been well documented by the Amendment that the film performers as well as authors of some of the underlying works utilized in cinematograph films and sound recordings shall possess a non-assignable right to receive continuing royalties for any use that that is made of their work or in case of live performances irrespective of the fact that the copyright in those works might have been assigned or that they might not be entitled to any enjoyment of the performers' rights.[20]

[16] Zakir Thomas, 'Overview of Changes to the Indian Copyright Law' (2012) 17 Journal of Intellectual Property Rights 324.

[17] Thomas (n 16).

[18] The Indian Copyright Act, 1957, s 2(2)(ff).

[19] Thomas (n 16).

[20] Ibid.

VII. Section 17 and the New Proviso

Section 17 of the *Copyright Act* of 1957 enunciates the author of a work as also the owner of the copyright vesting in the work. There are several exceptions to this general rule, mentioned under the first proviso to the section. A second proviso has been inserted by the Amendment, granting immunity to the "right" of the authors of literary, dramatic, musical and artistic works incorporated in cinematograph films from clauses (b) and (c) of Section 17[21]. Since the proviso has not been numbered, therefore, it seems that the intention of the drafters was to make it applicable to the first proviso in its entirety rather than solely to Sub-section (e) of the first proviso. There is a certain level of ambiguity with regard to the language used in the newly added proviso as the word "right" has been used not specifying as to which right of the author has been referred to. This leaves room for various interpretations; the most feasible one being that the word "right" referred to in the second proviso does not imply right to receive royalties, rather it stands for the copyright itself or the "ownership" right. A closer look at the proviso makes it clear that the "right" of the author of a work incorporated in a cinematograph film is immune from the impact of clauses (b) and (c). In order to ascertain the "right" as mentioned in the second proviso, it is essential to identify the manner in which clauses (b) and (c) are likely to impact the right of the author.[22]

In the case of *Indian Performing Rights Society* v. *Eastern India Motions Pictures Association*[23] (The EIMPA Case), the provisos (b) and (c) of Section 17 were interpreted by the Supreme Court as being applicable to cinematograph films as well as the works incorporated in the film with the effect that the default ownership of copyright would shift from the author to the producer. Thus, adherence to the ruling would vest the ownership of copyright even in the underlying works with the producer instead of the creator. It shall be pertinent here to discuss the EIMPA case since it has been instrumental in the interpretation of the new proviso.

VIII.The EIMPA Judgment

Upon its incorporation in 1969, the Indian Performing Right Society or the 'IPRS', had claimed royalties from cinema halls by way of publication of its tariffs for the exhibition of films embodying lyrics as well as music created by its members. To this end, the right to ownership over the literary and musical works was asserted by the producers (while acting through Eastern India Motion Pictures Association (EIMPA) and other associations) based on the commissioning of works and consequently the tariff stood challenged before the Copyright Board. Furthermore, the producers were supported in their claim by the cinema hall owners.

The Copyright Board, in 1973 upheld the tariffs while at the same time maintaining literary and musical works as not being covered under Section 17(b). Furthermore, the authors were to retain their copyrights in the absence of lack of substantial evidence in favour of the producers being assigned the authors' copyright.[24] However, the decision of the Copyright Board was reversed by the High Court of Calcutta in 1974[25] and the authors were held not to be the owners of the copyright in the underlying work and thereby precluded from assigning their copyright. The Court in its ruling vested the producer of a cinematograph film with the ownership rights in all works allied with the film under Section 17(b). Furthermore, the Court

21 Clause (b) is applicable to literary, dramatic or artistic works while clause (c) applies to all kinds of works.
22 Udit Sood, 'The Touch of 'Jadoo' in the Copyright (Amendment) Act, 2012: Assessment of the Amendments to Sections 17, 18 and 19' (forthcoming).
23 AIR 1977 SC 1443.
24 Sood (n 22).
25 Eastern India Motion Pictures Association v. Indian Performing Right Society, AIR 1974 Cal 257.

held that the copyright in literary and musical works as incorporated in the cinematograph films was not owned by IPRS and it could not lay its claim to royalties.

On the matter being brought before the Supreme Court of India, it was argued on behalf of the producers and cinema halls that despite the works being commissioned for incorporation in the soundtrack of the film, the authors (acting through IPRS) were not subject to payment of any royalties and that the application of Section 17(b) extended to the component parts of the film and was not restricted to copyright in the film alone. Since there were no executed assignment deeds for interpretation, the Supreme Court was faced with the scenario of determining copyright ownership between the producer and the author in the underlying works. The Court, relying on Sections 17(b) and (c) pronounced its decision in favour of the producers and held that the producer was the owner of the copyright in the literary and musical works incorporated in a cinematograph film. However, a license shall have to be availed from the author in order to exploit the literary or musical works otherwise than as part of the film. The ruling left the legal community as well as the industry baffled, to the extent that the Standing Committee Report on the *Copyright Amendment Bill*, 2010 acknowledged that wrongful exploitation of the authors' works by the producers was encouraged by the judgment.[26]

The upshot of the ruling for the industry was that absolute ownership over copyright was asserted by the producers of cinematograph films in the works commissioned by them. All that the authors of commissioned works incorporated in films received was an initial commission and were deprived of the independent commercial exploitation of their works. The problem posed by this judgment was sought to be rectified by the Amendment to Section 17 and as per the observations of the Standing Committee Report[27], the objective of the Amendment was to ensure that the authors of underlying works in cinematograph films were not deprived of their ownership rights in such works by an erroneous reading of Section 17, as was the case in the EIMPA judgment.[28]

Thus, the latest Amendment will go a long way in resurrecting the ownership rights of the authors of certain kinds of underlying works incorporated in cinematograph films that had so far been divested of their rights.

IX. The New Provisos to Section 18

The authors' right to royalty in terms of underlying works in films and sound recordings has been dealt with in the new provisos that have been inserted in Section 18 of the Act which deals with the right to assign copyright in an existing work by the owner or in a future piece of work by the prospective owner.[29] The first of the three provisos added to Section 18(1) provides that no assignment of the exploitation rights of works incorporated in films and sound recordings shall have application to any mode of exploitation that was not in existence or was unknown at the time of assignment. Under the second proviso, an author of a literary or musical work incorporated in a film is prohibited from assigning or relinquishing the right to receive royalties at par with the assignee. Similar to the case of cinematograph films in the second proviso, under the third proviso, authors of literary or musical works incorporated in sound recordings are prohibited from assigning or relinquishing the right to receive royalties at par with the assignee.[30]

[26] Sood (n 22).
[27] The Standing Committee Report on The Copyright Amendment Bill, 2010.
[28] Sood (n 22).
[29] Thomas (n 16).
[30] Sood (n 22).

These newly inserted provisos to Section 18 of the *Amendment Act* have been effective in strengthening the position of authors in the case of new modes of exploitation of work being discovered. Gone are the times when only video cassette recorders used to be played. The dawn of internet technology has witnessed new modes of exploitation being adopted which have made the exploitation rights of the authors more vulnerable than ever.

X. Section 19: The Addition of Sub-Sections (8), (9) and (10)

The requisites of a valid assignment of copyright are detailed under Section 19 of the Act. Three new sub-sections related to assignment of copyright with regard to copyright societies, cinematograph films and sound recordings have been incorporated in the section by the Amendment.

Under Section 19(8), copyright societies have been afforded protection against any further assignment in copyright already assigned to such societies by rendering such an assignment as void. The objective of the legislature was the establishment and protection of a separate channel for the flow of royalties with regard to literary or musical works incorporated in a cinematograph film through the medium of a copyright society.

Sections 19(9) and 19(10) incorporated by the Amendment stand complimentary to the provisos inserted in Section 18(1) and provide that the right of the author to claim royalties in case of utilization of the work other than by means of its incorporation in a film or sound recording, shall remain unaffected by the assignment of copyright in such work for making a cinematograph film or sound recording respectively. With the introduction of these sub-sections, the author of any work included in a cinematograph film or sound recording shall be entitled to an equal share of royalties and the consideration payable for the utilization of the work. It shall be pertinent to mention here that 'royalties' and 'consideration payable' have been clearly distinguished by means of the Amended Section 19(3).[31]

XI. Performers' Right to Royalty

In addition to the authors' right to receive royalties in respect of underlying works in cinematograph films and sound recordings, the 2012 Amendment has introduced a new Section 38A dealing with the right of the performers to receive royalties in case of the performances being made for commercial use. This shall entitle performers in films and sound recordings, predominantly the scriptwriters, lyricists and music composers who were earlier denied the fair share of revenues, to receive continuing royalties.[32]

XII. Calculation of Royalty

The other issue which has generated considerable amount of concern is the determination of the royalty payable. The 2012 Act is silent as to the entitlement of performers. It may be argued that Section 38A (dealing with the grant of right of royalties to performers) together with Section 39A (which provides for the application of licensing and assigning provisions to performers' rights) and Sections 18 and 19 (under which the authors of underlying works in films and sound recordings are granted a continuing right to royalties) give rise to the conclusion that performers, like the authors of underlying works, are entitled to an equal share of royalties. It however, remains to be seen whether or not this is the case.

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[31] Ibid.

[32] Nandita Saikia, 'New Film and Music Royalties under the 2012 Copyright Act' (Blogger, 25 May 2012) <http: // copyright. lawmatters. In / 2012 / 05 / new - film - and - music -royalties - under - 2012. html> accessed 17August 2013.

