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LEGAL CONTROL OF QUACKERY: A CRITICAL ANALYSIS

Dr. Venugopal B.S*

Medical profession being a learned profession warrants acquisition of theoretical knowledge and practical training as reflected in the attainment of educational qualification prescribed by law, before entering into the profession, as a condition precedent to protect the interest of the patients by preventing unqualified persons undertaking the task of administration of treatment and performance of medical procedures which are beset with many risks and uncertainties that at times once a damage is done to the human body, it is done forever. But unfortunately some unqualified persons without the knowledge of medicine embracing medical profession expose the patients to the risk of loss of life or limb or ill- health at times which is of a perpetual nature. It has given rise to the problem of quackery which with its various dimensions ranging from practice of medicine without knowledge of any branch of medicine whatsoever, practice of another branch of medicine in which he has no knowledge in addition to the branch in which he has license to practice, practice of a branch of medicine in which he has no knowledge deviating from one in which he has a license to practice, has assumed a menacing proportion reminding the need for protecting patients from such unscrupulous unqualified medical practitioners. Therefore an attempt is made in this article to critically analyse the legal control regime pertaining to quackery.

Quack, Meaning of: It signifies a person who pretends to have medical skill or knowledge.¹ He is otherwise called as a charlatan.² Accordingly, the term quackery implies practice of medicine by persons who have no knowledge of medicine. It amounts to medical fraud that individuals in the robe of doctors without medical skill deceive the general public to believe that they are capable of curing a particular disease. It is not confined to charlatans exploiting the patients by deceit, but encompasses the manufacturers advertising some products having medicinal effect of curing a disease, even though the truth is otherwise.³ The legal control of quackery can be broadly discussed under criminal & civil liability and statutory control.

CRIMINAL LIABILITY UNDER THE INDIAN PENAL CODE

Quackery amounts the commission of the following offences under the Indian Penal Code

Cheating

Presence of the following ingredients amounts to the offence of cheating.⁴

- i) There must be fraudulent or dishonest inducement of a person
- ii) The person so deceived should have been intentionally induced to deliver any property or induced to give consent for any person to retain the property or
- iii) The person so deceived should have been induced to do or omit to do anything which he would not do or omit to do if he was not so deceived.

*Professor, Alliance School of Law, Alliance University, Bangalore.

¹ Mithra's Legal & Commercial Dictionary, 6th Edn., (2010) p.719

² *M Jeeva v. Smt. Lalitha*, see infra n.54; *Poonam Verma v. Dr. Ashwin Patel*, see infra n.55

³ See the Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954.

⁴ See Sec.415 of the Indian Penal Code.

It is obvious that quackery answers the above description to constitute the offence of cheating. A quack even though he has no knowledge of medicine fraudulently or deceitfully makes the patients to believe that the former can heal their diseases and improve their physical condition. Under such belief of cure and recovery they are induced to pay the fee to a quack for whatever he has done. It turns out that a patient for the fee what he has paid cannot avail the services promised. In effect, it amounts to wrongful gain to the quack and wrongful loss to the patient who has fallen into the guile of a quack.

In spite of unprecedented development in the sphere of science and technology, in traditional societies and poverty stricken countries still the people are not free from superstitious belief. Accordingly they believe in the concept of divine healing by prayer. There is no dearth of self-declared god men and also fake priests and saints, for which India is also not an exception, who lure the innocent people into the trap of divine healing. It also amounts to cheating and medical fraud. In *Shri Bhagwan Samardhara v. State of Andhra Pradesh*,⁵ the Supreme Court has held that when a person represents himself as a healer by prayer and induces a sick person to part with money in anticipation of a cure and if the desired result does not materialize, he invites criminal liability for cheating as contemplated in the Indian penal code.