With regard to the authors of underlying works, there is lack of unambiguity as to the exact manner of calculation of royalties. Although the 2012 Act mandates that the royalties be shared on an equal basis between the assignor and the assignee of copyright, it offers little clarity as to the meaning of the same and there are several viable options for the distribution of royalties. The author of an underlying work in a cinematograph film or sound recording shall be entitled to a share of the total royalty received for the performance of the work. As such, royalty shall only be payable for the performance rights of the underlying work. For instance, if royalties accruing from the songs alone were to be considered, there could be two possible scenarios:

(1) There could be a possibility that the rights within a work are inseparable and the revenues generated by the song are indivisible. In such a situation, two options exist:

(i) The royalties would be shared equally between the assignee, the lyricist and the composer. The entitlement of each would be to the tune of 33.33% subject to the number of lyricists and composers; an increase in the number of people would inevitably bring down the shares of assignees and the authors.

(ii) The other possible interpretation of the provision could result in the assignee being entitled to a 50% share while the underlying authors jointly entitled to receive the remaining 50% of the music revenues. Thus, on the assumption that there is one lyricist and once composer, each shall be entitled to a 25% share of the royalties; an increase in the number of lyricists and composers bringing down the shares of both the lyricists and the composers.

It shall be pertinent to mention here that the royalties attributable to the music in the film shall be exclusive of the royalties from the film in which the song is incorporated or the sound recording of the song; each of which would be separate from the underlying works.

(2) The second possibility could be that the rights within a work are separable and the revenues generated by the song are divisible with regard to the rights. In such a situation again, two options exist:

(i) In the case of music rights: if there was a single composer, the assignee and the composer each would be entitled to a 50% share of the total revenue from the music right. In case of two composers, each of the two composers and the assignee would be entitled to a 33.33% share; an increase in the number of people bringing down the shares of both the composers and the assignees. While determining the shares with respect to the lyric rights, similar calculations would be made.

(ii) In the case of music rights: the other possible interpretation could be that in case there was a single composer, the assignee and the composer each would be entitled to a 50% share of the total music revenue. In case of two composers, the assignee would be entitled to a share of 50% while each of the composers would be entitled to a share of 25%; an increase in the number of people bringing down the share of the composers alone.

While determining the shares with respect to the lyric rights, similar calculations would be made.[33]

[33] Saikia (n 32) accessed 17 August 2013.
8 Journal of Intellectual Property Law and Practice 15.

Despite the existence and entitlement of a continuing right to royalty of the performers as well as the authors of underlying works in films and sound recordings, what is debatable is the mechanism for the distribution of this royalty and the amount payable.[34]

XIII. Protection of Technological Measures

Technological measures were adopted with the purpose of curbing the unauthorized use of copyright works created through the medium of internet technology. The WIPO Copyright Treaty (WCT) as well as the WIPO Performances and Phonograms Treaty (WPPT) provide for the protection of technological measures at the International level.[35] In order to bring the Indian Copyright Law in line with the provisions of the WIPO treaties, a new Section 65A was introduced by the latest Amendment in order to afford protection to the technological measures adopted by copyright owners for safeguard their rights over the work. Under the newly inserted Section, any person circumventing a technological measure shall be punishable with imprisonment as well as liable to a fine. The provision is not absolute and certain exceptions have been provided under Sub-section 2, most notably that the prohibition shall not apply to acts done for a purpose not prohibited by the Act.

The above addition to the *Copyright Act* is symbolic of Articles 11 and 18 of the WCT and the WPPT respectively. The technological measures are aimed at reducing the risk of infringement in the digital media. In order to counter the effect of technological measures, popularly known as TPMs or technological protection measures, certain circumvention techniques were developed. Such circumvention has been held to be a criminally punishable offence. The use of TPMs had a regulatory effect on the use of works permitted by law since the only way of making fair use of the works in the absence of the consent of the owner of the works was the circumvention of technology. In the aftermath of the prohibition on circumvention of technology, it was felt that the public interest might suffer as a result and hence, circumvention was allowed for certain specified uses under Sub-section (2) of Section 65A. It was stated in the Standing Committee Report on the *Copyright Amendment Bill*, 2010 that some of the terms in the newly added Section have been left undefined on purpose considering the difficulties faced by the developing countries in lending a definition to these terms.[36] It was further stated that the legislative approach followed in regard to Section 65A is to reduce the effect of legislative guidelines and enable the judiciary to evolve the law considering practical scenarios whilst at the same time keeping in mind the interests of the masses and facilitating public access to the work. What remains to be seen is what interpretation the judiciary will give to these terms.

XIV. Protection of Digital Rights Management Information

The term 'Digital Rights Management' (DRM) refers to the use of techniques for limiting access or control over protected intellectual property post its sale by the copyright holder. The introduction of DRM protection measures via the latest Amendment in the *Indian Copyright Act* has been largely attributable to the need to bring India's Copyright regime in line with the WCT and the WPPT.[37] The 2012 Amendment has inserted a new Section 65 B for the protection of Rights Management Information or RMI which includes within its ambit any information

[34] Ibid.
[35] Arathi Ashok, 'Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment' (2012) 17 Journal of Intellectual Property Rights 521.
[36] Thomas (n 16).
[37] Tarun Krishnakumar and Kaustav Saha, 'India's New Copyright Law: The Good, the Bad and the DRM' (2013)

inclusive of the names of the performers, information related to copyright and the ISBN number, which is primarily used for the identification or authentication of copies of a work or performance. The offence of removal or alteration of the RMI in a work has been dealt with under Sub-section (1) while Sub-section (2) provides for the liability of a person involved in the unauthorized distribution, broadcast or communication to public or marketing copies of the copyright work with the knowledge of the removal or alteration of the RMI. Such a person is held equally liable as the person involved in the removal or alteration. Unlike the Technological Protection Measures (TPMs) referred to in Section 65 A, there are no exceptions to this provision.[38]

The Amendment with respect to the introduction of Section 65 B in the *Copyright Act* is in conformity with Articles 12 and 19 of the WCT and the WPPT respectively, dealing with the rights management information. The developments in digital technology have led to the management of copyrights by way of online contracts. Since these can be removed, the intention of the legislature while amending the Act was to prevent the unauthorized removal of RMI and the subsequent distribution of the work, performance or phonogram sans the RMI. The introduction of provisions safeguarding the technological measures and rights management information, in line with the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) was with the objective of averting copyright infringement in the digital world. The film and music industry is likely to benefit from the introduction of Sections 65 A and Section 65 B in its fight against piracy.[39]

XV. CONCLUSION: THE DAWN OF A NEW ERA AND THE ROAD AHEAD

The modern day music industry, based on creative expression, stands to offer substantial growth and the potential to become one of the most prolific export sectors of the developing world; Indian music industry being no different. In this regard, the constant evolution and implementation of copyright protection measures ensuring adequate protection to the contributing artists has become imperative. The Indian Copyright (Amendment) Act, 2012 is a step towards achieving that end. In what can be termed as a major victory for the lyricists, composers and musicians plying their trade in the Indian film and music industries, these artists now have a superior ownership control over their works courtesy of the latest amendment.[40] It is heartening to see that the lyricists and composers having so far suffered at the hands of music companies and producers shall finally be getting their fair share of the royalty pie[41]. This coupled with the changes made in the provisions relating to the assignment and grant of licences, are likely to aid in streamlining business practices.

Besides the stipulations in terms of the distribution of royalties, the other important change brought about by the Amendment has been in terms of the DRM. Amidst constant developments in internet technology, the introduction of the DRM protection is no doubt a step in the positive direction but its enforcement on a larger scale might be hampered by an undertrained, overworked and ill-equipped criminal justice system. Thus, whether or not it actually ends up stanching the levels of internet piracy in India remains to be seen. After all, a case of homicide

[38] Thomas (n 16).
[39] Ibid.
[40] Bhushan (n 6) accessed 10 July 2013.
[41] Agarwal and Sharma (n 5) accessed 22 August 2013.

is more than likely to be given priority over a case under Sections 65A or 65B by a police force that is already under-staffed.[42]

A year on and most of these amendments are yet to witness practical results. The biggest stumbling block in their path is the matter of- *Indian Performing Right Society* v. *Aditya Pandey &Anr.*[43], currently pending before the Supreme Court of India. What is sought to be determined by the judgment is whether or not the right of exploitation of derivative works in the form of cinematograph films and sound recordings carries with it the right of exploitation of underlying original works in the form of literary, dramatic, musical or artistic works and furthermore, whether such underlying original works require licences for their exploitation. The Amended Ss. 17, 18 and 19 are also likely to be dealt with by the Court and it is strongly believed that the lyricists and composers are unlikely to gain from these amendments in any real way up until the ruling.[44]

One could argue that the latest amendments in the *Indian Copyright Act*, 2012 effectively make it a social justice driven legislation and although it might not survive judicial scrutiny, for the authors and the composers, it is odds on certain to mark the dawn of a new era; an era wherein they possess greater bargaining power even *de hors* statutory protection.

[42] Tarun Krishnakumar and Kaustav Saha, 'India's New Copyright Law: The Good, the Bad and the DRM' (2013) 8 Journal of Intellectual Property Law and Practice 15.
[43] SLP (C) 21082-83/2012.
[44] Sood (n 22).1

Consumer Disputes Redressal Agencies Established Under The Consumer Protection Act, 1986: Role of the National Consumer Dispute Redressal Commission in the Growth and Development of Consumer Protection Law in India

Pooja Chugh *

Abstract

The passing of the Consumer Protection Act in the year 1986 by the Parliament of India brought in India Consumer Justice in the doorsteps of the people. The Consumer Dispute Redressal Mechanism under the said Act envisaged a three tier redressal mechanism in India. The Apex Institution in the hierarchy of the three tier consumer dispute redressal mechanism is National Consumer District Redressal Commission. This paper has critically analysed the role of National Commission in protecting consumer rights as envisaged in the Consumer Protection Act, 1986.

I. INTRODUCTION

The enactment of the *Consumer Protection Act*, 1986 has been a step in the direction of bringing consumer justice to the door steps of the people. By way of passing this law, our country has attracted the attention even of some of the most developed countries in the world to the Three Tier Consumer Disputes Redressal Mechanism envisaged under this Act. This has indeed been considered nothing short of a revolutionary initiative by a developing nation plagued by various socio-economic problems, lack of access to justice being one of these. It may also be appropriate to mention here that the Consumer Disputes Redressal Agencies established by the government at the national, state and district levels have been vested with the jurisdiction concurrent with the established courts of law. According to the Hon'ble Supreme Court, the redressal mechanism established under the *Consumer Protection Act*, 1986 is "not supposed to supplant but to supplement the existing judicial system".[1]

Thus, the philosophy and the avowed object of the *Consumer Protection Act*, 1986 is to provide expeditious justice to the aggrieved consumers. Accordingly, the language and the procedure prescribed under the Act have been kept relatively simple and non-technical and free from the constraints of the *Court Fee Act* of 1870 and the *Suit Valuation Act* of 1887 as was emphasised in the famous case of *Premier Automobiles Ltd. Anr*. v. *Santosh Kumar*

* Ph.D. Student, Department Of Law, Guru Nanak Dev University, Amritsar

[1] Gurjeet Singh, The Law of Consumer Protection in India: Justice Within Reach, Deep and Deep Publications, 1996, pp. 63-64.

Awadhiya[2] As regards the background of the enactment of the *Consumer Protection Act*, 1986, one leading intellectual N. Krishnamurthy has described the entire scenario in the following apt words:

> Legal draftsmanship in India generally embark upon large number of sections, sub-sections, sub-clauses and provisos whenever a new Act is contemplated by the Government to regulate any field of public activity. Whether it is a tax law, company law, excise and customs law and so on, the popular notion of the framers of such legislation is towards a big size of the statute with hundreds of sections, sub-sections, sub-clauses etc. Fortunately, in the case of the present Act on this subject, the framers of law had restricted the total provisions to about 31 sections covering all aspects of consumer protection and its safeguards through statutory bodies. The language used in the Act is, by and large, simple and easily understandable. The brevity of the Act and its smallness in size do not by themselves give room for uncertainties and vagueness of the Act as a whole and there is a bold attempt to lay down a most simple procedure of enquiry and ultimate result which is free from any complex situations and rigours of pure law of evidence.[3]

The then Minister of Food and Civil Supplies, while piloting the Consumer Protection Bill in Parliament has made the following important observations:

> This Bill is a landmark in the field of socio-economic legislation of the country. The comprehensive Bill is in addition to and not in replacement of any other law on the subject of Consumer Protection. The Bill enshrines the rights of the consumers to be promoted and protected by the Consumer Protection Councils in the Centre and the States and Redressal Machinery at the National, State and District levels. The legislation intends to provide prompt and meaningful remedy for consumer grievances . . . .[4]

In line with the above mentioned two important discourses, the Hon'ble Supreme Court of India also explained the object and philosophy of the *Consumer Protection Act*, 1986 in the landmark case of *Lucknow Development Authority* v. *M.K. Gupta*[5] The apex court has made the following important observations:

> In fact the law [the law of consumer protection] meets the long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory . . . The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power to 'rob the rest' and the might of public bodies which are degenerating into store house of inaction where papers do not move from one desk to another as a matter of duty and responsibility and for extraneous considerations leaving the common man helpless, bewildered and shocked.[6]

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[2] I (1992) CPJ 218.

[3] N. Krishnamurthy as quoted by Gurjeet Singh, 1996, p. 64.

[4] As quoted in Prabhat Bag Factory v. United India Insurance, II (1991) CPJ 327, at p. 329.

[5] Lucknow Development Authority v. M.K. Gupta, (1993) 1 CTJ 929 (SC). It may be appropriate to mention here that the judgment handed down by the Apex Court in this case is no doubt the second judgment delivered by the Supreme Court of India in relation to the Consumer Protection Act, 1986, but for all intents and purposes this was the first one on the interpretation of the various provisions of the 1986 Act. The earlier judgment of the Supreme Court in the matter of Common Cause v. Union of India, (1993) 1 CTJ 678 (SC) was only in the nature of direction to the governmental authorities to establish the District Consumer Disputes Redressal Forums and the State Consumer Disputes Redressal Commissions and to provide the infrastructural support. For more details, see: S.S. Kumar, "Supreme Court on Consumer Protection", Consumer Protection and Trade Practices Journal, Vol. 1, 1993, pp. 213-217.

[6] Lucknow Development Authority v. M.K. Gupta, (1993) 1 CTJ 929 (SC), at p. 933.

All the above mentioned objects are sought to be promoted and protected by the *Consumer Protection Act*, 1986 in general and by the Consumer Disputes Redressal Agencies and the Consumer Protection Councils envisaged and established under the Act in particular.

II. THE NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION AS AN APEX INSTITUTION IN THE HIERARCHY OF THE CONSUMER DISPUTES REDRSSAL AGENCIES

In the hierarchy of the three tier consumer disputes redressal mechanism envisaged and established under the *Consumer Protection Act*, 1986, the National Consumer Disputes Redressal Commission is the at the apex level. The National Commission (as it is popularly called) is a unique institution having original, subject matter, appellate and the revisional jurisdiction. On the top of it, the authority of the National Consumer Disputes Redressal Commission extends to the whole of India.

Composition of the National Consumer Disputes Redressal Commission

According to section 20 of the *Consumer Protection Act*, 1986, the National Commission shall consist of:

(a) A person who is, or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President;

(b) Not less than four, and not more than such number of Members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely:

  (i) They must not be less than thirty five years of age;

  (ii) They must possess a bachelor's degree from a recognized university; and

  (iii) They must be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs and administration

It may be appropriate to mention here that there are two provisos annexed, one each to section 20(1)(a) and to section 20(1)(b) of the 1986 Act. The proviso to section 20(1)(a) says that no appointment under this clause shall be made except after consultation with the Chief Justice of India.[7] Similarly, the proviso to section 20(1)(b) says that not more than fifty per cent of the Members shall be from amongst the persons having a judicial background. Further, there is an Explanation which states that for the purposes of this clause, the expression "persons having a judicial background" shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level. However, a few categories of persons are disqualified from being appointed as members of the National Consumer Disputes Redressal Commission. Thus a person shall not be qualified for appointment as a member of the National Commission:

(a) If he/she has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or

(b) If he/she is an undischarged insolvent; or

(c) If he/she is of unsound mind and stands so declared by a competent court; or

(d) If he/she has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

[7] Inserted vide the Consumer Protection (Amendment) Act, 1993.

(e) If he/she has, in the opinion of the Central Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a Member; or

(f) If he/she has such other disqualifications as may be prescribed by the Central Government.

According to the *Consumer Protection (Amendment) Act*, 1993), every appointment made under Section 20 shall be made by the Central Government on the recommendations of a Selection Committee consisting of the following:

(a) A person who is a Judge of the Supreme Court to be nominated by the Chief Justice of India — Chairman

(b) The Secretary of the Department of Legal Affairs In the Government of India — Member

(c) The Secretary of the Department dealing with Consumer Affairs in the Government of India — Member

III. The Jurisdiction of the National Consumer Disputes Redressal Commission

The National Commission being the apex consumer disputes redressal agency in the hierarchy of the three tier consumer disputes redressal mechanism, has been vested with the pecuniary, the appellate and the revisional jurisdictions. These have been discussed in detail in the following paragraphs.

The Pecuniary Jurisdiction

According to section 21(a), subject to the provisions of the *Consumer Protection Act*, 1986, the National Commission shall have jurisdiction to entertain consumer complaints where the value of the goods or services and compensation, if any, exceeds rupees one crore. It may be appropriate to mention here, that in the *Principal Act* of 1986, the pecuniary jurisdiction of the National Commission was rupees ten lakhs.[8] However, by virtue of the passing of the *Consumer Protection (Amendment) Act*, 1993, the limit of the pecuniary jurisdiction was raised from rupees ten lakh to rupees twenty lakhs.[9] Later on when the *Consumer Protection (Amendment) Act*, 2002 was passed, the pecuniary limit was raised to rupees one crore.[10]

The Appellate Jurisdiction

Section 21 of the *Consumer Protection Act*, 1986 empowers the National Consumer Disputes Redressal Commission to entertain appeals against the orders of any State Commission. However, the procedure for filing the appeals has been laid down in the *Consumer Protection Rules*, 1987 framed by the Central Government.

The Revisional Jurisdiction

The National Consumer Disputes Redressal Commission has also been vested with jurisdiction for the purpose of ensuring that the State Commissions exercise their powers within the limits of jurisdiction fixed for them by the law. According to section 21(b), the National Commission shall have the jurisdiction to call for the records or pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised jurisdiction not vested

[8] For more details, see: The Consumer Protection Act (the Principal Act), 1986.
[9] For more details, see: The Consumer Protection (Amendment) Act, 1993.
[10] For more details, see: The Consumer Protection (Amendment) Act, 2002.

in it by law or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

After discussing about the composition and jurisdiction of the National Consumer Disputes Redressal Commission, one needs to know about actual working and performance appraisal of the Apex Institution in the hierarchy of the Three Tier Consumer Disputes Redressal Mechanism. Thus the complete focus of the present article is the National Consumer Disputes Redressal Commission, the apex body in the hierarchy of the three tier consumer disputes redressal mechanism. Having discussed the statutory provisions relating to each and every aspect of its functioning, I have attempted to discuss the role and decision-making of the National Commission in the arena of consumer protection. By examining the role of the National Commission in the light of some of the prominent cases decided by the latter, I have also tried to portray some of the challenges that are being faced by this apex body on the road to achieve consumer protection for all.