It follows that even if a patient does not part with any property or money, if because of such fraudulent representation, he submits himself to the process of divine healing, which but for the inducement he would not have done amounts to cheating if the desired result does not materialize. If the desired result materializes, it does not amount to cheating. Materialization of the result is a mere co-incidence in such a situation. But such fake godmen do more harm to the society by spreading the superstitious belief. It goes against the fundamental duty of developing scientific temper as envisaged in the constitution which is the sine quonone of a positive and constructive society.⁶

Transmission of dangerous communicable disease

Any person who by a negligent or unlawful act or knowingly does or does an act having reason to believe that it is likely to cause spreading of any dangerous communicable disease, causes such transmission of the disease to another person, invites criminal liability under the Indian penal Code.⁷ Accordingly a prayer healer vis-a vis-a quack makes to believe a HIV patient that he is cured of the disease and on the strength of the belief so created, the latter gets married and causes transmission of HIV to his wife or by sexual contact causes transmission, the former invites criminal liability. Such a person has reason to believe that his faith healing is a hoax. Even otherwise it is not an act done in good faith. An act done in good faith implies one done with due care and caution.⁸ If a practitioner were to be qualified, by virtue of his knowledge in medicine he would have known that HIV/AIDS is incurable in nature. He is also under an obligation to know the things concerning him. Accordingly a qualified doctor also invites criminal liability for causing transmission of dangerous communicable disease if the conditions contemplated above are present.

⁵ AIR 1999 SC 2332

⁶ See Art.51A of the Constitution of India

⁷ See Secs.269 and 270 of the Indian Penal Code

⁸ See Sec.52 of the Indian Penal code

Forgery

Some unqualified medical practitioner in order to gain the confidence of the patients may forge the documents showing their eligibility and license to practice medicine in order to use them as genuine documents. Such an act amounts to the offence of forgery as it involves dishonest use of a fake document as genuine one and there is knowledge or reason to believe that the document is forged one.⁹

Unlawful abortions

Abortions or termination of pregnancies are regulated under the Medical Termination of Pregnancies Act, 1971 (MTP Act) which permits termination of pregnancies on the grounds and subject to the conditions contemplated there in only by the registered medical practitioners.¹⁰ It is an open secret that some pregnant women or married couples though approach registered medical practitioners, for termination of pregnancies but they do so in violation of the provisions of MTP Act, and the latter charge exorbitant fees for that. Because of heavy fee by the registered medical practitioners the unmarried pregnant women and married couples approach the quacks for termination of pregnancies whether it is for therapeutic or non-therapeutic purposes. Especially in villages approaching the quacks for that purpose is rampant. Further termination of pregnancy by quacks amounts to termination not in a government hospital naturally or any place approved under the Act.¹¹ Therefore whatever may be the nature of termination, quacks invite criminal liability under the Act for the violations of the specific provisions thereof and the Indian penal code, where the MTP Act is silent.¹² Some of these provisions of the Indian Penal Code exonerate those acts done in good faith.¹³ But quacks cannot claim the shelter of those provisions as their act cannot be styled as one done in good faith.¹⁴

Hurt

Administration of treatment by a quack may result in bodily pain, disease or infirmity to a patient. As a quack administers treatment with the knowledge that he is a layman in the sphere of medicine it amounts a voluntary act on his part for which he invites liability under the Indian Penal Code for causing simple hurt.¹⁵

Grievous Hurt

A quack invites criminal liability under the Indian Penal Code for causing grievous hurt. Treatment or performance of any medical procedure by any quack, which causes injury resulting in emasculation, permanent privation of any member or joint, destruction or permanent impairing of the powers of any member or joint, permanent disfigurement of the head or face, fracture or

⁹ Id at Sec.463.

¹⁰ See Sec.3 of the Medical Termination of Pregnancy Act, 1971. Under the Act pregnancy can be legally terminated on therapeutic, eugenic, humanitarian and social grounds.

¹¹ Id at Sec.4

¹² See Secs.312-316 of the Indian Penal Code

¹³ Id at Sec.312

¹⁴ An act is said to be done in good faith when it is done with caution and due care.

¹⁵ See Sec.319 of the Indian Penal Code.

dislocation of a bone or tooth or any hurt which endangers life or which causes the victim to suffer from severe bodily pain or causes severe inability to pursue ordinary pursuits for a period of 20 days amounts to the offence of causing grievous hurt.¹⁶ The same rationale applies here also for the infliction of criminal liability, as applied in the case of causing simple hurt.