IV. ROLE PLAYED BY THE NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION THROUGH DECISION-MAKING IN THE ARENA OF CONSUMER PROTECTION LAW

By virtue of being the highest decision making body in the hierarchy of Three Tier Consumer Disputes Redressal Mechanism envisaged and established under the *Consumer Protection Act*, 1986, the National Consumer Disputes Redressal Commission has decided a large number of case on various issues. These, *inter alia*, are the issues stating alphabetically from airlines to telecommunications. However, the scope of the present paper being limited, I have discussed some of those prominent cases in the context of the role played by the National Commission and not the cases themselves. There are a few instances where the different State Consumer Disputes Redressal Commissions have given contradictory decisions and where the decision of the National Consumer Disputes Redressal Commission has been binding and the deciding factor to close the issue. Notwithstanding all this, the study and analysis of the case law relating to the decision making by the National Consumer Disputes Redrssal Commission has not only been highly interesting, it has equally been challenging, too. All said and done, the present researcher has learnt a lot while studying and analysing the decision-making by the National Commission as some of the decisions have indeed been the path breaking one as these decisions have certainly paved way for the future development and consolidation of consumer protection law and policy in India, something to be emulated not only by the neighbouring countries, but also by the western jurisdictions. I have discussed these decisions in the following paragraphs.

Advising and Counselling the Consumer Disputes Redressal Agencies

It may be interesting to note that Hon'ble Mr. Justice Ashok Bhan, the then President of the National Consumer Disputes Redressal Commission, while delivering the order of the Bench in the matter of *Sahara India Commercial Corporation Ltd*. v. *P. Gajendra Charry*[11] had done well to counsel the Consumer Courts to remain the boundaries of the *Consumer Protection Act*, 1986 and while dealing with the consumer disputes must not overlap. The context was that in the case which came up before the National Consumer Dispute Redressal Commission, the complainant had booked a house with the petitioner company and had paid a sum of Rs. 46,350/- as advance. Later, on account of financial difficulties he cancelled the booking and

[11] 2010 CTJ 768 (NC).

requested for the refund of the amount so deposited. The company refused to do so contending that as per clause 8 of the agreement entered in to by the parties, in the event of default by the allottee in paying the instalments, the company was entitled to forfeit 10 per cent of the total agreed amount of the house and it did so pursuant thereto. The complainant filed a consumer complaint. Both the District Forum and the State Commission directed the Company to refund the amount to the complainant with interest. The Andhra Pradesh State Commission, however, went a bit further and held that clause 8 of the agreement was not merely arbitrary but also an unfair trade practice and hence was unwanted.[12] In the order, Justice Ashok Bhan, the then President of the National Commission had observed that "Consumer For a are not the courts of plenary jurisdiction having the power either to strike down the provisions of the Act or have the power either to strike down the provisions of the Act or have the power of judicial review. Consumer Fora have limited jurisdiction and operate in the defined area only."[13]

Yet another Bench of the National Commission comprising Hon'ble Mr. Justice B.N.P. Singh and Mr. S.K. Naik noticed in *M.P. Housing Board* v. *Jagdish Prasad Mahesh*[14] that the Madhya Pradesh State Commission had overstepped its jurisdiction in reviewing its earlier order. The National Commission while reminding back the matter to the State Commission has observed and rightly so, that "it is not very well settled that neither the District Forum nor the State Commission enjoys the power of review."

It may be appropriate to mention that while the National Commission had done well to tell the Consumer Disputes Redressal Fora below to remain within their bounds and not to cross the *lakshmanrekha* earmarked in the statute itself, it had perhaps lost sight of the fact that the Presidents heading the Consumer Fora or the Commissions were, once upon a time, omnipotent and could pass any order, whatsoever. They seemed to have not realized that they had atleast now been under the new regime not to overstep. That it was so can be seen from the fact that as early as in 1994 even the Supreme Court of India had to unambiguously tell the Consumer Courts that they did not possess the unbridled powers. On 4th January 1994, a District Consumer Forum in Calcutta passed an interim order of injunction restraining the public issue of shares from being floated by Messrs Morgan Stanley Mutual Fund forgetting that the Consumer Courts had then no power to provide an injunctive relief. The result of this overstepping was the straight intervention of the Supreme Court of India which had to tell that District Forum to remain within limits as "there is no power under the *Consumer Protection Act* to grant an interim relief or even an ad-interim relief. Only a final relief could be granted." Law has to be read as it is written and not how the Judges would like to read. Cockburn C.J. had laid down this proposition very candidly as early as in (1878) 3 QBD 346 by observing that "the question for the court is not what the legislature meant, but what the language means, i.e. what the Act has said that it means."[15]

Launching of a Campaign Against the Old and Nearly Obsolete Legislations and Offering Pleas for their Repeal

Day in and day out, orders are being passed by the Consumer Disputes Redressal Agencies at the district, state and the national level in relation to the complaints of late delivery, non-

[12] S.S. Kumar, "Consumer Courts Must Remain Within Limits Counsels the National Commission", Consumer Protection and Trade Practices journal, Vol. 18, 2010, p. 97.
[13] id.
[14] 2010 CTJ 749 (NC).
[15] id.

delivery or damaged delivery of postal articles. Each one has been trying to pass illuminating judgments, sometimes running into several pages. Despite thereof, no one knows precisely as to what really the law on the subject is. Conflicting versions are handed down. In some cases, the postal authorities are totally exonerated on the ground that in handling the postal services they are only performing the statutory functions and not rendering service within the meaning of the *Consumer Protection Act*. In several other decisions, where the tilt towards the suffering consumer is noticed, the law is stretched to award a pittance of compensation to please the consumers irrespective of the fact how badly they suffer when their urgent documents are not delivered or delivered belatedly.[16]

Although there has been a spate of complaints against the postal authorities, the major obstacle in the path of the consumers for redressal of their grievances against them is Section 6 of the *Post Office Act*, 1898 and the postal authorities without fail put it in defence in all cases coming before the Consumer Courts. Ironically, at a time when accountability and reliability in the postal service sector is the need of the hour, the postal authorities by pulling out Section 6 of the archaic *Indian Post Office Act* of 1898 out of their hat have virtually managed to shield themselves from any action against them even for obvious lapses unless the consumer can prove that the negligence occurred due to a fraud or wilful act or default, which is a difficult task indeed.

Be that as it may, one is inherently concerned with the totally apathetic and lackadaisical attitude of the authorities who seem to be least bothered on such sorry state of affairs. It may be recapitulated that as early as on 24 January 1994, the then Hon'ble President of the National Consumer Disputes Redressal Commission Hon'ble Mr. Justice V. Balakrishna Eradi, while speaking at the National Convention of the Presidents and the Members of the State Commissions, Secretaries of the Union States Food and Civil Supplied Departments, had in his inaugural address, observed as under:

> The *Indian Post Office Act*, 1898 and the *Indian Railways Act*, 1890 are the two very ancient statutes enacted during the British colonial period, but they are still on our statute books as existing laws in force. It is expressly laid down in Section 6 of the *Post Office Act* and in a similar provision contained in the *Railways Act* that the post authority and the railway administration shall not be made liable to pay any compensation in the event of delay in delivery or loss of letters or other articles sent through post or of any goods consigned by rail. These provisions were enacted at that time to protect the interest of the imperialist British Government and they are totally out of tune with the altered state of things presently existing in the modern India. The existence of this statutory bar against the award of compensation is resulting in gross injustice to consumers. It is highly necessary that urgent steps should be taken for the repeal of these two anachronistic and obnoxious provisions.[17]

More than a decade and a half have gone by, but nothing tangible had happened nor does one expect anything from the politicians. However, it appears that only the consumer activists have to do something by launching a campaign to put an end to this indifference of the

[16] S.S. Kumar, "Post Office Act of 1898 Consign This Antique to the Archives", Consumer Protection and Trade Practices Journal, Vol. 18, 2010, p. 65.
[17] ibid.

administrators.

Resolution of Jurisdictional Issues in Case of Prevalence of the Parallel Proceedings Before the Consumer Disputes Redressal Agencies and the Civil Court

It may be quite interesting to note that in the recent past, a Division Bench of the Delhi High Court was concerned with an important issue of jurisdiction of the consumer courts in the writ petition No. 264 of 2009 in *Hindustan Motors Ltd*. v. *Amardeep Singh Wirk*.[18] The issue involved in the appeal before the Hon'ble Delhi High Court was whether the proceedings before the consumer forum should remain stayed and await the outcome of the proceedings involving similar issues pending before a civil court. In this case, Amardeep Singh had purchased a Mitsubishi Pajero vehicle manufactured by the Hindustan Motors Ltd. The vehicle met with an accident while being driven by Singh's brother who sustained fatal injuries. Contending that the vehicle had manufacturing defect, a consumer complaint was filed claiming compensation from the manufacturers. Mrs. Jatinder Wirk, the deceased's widow also filed a suit before the Delhi High Court claiming inter alia damages for negligence from the manufacturers. The State Consumer Disputes Redressal Commission, before whom it was pleaded that parallel proceedings must not be allowed to continue on the same cause of action, by order passed on 06 November 2007, declined to stay the proceedings before it. This was challenged by a writ petition filed before the Delhi High Court. It was contended before the Hon'ble High Court that the issues in both the proceedings were common and the continuation of both the proceedings could have a deleterious effect and could result in conflicting orders.[19]

By an order passed by a Single Judge of the Delhi High Court in the above writ petition, it was held that section 3 of the *Consumer Protection Act* could not simply imply that the rights created under the said Act could be curtailed on the ground of pendency of other proceedings. It was also held relying on judgments of the Supreme Court that existence of parallel or other adjudicatory Forums could not take away or exclude jurisdiction created under the *Consumer Protection Act*.

The Division Bench's ruling had been handed down after relying upon several judgments of the Supreme Court of India and if one reads the same carefully, barring the one namely that of Satya Pal Mohindra none other is concerning the parallel proceedings instituted in the civil court and the consumer forum. In this case too, the Hon'ble Supreme Court noticed that the consumer complaint was filed earlier than the civil court suit and also that the reliefs claimed in the two proceedings were different and hence it directed the consumer forum to continue with the complaint and decide it on merit. The other decisions quoted, cited and relied upon by and large relate to the wider scope of the jurisdiction and powers of the Consumer Courts set up under the *Consumer Protection Act*. Major thrust of the verdict of the Delhi High Court in this case was that the purport and the scheme of the *Consumer Protection Act* which had been emphasised unequivocally by the apex court in the case of *Secretary, Thrumurugan Cooperative Agricultural Society* v. *M. Lalitha and Others*[20] and in *Lucknow Development Authority* v. *M.K. Gupta*[21]. Keeping this objective and wider scope of the 1986 Act in view, the Division Bench of the Hon'ble Delhi High Court, in our view, ought to have directed the appellants to choose one of the two forums viz. the State Consumer Commission or the High

[18] 2010 CTJ 601 (Delhi High Court).
[19] S.S. Kumar, "Parallel Proceedings - One in Civil Court and Another in Consumer Court Confusion All Around', Consumer Protection and Trade Practices Journal, Vol. 18, 2010, pp. 87-88, at p. 87.
[20] 2004 CTJ 1 (SC).
[21]1993 CTJ 929 (SC).

Court. On the contrary, it had allowed both the proceedings to continue irrespective of the fact that conflicting results might ensue in the two simultaneous proceedings on the identical issues and same cause of action.

It was all the more incumbent in the case before the Delhi High Court to confine to the facts of the case before it and held in that case alone that because the two cases have been filed by different plaintiffs / complainants and the grievances are different, hence both the cases can continue. This is what the Hon'ble Supreme Court too did in the above mentioned Satyapal's case. However, the Delhi High Court had gone ahead to pass the sweeping order of general application that simultaneous proceedings could be filed on the same cause of action before the two different adjudicatory bodies. This decision would lead to a lot of confusion and would end in results which may not only be conflicting, but also absurd sometimes. One court may dismiss the suit, the other may allow substantial relief.[22]

It may be pertinent to state here that as early as in the year 1904, Farewell L.J. dealt with the above aspect in the case of *Japson* v. *James*[23] and observed that "the existence of concurrent jurisdiction renders very necessary the observant of a comity between those jurisdiction the disregard of which would lead to most unfortunate friction. It is a matter of great importance that there should be no conflict or clash of jurisdiction between two equally competent authorities", the judgment stated.

It may further be noted that the judgment of the Delhi High Court not relating or confining to the particular case before it but by laying the law applicable generally, will be binding to the National Consumer Disputed Redressal Commission and with the Seven Member Bench of the Supreme Court has stated authoritatively on 18 March 1997 in *L. Chandra Kumar* v. *Union of India*[24] as under:

> We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution constituting part of its basic structures. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution.

The resultant effect of all this would be that multiple suits and complaints may be filed and the consumer courts which even earlier were objecting to the forum-hopping, will not be able to raise any finger. Parallel proceedings may become the order of the day and the unscrupulous complainants may take advantage of where their benefit lies. This would be a totally undesirable situation and must have to be put an end to. The Supreme Court has repeatedly said that consumer courts are substituted courts and the aggrieved consumer can choose between a civil suit and consumer complaint but in no case file the same case in two courts simultaneously. Delhi High Court says otherwise.

The above judgment seems to have gone unnoticed. Has anyone in the apex National Commission and more particularly in the Union Consumer Affairs Ministry bothered to realize

[22] S.S. Kumar, 2010, p. 88.
[23] (1904) 77 LJ Ch. 824.
[24] (1997) SCC 1125.

that this judgment has to be reversed as it would bring in unpleasant consequences. If not so done, the stalemate will continue and the effect ultimately will be frustrating the very purpose of setting up the consumer courts.

Laying Down of the Guidelines and Norms for Determining and Awarding of Compensation to the Aggrieved Consumers by the Consumer Disputes Redressal Agencies

It is a matter of common knowledge and understanding that the National Consumer Disputes Commission is the apex body under the *Consumer Protection Act*, 1986. Its orders are followed by all the State Consumer Disputes Redressal Commissions and the District Forums, numbering more than six hundred or so. The law down by the National Commission has not only the guiding but the binding effect on the fora below. Obviously, therefore, it has to be consistent in its approach so as not to create confusion in any way. This is precisely what the National Commission has by and large been doing, notwithstanding a few digressions here and there.[25]

Section 14(1)(d) of the *Consumer Protection Act*, 1986 makes a provision for the award of compensation to the consumer for any loss or injury suffered by him due to the negligence of the opposite party. While interpreting section 14(1)(d) of the *Consumer Protection Act* in the case of *Consumer Unity and Trust Society and Trust Society, Calcutta* v. *The Chairman and Managing Director, Bank of Broda*,[26] the National Commission had observed:

> Under this clause, compensation can be awarded to a consumer only in respect of any loss or injury found to have been suffered by him, due to the negligence of the opposite party. It is of the essence of this provision that the loss or injury for which compensation is to be adjudged and awarded should be found to have been caused by the negligence of the opposite party. The complainant has, therefore, to establish that there was negligence on the part of the opposite party and that as a consequence thereof loss or injury was suffered by him. It is only in such event that award of compensation would be warranted under the provisions of this sub-clause.[27]

Again in *Commercial Officer* v. *Bihar State Warehousing Corporation*,[28] the National Commissions made the following observations:

> The award of compensation by the Forums established under the Act has to be made only on well recognized legal principles covering the quantification of damages or consideration of material produced before the adjudicating forum showing the extent to which monetary loss has been caused thereby to the complainant.[29]

The above principles in relation to the award of compensation are obviously required to be followed by every court and tribunal and no exception should ideally be made by anyone in this behalf. It was in this context that when the National Consumer Disputes Redressal Commission noticed that the Bihar State Consumer Disputes Redressal Commission was not following the aforesaid principles in the right earnest manner, it immediately corrected that approach. In the case of *General Manager, South Eastern Railway* v. *Shri Anand Prasad Sinha*,[30] the facts were that the complainant Anand Prasad Sinha, a retired Judge of the Patna

[25] S.S. Kumar, "Compensation in Consumer Disputes Consistent Approach Will Benefit All", Consumer Protection and Trade Practices Journal, Vol. 12, 2004, pp. 11-13.
[26] 26 1991 (1) CPR 263 (NC).
[27] ibid., p. 266.
[28] 1994 (1) CPR 357.
[29] ibid., p. 359.
[30] 1991 (1) CPJ 10 (NC).

High Court and his wife were travelling in the first class compartment of the railways. Apparently, the fans were not working in the said railways compartment. Moreover, the iron shutters in the windows were not in working condition and even shutters with glass panes could not be used since the glass was missing. It was also alleged that the rexine of the upper berth was in a bad condition and there were two exposed rusty nails which caused some injuries to the complainant's wife. Though a complaint was made to the conductor on duty, no action was taken to set right the defect. As a result of these deficiencies, the complainant alongwith his wife faced acute discomfort and inconvenience. The Bihar State Consumer Disputes Redressal Commission, after taking into account the status of the complainant awarded Rs. 10,000/- each as compensation to the complainant and his wife. After issuing the said direction, the State Commission went on to observe as under:

In view of the status of the complainant and condition in which they were forced to travel, the aforesaid amount of compensation is not sufficient but on the assurance given by the Railway Administration, the steps are being taken to improve the condition, we hope the present amount of compensation will meet the ends of justice.[31]

In an appeal before the National Commission against the above order, it held that the quantum of compensation awarded, based as it was on the status of the complainant awarded, based as it was on the status of the complainant, was found to be manifestly excessive and not based on the well settled principles governing the fixation of compensation. In so holding, the National Commission observed:

No reference is to be found in the State Commission's order to any of the well settled principles governing the fixation of compensation in case like the present one an one is left in complete darkness as to what factors weighed with the State Commission in fixing the compensation at the figure of Rs. 10,000/- each to the complainant as well as to his wife. It is an established principle of law that the compensation awarded must have a rational relation to the nature and extent of the injury, inconvenience or physical and mental suffering caused to the complainant by the action or omission of the opposite party. No attempt was made by the State Commission to approach the question of quantification of compensation form this corrective perspective. The status of the complainant was of little relevance in this context since every passenger who had paid for the first class travel and who has been subjected to inconvenience and suffering of a like nature on account of defects in the compartment is entitled to similar treatment in the matter of award of compensation irrespective of any question of status.[32]

In yet another case of *M.T.N.L*. v. *Raja S. Bhosale*[33], the complainant Raja S. Bhosale, a former Judge of a High Court and a practising lawyer, received a telephone bill for an amount of Rs. 34,395.10 which, in his opinion, was excessive. In his complaint before the Maharashtra State Commission, he claimed Rs. One Lakh as compensation alleging deficiency in service of the telephone authorities in sending him the bill of such a magnitude when his earlier bills never exceeded Rs. 2,500/- per billing cycle. The State Commission awarded Rs. 25,000/- as "exemplary compensation" alongwith Rs. 1.000/- as costs to the complainant. MTNL filed an appeal before the National Commission which in its order observed as under:

The State Commission appears to have been influenced by the status of the complainant and therefore awarded exempary compensation amounting to Rs. 25,000/-. The status of a person

[31] id.
[32] ibid.p. p. 12.
[33] 1993 (1) CTJ 856 (NC).

is not of much relevance while awarding compensation / exemplary compensation. The nature of the grievance and resultant los have alone to be considered. However, considering the fact that the bill were used to be sent by the Department in the name of a wrong person and the complainant apprehending excessive bills in future, got the STD facility disconnected from his telephone, we are of the opinion that he is entitled to some compensation. Accordingly, we award Rs. 500/- as compensation. The amount of compensation was thus scaled down Rs. 25,000/- to a mere Rs. 500/-.