Causing hurt by means of poison

Administration of poisonous substance with an intention to cause hurt invites liability.¹⁷ Sometimes a quack may administer poisonous substance as a part of treatment which may cause injury to a patient. Though there is no intention to cause hurt, but the act is done not in good faith with the knowledge that he is a layman in the field of medicine.

Causing hurt or grievous hurt by an act endangering human life

Causing hurt or grievous hurt by a rash or reckless act endangering human life or personal safety of others amounts an offence. If a quack ventures such act which endangers the life of a patient he invites criminal liability.¹⁸ A reckless act negates good faith as they are anti-thetical to each other. An unqualified medical practitioner, who ventures an operation, cannot plead the defense of good faith. The obvious reason is that playing doctor by itself amounts to a reckless act. In *Sukaroo Kobiraj v. Empress*,¹⁹ an unqualified practitioner operated a patient, for internal piles. He used an ordinary knife for cutting the piles. The patient breathed his last as a result of bleeding. The practitioner's contention that on many occasions in the past, he had successfully conducted such operation was rejected by the court. Accordingly his plea that the act was one done in good faith for the benefit of the patient could not cut ice with the court. In effect, the court held the practitioner criminally negligent as he was not educated in surgery.

The offender in the above case was held liable for committing an act endangering human life, as 304 A was subsequently incorporated into the Indian penal code to indict an offender who causes death of any one by his rash and reckless act.

Offence of death caused by rash or negligent act

As contemplated in Sec. 304A of the Indian Penal Code a person invites criminal liability for causing death of any person by doing any rash or negligent act, not amounting to culpable homicide. Under English it is known as the offence of manslaughter. If there is an intention to cause death it amounts to either culpable homicide amounting to murder or not amounting to murder as the case may be.

The term reckless is a word of indignation.²⁰ It normally involves conscious and unreasonable risk taking by any person as to the possibility that a particular undesirable circumstance exists or as to the possibility that an evil will come to pass.²¹ A reckless person

¹⁶ Id at Sec.320

¹⁷ Id at sec .328

¹⁸ Id at Secs.336, 337 and 338

¹⁹ (1889) ILR 14 Cal 566

²⁰ Glanville Williams, "A Text Book of Criminal Law", London", 2nd Edn. (1983) p.96

²¹ Ibid

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deliberately takes a chance.²² It signifies unreasonable risk taking by any person. It is an extreme departure from the conduct of a prudent person. Recklessness is inferred from the conduct of a person which dispenses the need to look into the state of mind of a person at the time of the commission of the act.²³

It is obvious from the above discussion that conduct of a quack involves conscious and unreasonable risk taking irrespective of the knowledge of the danger ahead. Accordingly he invites liability for criminal negligence under Sec. 304 A for causing the death of a patient. In *Juggan Khan v. State of Madhya Pradesh*,²⁴ a patient was suffering from guinea worm. A homeopath administered her 24 drops of stramonium and a dhatura leaf without studying the consequences of the latter. She died. Dhatura is not a medicine which falls within the homeopathy system of medicine. It is perhaps a substance which is administered by *ayurvedic* doctors. The Madhya Pradesh High Court convicted the homeopath for murder. On appeal the Supreme Court convicting him for criminal negligence observed,²⁵ “It is a rash and negligent act to prescribe poisonous medicines without studying their probable effect”

In *Dr. Kushaldas Pammandas v. State of Madhya Pradesh*,²⁶ a Hakim administered a penicillin injection to a patient. After the administration of an injection, the patient profusely perspired, vomited and eventually died. The lower court convicted the Hakim. Confirming his conviction, the Madhya Pradesh High court observed,²⁷ “The fact that a person totally ignorant of the science of medicine or practice of surgery undertakes a treatment or performs an operation is very material in showing his gross ignorance from which an inference about his gross rashness and negligence in undertaking the treatment can be inferred.”