By the above rulings of the National Commission, a guideline has been given to the Consumer Disputes Redressal Agencies at the state and at the district level that they should award compensation by following the well entrenched norms and that no compensation be awarded on remote or unconnected grounds and that status of the complainants should not influence the tribunals while dealing with their cases.

V. CRITICAL EVALUATION OF THE WORKING OF THE NATIIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

It goes without saying that when one is doing a case study of an individual, a group of individuals or of an institution, one is able to find a lots of issues that necessitate attention. The present study is not an exception. While doing a brief case study of the National Consumer Disputes Redressal Commission, the present researcher came to learn about a number of negative points with regard to its functioning. However, the scope of the paper and the space being limited, I have endeavoured to highlight three main issues while being fully conversant of various other similar issues that I could not include due to the space constraints. These issues are mentioned hereunder:

The Issues Relating to the Filing of the Revision Petitions

The first issue concerns the filing of the revision petitioner. If one endeavours to analyse the factual position, then one will perhaps like to believe that the Apex National Commission has been for the past ten years handling most of the work which does not probably legally fall within its jurisdiction. Its work has not spontaneously increased but has been made to increase. How did it increase? For example, if one looks up at the cause list of the National Commission on any one day or have a glance over any law journal which reports its orders, eighty per cent or even more of the cases coming up before it are the revision petitioners filed before it by the unsuccessful appellants who lost their appeals in the State Consumer Disputes Redressal Commission. Barring a few, these are invariably admitted, notices are issued, replies are sought and then arguments are heard on the evidence tendered before the District Consumer Disputes Redressal Forum and orders are passed under section 21(b) of the *Consumer Protection Act*, reversing, modifying and annulling the orders of the appellate State Consumer Commissions, sometimes not interfering with them and on other occasions remitting them back for retrial. Does this type of work lie within the ambit of the National Commission as per law? Does the *Consumer Protection Act* provide for a second appeal? If not (which is a crystal clear fact), then why second appeals are being entertained and decided in the garb of revision petitions?[34]

Inconsistent Approach of the National Consumer Disputes Redressal Commission With Regard to the Awarding of Compensation to the Aggrieved Consumers

[34] S.S. Kumar, "Revisional Powers of the National Commission - Being Exercised Contrary to Law", Consumer Protection and Trade Practices Journal, Vol. 18, 2010, pp. 171.

It may be appropriate to mention that during its decision making in the arena of consumer protection, the National Consumer Disputes Redressal Commission has tried to lay down the norms and guidelines to be followed by the Consumer Disputes Redressal Agencies while awarding compensation to the aggrieved consumers. The underlying point has been that the status of an individual should not always be the determining factor for the award of compensation in consumer protection case and that the compensation should be awarded in accordance with the well settled principles and canons of jurisprudence. The National Commission has been expecting the Consumer Disputes Redressal Commissions at the state level and the Consumer Disputes Redressal Fora at the district level to follow the guidelines laid down by the apex commission.

There is, however, the other side of the story which indeed is disturbing, and that is that there has been deviation from these settled principles and that, too, by none other than the National Commission itself. One wonders as to how and why these aforesaid guidelines have been given an occasional good bye by the Apex Consumer Disputes Redressal Agency. For instance, in the case of *U.S. Awasthy* v. *Gulf Air and Anr*.,[35] the case of the complainant was dismissed by the State Consumer Disputes Redressal Commission and the complainant came before the National Commission in appeal against the Gulf Air, an international carrier. His complaint was that he was a business class passenger and in the flight of Gulf Air between the sector Bahrain-Istanbul, he was given a seat which was fixed and was not reclining one on account of which he suffered great inconvenience and discomfort for about six and half hours. He claimed Rs. 5 lakhs as damages for the discomfort and agony caused to him. In its reply, the Airlines stated that there were sixteen first class seats, twelve business class seats and ninety five economy class seats and that all the seats were occupied and in view thereof, it was not possible to make available an alternative seat to the complainant. It was further stated that otherwise the seat given to the complainant was wide, well cushioned and was also comfortable to sit and all business class facilities were otherwise provided to him. Taking into account these factors and the fact that the seat given to the complainant was not a reclining one being next to the emergency exit which has to be like that for the security reasons, the State Commission dismissed the complaint.[36]

In case of the above nature and keeping in view its own earlier rulings, all what was justifiably expected of the National Consumer Disputes Redressal Commission in appeal was, that the complainant at best should have been reimbursed the difference of air fare between the business class and the economy class and a couple of thousands of rupees of compensation could have been awarded and that would have been reasonable in the circumstances and under the Indian conditions. The National Commission, however, in this case, after referring to nearly a dozen judgments, mostly of foreign courts, in a detailed order dated 30 September 2003 running into more than 20 pages, awarded a sum of Rs. One Lakh as damages to the complainant and also directed the Gulf Air to pay to the complainant, the amount of difference between the business class and the economy class fare. In addition, the Airlines had also been directed to pay the interest at 9 per cent on both the amounts from the date of filing of complaint till payment. Cost of Rs. 10,000/- was also awarded.[37]

Compare the facts of the above case with those of another recent complaint of similar nature which had been dealt with by the Maharashtra State Consumer Disputes Redressal Commission.

[35] 2003 (4) CPJ 114 (NC).
[36] ibid., pp. 12-13.
[37] id.

In *Kurana Travels* v. *Doctor Dilip Govind Rao Mhaiskar,*[38] the complainant had booked four tickets in a luxury bus for journey from Nanded to Nagpur on 30 June 2002. However, when he boarded the bus alongwith his family members which included his minor daughter, he noticed that the window pane by the side of his seat was broken. Consequently he and his family members had to suffer cold wind and also rain which led to his young daughter falling sick. He filed a complaint before the District Consumer Disputes Redressal Forum against the travel agent who had arranged the bus journey and had projected a comfortable and luxurious journey. He claimed a compensation of Rs. 10,000/- for all the mental agony and discomfort suffered by him and his daughter due to the deficiency in service of the travel agent. From all standards, the amount claimed should have been fairly reasonable but perhaps keeping the law enunciated by the Apex Commission in its earlier decisions, the District Fourm awarded a paltry sum of Rs. 1,000/- as compensation to be paid to the complainant by the travel agent. An appeal was filed before the Maharashtra State Commission, which despite noticing the fact that the travel agent had admitted that the window glass was broken, upheld the decision of the District Forum and found no justification in awarding more than Rs. 1,000/- as compensation for all the torture meted out to the complainant and his family.

It may be appropriate to mention here that whenever and wherever any decision making is involved at any place at any time, consistency in approach helps following the law. However, when the consistency is found missing at the highest echelons, then the confusion develops and it gets more confound in the course of time. It may be pertinent to mention here that as recently as on 25 September 2001, the very same National Commission in the Standard Chartered Bank's case had observed that relief to a consumer by a Consumer Disputed Redressal Agency established under the *Consumer Protection Act* can be given for the actual loss and not for the remote loss or for abnormal loss. Doesn't the Awasthy's case deviate from the aforesaid principle? This is one of the issues that deserve utmost attention.

Passing of the Sketchy and Not Reasoned Orders by the National Consumer Disputes Redressal Commission

The National Consumer Disputes Redressal Commission being the Apex Consumer Court is expected to act both judicially as well as judiciously and pass reasoned orders in the cases relating to consume complaints. However, it sees that the things are not working well with the National Commission. The remand of a number of cases relating to consumer grievances in a row by the Hon'ble Supreme Court of India to the National Commission has brought into focus and limelight the hasty and illogical behaviour on the part of the National Commission. And when the remand of all such cases is for no other reason than for the non-application of mind by the Apex Commission, it becomes all the more alarming and worrisome. Notwithstanding the amount of case law that one is able to study and analyse on the subject, one can hardly be sure as to whether these were the only cases disposed of the Apex Consumer Disputes Redressal Agency in a manner that incensed the affected parties to have invoked the jurisdiction of the Apex Court, that is, the Hon'ble Supreme Court of India. It is quite possible that there would be many more holding sketchy or cryptic orders issues to them by the National Consumer Disputes Redressal Commission, they do not have the means or resources to approach the Supreme Court for its interference. This is a matter of common knowledge as to how expensive, cumbersome and tedious the entire process is.[39] It is, therefore, required that

[38] 2003 CTJ 1022.

[39] S.S. Kumar, "Reasoned And Not Sketchy Orders Supreme Court Tells the National Commission", Consumer

the National Consumer Disputes Redressal Commission passes the reasoned orders and not the sketchy orders. That shall help in the growth of a new consumer protection jurisprudence in the country.

VI. CONCLUSION

To recapitulate the entire discussion, in our country, even before the enactment of the *Consumer Protection Act*, 1986, there were several enactments on the statute book to protect the consumer interests, such as the *Indian Penal Code*, 1860; the *Indian Contract Act*, 1872; the *Sale of Goods Act*, 1930; the *Drugs and Cosmetics Act*, 1940; the *Prevention of Food Adulteration Act*, 1954; the *Essential Commodities Act*, 1955; the *Monopolies and Restrictive Trade Practices Act*, 1969; and the *Standards of Weights and Measures Act*, 1976. Notwithstanding these enactments on the statute book, the ultimate consumers could not even then be protected, neither from the manufacturers supplying defective goods, nor from the service providers rendering deficient services. The well organized sections of manufacturers, traders and the service providers, armed with the knowledge of the market and manipulative skills, often attempted to exploit the consumers in spite of the provisions in different laws protecting their interest. Moreover, these laws required the consumer to initiate action by way of a civil suit that involved lengthy legal process proving to be too expensive and time consuming for lay consumers. Therefore, a need was felt for a simpler and quicker access to redress consumer grievances.[40] Then in the year 1986, the *Consumer Protection Act* was enacted and it proved to be a milestone in the history of socio-economic legislation in India. The primary objective of the 1986 Act was to provided cheap, quick, inexpensive and time bound redress to consumer complaints. Complaints and grievances of the consumers are redressed by the Consumer Disputes Redressal Agencies established under the *Consumer Protection Act*, 1986 at the district, state and the national level. And it goes without saying that with the establishment of the Consumer Disputes Redressal Agencies, justice has reached the doorsteps of the people, something that was considered to be a luxury for most people.[41]

However, there is other side of the story. There is no denying the fact that the *Consumer Protection Act*, 1986 was enacted with the primary purpose of proving inexpensive, speedy, effective and efficacious remedies to the consumers who have been exploited by the unscrupulous traders and the unethical service providers. Therefore, the primary object of the 1986 Act was to bring justice to the very doorsteps of an ordinary man. The provisions of this law were in addition to and not in derogation of any other law for the time being in force. Though the legislature has amended the *Consumer Protection Act*, 1986 thrice so as to keep it in tune with the times and to do away with the provisions which have proved to be ineffective, much still needs to be done. The Consumer Disputes Redressal Forums and Commissions as well as the Supreme Court of India and the various High Courts have on their part brought almost all services within the ambit of the *Consumer Protection Act*, thereby widening the jurisdiction of the Consumer Disputes Redressal Agencies.[42]

It may be appropriate to mention here that these agencies suffer from certain defects and deficiencies which hamper their smooth functioning. The Ministry of Consumer Affairs, Government of India has analysed the reasons for the poor functioning of these redressal

Protection and Trade Practices Journal, Vol. 9, 2001, pp. 93-94, at p. 93.

[40] Anshu Jain, "Problems Faced by the State Commissions With Particular Reference to the Working of the Punjab State Commission", Consumer Protection and Trade Practices Journal, Vol. 14, 2006, pp. 36-38, at p. 36.

[41] ibid.

agencies. The prominent reasons for their mal-functioning, *inter alia*, include, delay in appointment of the Presidents and the Members; poor pay and inadequate facilities for the functionaries; inadequate budgetary provisions, lack of adequate infra-structure and required facilities; infrequent interaction between the State Commissions and the District Fora for monitoring the disposal of cases; inadequate and inexperienced secretarial staff; frequent and long adjournments; lack of interest and drive to liquidate pendency; failure to hold sittings on all working days and failure to work fully during the working hours; delay in issuing show cause notice to the opposite party; and delay in passing orders after completion of hearing.[43]

According to the consumer protagonists and experts, and rightly so, it seems quite ironical that the above reasons for the poor functioning of the Consumer Disputes Redressal Agencies have been given by the Ministry of Consumer Affairs, whereas it is the responsibility of the aforesaid Ministry as well as of the state government to ensure that there are no hurdles in the path of the smooth functioning of these agencies. When approached, the Consumer Disputes Redressal Agencies often cite the casual approach and the lack of seriousness on the part of the Government for the various impediments that come in the way of their proper functioning. If the Central Government as well as each of the state governments and across the country take up the cause of consumer protection with complete zeal and responsibility, there would hopefully be no stumbling blocks on the path of the efficacious working of the Consumer Disputes Redessal Agencies and a stage would accordingly be set for the consumer movement to become a real national movement. An average consumer would then be the real king in the true sense of the word and the famous wording of the Father of the Nation Mahatma Gandhi that "a consumer is the most important visitor on the premises of business" and that "he is the purpose of all economic activity" shall fully be justified.[44]

In summing up, I would like to reiterate that the *Consumer Protection Act*, 1986, a beneficent, a benevolent and a path breaking socio-economic legislation, which may safely be called as the *Magna Carta* of Consumer Protection, has certainly brought qualitative change in the overall scenario in the country. However, a lot yet remains to be done. Let us hope and pray that the "Best is Yet to Come ! ! ! ! ! "

[42]ibid., p. 38.
[43]id.
[44]id.

Book: Essays on the Indian Penal Code
Editor: S. Govindarajulu
Revised: Prof. K.N. Chandrasekharan Pillai & Shabistan Aquil
The Indian Law Institute (ILI), New Delhi
(Shivam Offset Press, 2005)
Pages: 355 Price: Rs. 400

This unique book on substantive criminal law is a compilation based upon several working papers prepared by various professorsof law like Tapas Kumar Banerjee, A.C.Patra,V.Balasubrahmanyam, Eric H. Banerji and R.B. Tiwary for a seminar that was organized by the Indian Law Institute in the year 1961. Needless to say, such scholarly in depth analysis and writing dictated by profound legal knowledge needed revision since the topics dealt with in this book has gone through a lot of rigours of different judicial interpretations over a period of time since 1961. That is where the subsequent revisions made by Prof. K.N. Chandrasekharan Pillai as the Director of ILI & Shabistan Aquil encompassing the topics contained in the book in the broad areas of historical background, some general principles, few specific offences and reform gains significance and stands tall in terms of rigorous work in the field of substantive penal law.

This book in essence deals with the following. Firstly, it looks into the historical evolution of the Indian Penal Code and how the substantive criminal law in our country stood before the Indian Penal Code came into existence in Part I of the book. In Part II, the book delves into some general principles like jurisdiction, mens rea, strict liability offences, exemptions from criminal liability, abetment, conspiracy, group liability, criminal attempt and punishment.Further in Part III, the specific offences of Sedition and Homicide has been looked into. Finally in Part IV, certain reform proposalshas been put forward in an attempt to consolidate the glitches and ambiguity in the law. In brief, this book attempts to deliver aquality theoretical discourse in criminal law which would aid students, lawyers and researchers alike.To add to that, this book at depth deals with conflicting judicial decisions based on varied judicial interpretations of the black letter law on topics discussed therein.

Essays on the Indian Penal Code as mentioned in the prior Para consists of four parts namely Historical Background, Some General Principles, Some Specific Offences and Reform in numerical sequence. Instead of putting the topics by way of chapterization, this book finds a

new nomenclature in the form of sections. There are a total of 13 sections divided among various Parts and sub-sections, while Part IV of the book deals with the aspect of reform in totality.

The topics dealt with in this book have been worked upon before and after in various books likeKenny's Outlines of Criminal Law[1] byJ.W. Cecil Turner; Textbook of Criminal Law[2] by Glanville Williams; Smith and Hogan'sCriminal Law[3] by David Ormerod; The Principles of the Law of Crimes in British India[4] by Shamsul Huda;Basic Concepts of Criminal Law[5] by George P. Fletcher; P.S.A. Pillai's Criminal Law[6] by K.I. Vibhute; General Principles of Criminal Law[7] by K.N.C.Pillai amongst few others.This book too, clearly finds a standing of its own mainly because of the learned and scholarly analysis and research that has gone into making this tome devoid of the weight, what it is.

The content that finds mention in this book is a piece of scholarly thinking and socio-political and legal understanding manifested lucidly through analytical expertise. The data is collected from precedents, books, working papers, articles from Journals, vintage letters pertaining to consultations from the Revenue Department of Fort William, CBI Bulletin, Law Commission Reports and Government of India reports;draft Macaulay Report, Acts and Penal Code of other countries.

In a nutshell, the reviewer now intends to summarize the contents of the book chronologically.

Part I dealing with the Historical background of the criminal law is definitely a well researched, informative and enlightening area authored by Tapas Kumar Banerjee and A.C.Patra. Comprising of 2 sections, Part I deals with the law prior to the codification of the Indian Penal Code and shows how the drafters used their independent thinking into the making of the code instead of simply and blind folded codifying the law as is in the then England. At length the origin and foundations of Muslim Law has been discussed followed by periodwise transformation of the substantive criminal law from 1772 to 1860 that led to the evolution of the code through the parallel struggle of freedom and the proposal of the Law Commission of which Lord T.B. Macaulay was the President.

Part II dealing with some general principles has been segregated into 5sections of which section 2 and section 3 on complicity in rime has been further divided into3 subsections each and written by V.Balasubrahmanyam, Eric H. Banerji and R.B. Tiwary.

In Section 1 of Part II, the Jurisdictional ambit of the Indian Penal Code has been dealt with at great length encompassing intra-territorial, extra-territorial and extradition features of the law drawing relevant reference to the section 188 of the Code of Criminal Procedure.

Section 2, discusses mens rea, strict liability and insanity as a defence in a crime. Guilty mind (intention), motive, recklessness, foresight, negligence,knowledge and the proof of intention has been beautifully dealt with the aid of relevant cases including scholarly in depth observations from legal luminaries like Henry Mayne to M.C.Setalvad.Further, Insanity as defence in criminal liability has been looked into and how the law has undergonechanges

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1 Published by Universal Law Publishing Co. Pvt. Ltd
2 Published by Sweet & Maxwell
3 Published by Oxford University Press
4 Published by Eastern Book Company
5 Published by Oxford University Press.
6 Published by Lexis Nexis Butterworths Wadhwa, Nagpur
7 Published by Eastern Book Company

over the years is indeed intriguing, interesting and revealing.

Section 3 is a mix of inchoate crimes like abetment, conspiracy and the third part deals with group liability pertaining to section 34 and section 149 of the Indian Penal Code namely common intention and common object respectively.The book deals with the conflicting judicial interpretations in the above-mentioned areas and how the interpretation of the law has evolved over a period of time through decisions rendered in various cases.Again, when it comes to group liability, still now the difference between Section 34 and 149 remains to be ambiguous and unclear leaving scope for revision or change in the law especially with respect to the requirement of physical presence and explicit overt act.

Section 4 of Part II is exclusively dedicated to the ever slippery area of the law on criminal attempt. This ambiguous and complex subject area in substantive penal law has been well looked into delving intoimportant and controversial cases and tests. Also the confusion pertaining todefining theprecise nature and scope of section 511 of the Indian Penal Code has been brought to the limelight and how various High Courts has come up with conflicting views.

Finally in section 5 of Part II, punishment has been discussed in great detail looking into the various theories of punishment and the attitude of the courts in sentencing that have changed over a period of time. Invidualisation has gained immense significance in the current context and focus has shifted from the crime to the criminal. This section also throws emphasis on deterrent and reformative potentialities and the gradation of punishments wherein the punishment must fit the blameworthiness of the offender.

In ***Part III***, the penultimate Part of the book and law on sedition and culpable homicide has been looked into by R.B. Tiwary and V.Balasubrahmanyam respectively. With respect to the law on sedition, the oldest English and Indian cases have been referred to and how the law which is in conflict with the freedom of speech as envisaged by the Indian Constitution has been put to use/ misuse by the Court of Law including the conflict in interpretation of the Privy Council and Federal Court has been looked into at length. While, pertaining to homicide which James Stephen mentioned as the weakest part of the Indian Penal Code, too has been looked into from the standpoint of intricacies, ambiguousness and the blurred distinction between section 299 and 300 which still remains to be an enigma of sorts. While dealing with homicide, the author has looked into the difficulties encountered in the field ofcausation and the problems that arises pertaining to punishment in cases of homicide.

Finally, ***Part IV*** by Eric H. Banerji deals with the aspect and scope of reform that could be incorporated into the Indian Penal Code with respect to consolidation of the code comprising of 511 sections, organized crimes, rape laws, adultery and punishments over and above the piece-meal amendments that has taken place over the years pertaining to the introduction of sections 124A, 153A, 295A, 304A etc.

Overall the book is a very informative and scholarly discourse andreflects quality research in substantive Indian penal law although the reviewer feels certain other topics like the rape laws, law relating to homosexuality and under the current scenario the socio-economic offences can be incorporated in this absorbing, educative, interesting and enlightening book on criminal law. But having said that, the reviewer is in absolute concurrence with the Editor who has mentioned that, “There has been no attempt to cover all the important parts of the Indian Penal Code… The individual professors choose at very short notice a few topics of current

interest."[8] As mentioned in the first Para of the review that these essays are a product of the seminar organized by ILI in 1961.

This book which is a product of deep research study and learning has been printed with a sophisticated colour jacket and its paper quality and printing has been excellently laid out. The work put into this compilation of the essays in this book form will definitely prove to be of great use to judges, lawyers, scholars and researchers and deserves to be read by all the members of the legal fraternity. Last but not the least, this detailed and well revised book which is a reliable text with an absolute clarity of perception is an essential must for all Law Libraries and asource of inspiration for researchers taking avid interest in substantive criminal law to come up with such more books in future.

Mr. Souvik Roy*

[8] Essays on the Indian Penal CodeRevised byProf. K.N. Chandrasekharan Pillai & Shabistan Aquilat p.vii

* Assistant Professor (Law) [Ph.D - Faculty Scholar], School of Law, Kiit University, Bhubaneswar

Policing and Young People (2011) Tim Read and Collin Rogers Learning Matters Ltd, United Kingdom, Pp. V+136 Price 16.99 pounds ISBN No: ISBN-10: 0857254774 | ISBN-13: 978-0857254771

This text is an accessible and up to date introduction to the key theme of policing and young people. It gives a comprehensive overview of the issues involved in working with young people as offenders, suspects, witnesses, victims and citizens. It looks at perceptions of the young, and the role of the media in the context of current debates around anti-social behaviour, gangs and the family.

The book throws light on various issues in relation to the police and the young people aspects, some of them are:

- The relationship between police and the young people.
- Two groups constantly come into contact.
- The experience of young people as offenders and as victims of crime.
- The perception of the police about young people
- The perception of the public at large about young people
- The present laws are enough.
- Changes that are needed to be brought about to accommodate young offenders.

The book in question aims basically at 3 major matters:

- The **first** and the foremost to address clearly the reason as to why there are young offenders --- what drive them to commit crimes.
- The **second** matter that has been discussed in the book is the personal reasons that compel youngsters to commit crimes --- educational, health, familial, environmental and attitudinal.
- The **third** and essential point that the book discusses is an assessment of young people and then recommending the court suitable sentences --- the role of parents in developing the character of young offenders has also been discussed.

Chapter 1 is basically an introduction to the matters dealt with in the book. It also provides an overview of the contents of the book in question. It discusses the relationship between the police and young people. It examines the intervention of police in the lives of young people. According to the authors "In the 'rationale for intervention' produced in 2008 by the relevant government departments and in the same years report titled, 'Youth Crime Action Plan' it was suggested that the economic rationale for intervening to tackle youth offending and re offending is based on the argument that youth crime is 'public bad' because the harm it causes goes beyond the individuals committing it."

Chapter 2 looks at the influence crime has on young people. It examines how young people react when they become victims of crime and how repeated victimization affects them. The chapter also throws light on the age and the gender of the offenders. It says 68% of the offences are committed by those who are aged 21 and above. The types of offences perpetrated by young people have also been discussed. Some of the common offences are: theft, robbery, handling of stolen goods, violation of person and sexual offences.

The major thrust contained in Chapter 3 relates to the role of media in forming ideas/ perceptions in young people's minds. It discusses the influence of television shows, articles comics and documentaries on the minds of young people. Then another topic discussed is the reaction of the public towards these incidents, it has been termed by the author as 'moral panic.' The authors of the book also go on to narrate various case studies to strengthen their observations.

The fourth chapter emphasizes on what anti social behaviour means and why young people are attracted towards it. It also discusses how the police and other agencies can tackle such behaviour. Various definitions of anti social behaviour have been provided in order to make the term more understandable. A few examples of anti social behaviour includes: causing nuisance to neighbors, bad behaviour towards parents, vandalism, graffiti and buying drugs on the street, etc. The author then talks about a kind of a contract called 'Acceptable Behaviour Contract.' These contracts help individuals to recognize their behaviour and its negative impact on others thus encouraging them to refrain from such behaviour.

Chapter 5 points out about the various measures taken by the government and the criminal justice system while interacting with young people. It also presents the various programs conducted by the government in order to create awareness against such offences. The various efforts taken by the criminal justice system and the role of the police have been discussed at length. Various suggestions have been provided such as swifter action in cases involving young people, tackling of problems before they go out of control, provide support for young victims and finally effective punishments. The book also suggests that various agencies should be allotted the role of reforming young offenders.

The sixth chapter elucidates the interaction between the police and the young people before involving the criminal justice system in a formal manner. It provides examples of how such interactions can take place successfully and be productive. The authors talk about three stages in which such interaction can take place, namely: primary, secondary and tertiary. Various social crime prevention methods have also been discussed in this chapter. Various programs such as 'Crime Resistant Communities', 'Youth Inclusion Program' 'Safer School Partnerships' help in preventing young people from engaging in crime and disorder.

In chapter 7 the conditions of juvenile detention at the police stations has been discussed. There should also be the appointment of an 'Appropriate Adult'. Such person shall have multi

ferrous role in the development and betterment of young offenders. The person who can be appointed as an appropriate adult has also been specified. Certain points such as opening of a custody record shall be done as soon as possible, the conditions of the custody should be properly examined, interviews should generally be audio visual in nature, a juvenile should never share a custody with an adult offender, etc have been talked about. Chapter 8 talks about the influence on the minds of young people when they act as witnesses in landmark and tragic cases. The nature of the case, the nature of the witness and the nature of the accused affects the young minds to a great extent. Three essential legal principles of: 'witness credibility, reliability and compellability' are explained at length by the authors. How young witnesses (meaning those below 17 years of age) can be given special attention and protection has also been mentioned at length along with guidelines mentioned in the Act. A clear guideline to the investigators relating to handling venerable witnesses has also been provided in the aforesaid Act.

The concluding chapter of the book speaks about the various measures the can be undertaken to protect and safeguard young people from being victims and offenders in various crimes. The historical reasons which lead to the present justice system have been elucidated. The role of the legislature in making young people friendly laws has been discussed by the authors. Prevention of any form of abuse, that is physical, emotional or sexual and of neglect has been mentioned in the various acts. A case study relating to a boy named Graham has been mentioned at the end which is truly heart stirring.

According to the reviewer, the objectives mentioned at the start of every chapter are very useful for the readers. But, the chapter titled "Young People as suspects: the 'Appropriate Adult' is rather confusing. It does not convey the essence the authors intend express. The title of the above mentioned chapter could be changed to 'the Appropriate Adult: Roles and Requisites' this would help in making the meaning clearer and more understandable.

The book is a good read for any person who is interested to do research in police sciences and criminology. It can be used as material to understand the legal aspects of protection of young people. Since the book talks about English laws from which Indian laws borrow so leniently it is a good base book for Indian researchers in the legal field. The chapters have been well formed and the important points and case studies have been highlighted to draw the reader's attention and to avoid monotony. The authors have shown their pure passion for the subject of police science in the way in which the book has been written. It is a helpful book for researchers, professors and students of the legal fraternity.

There are a few limitations in the book, a few mentionable ones are: the authors concentrate only on England and Wales the study is thus limited and so is the approach. A chapter on the trends around the world could have made the book a more wholesome one. At least the case studies provided by the authors should have included incidents from around the world which would have made the book more comprehensive in nature.

Sthita Prajna Mohanty *

* Faculty Associate (Law) School of Law, KIIT University, Bhubaneswar