It is obvious from the above decisions that the courts fall heavily upon the quacks in their bid to crack down quackery. But the courts are slow to indict a qualified doctor for criminal negligence unless he commits a reckless act, which manifests gross negligence.²⁸ Indictment for criminal negligence warrants a proximate connection between the administration of medicine and death. This issue was not looked in the above cases for the reason that the practitioners were charlatans. But in *Jhon Oni Akerel v. The king*,²⁹ the court delved deep on the above issue as the practitioner involved in the case was a qualified one. In that case the patients were suffering from yaws an endemic disease causing lesions and ulcerations all over the body especially on the lower limbs and feet. There were two methods of treatment known to the medical world for the same viz., injection of N.A.B. an arsenical preparation and *sobitha* powder by use of injection. The doctor took recourse to the latter which resulted in the death of ten children. The lower court convicted the doctor on the ground of criminal negligence, which was affirmed by the West African Court of Appeal. On appeal, acquitting the doctor the Privy Council observed,³⁰ “... It must be remembered that the degree of negligence required is that it should be gross and that

²² Ibid.

²³ Commissioner of Police of the Metropolis v. Caldwell, (1982) AC (H.L.) p.341

²⁴ AIR 1965 SC 831

²⁵ Id at p.834

²⁶ AIR 1960(M.P.) p.50.

²⁷ Id at p.51

²⁸ *R v. Crick*, (1859) 1F,F,519, Angela Roddy Holder, “Medical Malpractice Law,” St. Pauls Minn, p.361

²⁹ (1940) PC p.72

³⁰ Id at p.75

neither a jury nor a court can transform negligence of less degree into gross negligence by merely giving that appellation... They rightly stress the care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession”.

Indian law also has taken similar position. In *Ganashyamdas v. State of Madhya Pradesh*,³¹ a patient was suffering from chronic asthma for 25 years. The doctor who was a vaidhya was holding a degree of AVMS from the Board of Indian Medicines administered a coramine injection to the patient to check heavy coughing and difficulty in breathing. The patient died. The post mortem report stated that suffocation and respiratory failure caused by the obstruction of bronchia in both the lungs due to tenacious sputum resulted in the death of the patient. It was not stated in the report that coramine injection had the effect of accelerating the death. A civil surgeon gave evidence to the effect that coramine was not given to asthma patients. In spite of that it was held that coramine injection was not the proximate cause of death and natural death could not be ruled out as the patient being an old man was suffering from chronic asthma.

If in the above case if the practitioner were to be a quack he would have been certainly indicted under Sec. 304A of the IPC. The English Courts also have taken similar position. In *R v. Crick*,³² the practitioner was not a qualified one. He administered a patient lobelia, a dangerous medicine. In effect, the patient died. The practitioner was convicted for manslaughter. In this regard the court observed,³³ “...If the prisoner had been a medical man I should have recommended you to take the most favorable view of his conduct for it would be most fatal to the efficiency of the medical profession, if no one could administer medicine without a halter around his neck.”

In an English case,³⁴ a patient complained chest pain. He was treated by unqualified practitioner, who did not allow the former to consult other doctors. In spite of development of complications, he continued the treatment. Subsequently at the instance of the family members the patient was subjected to diagnosis by a doctor. It was diagnosed that the patient was suffering from severe pneumonia and pleurisy. Two days later the patient died. The unqualified practitioner was indicted for manslaughter.

In the United States of America also the appellate courts have taken a lenient view of criminal negligence on the part of doctors by setting aside the convictions made by the lower courts.³⁵ But as a matter of policy such a soft stance was not extended to the quacks. In *State v. Karsunky*,³⁶ the accused even though he has not attended any medical school, projected himself to be a doctor. A diabetic patient was under insulin as prescribed by his family doctor. The accused practitioner took him off from insulin and put him on herbal drugs. The patient died. The accused practitioner was held liable for manslaughter.

³¹ (1977) Cri. L.J. p. 1373

³² See supra n .29

³³ Ibid.

³⁴ Lancet, 28 January 1931, p.213 as quoted in “Modi’s Medical Jurisprudence”, 23rd Edn. Nagpur, at p.187

³⁵ Angela Roddy Holder, op. cit.

³⁶ 84 P2d 390 Wash, 1938

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In the U.S.A many Chiropractors have been held liable for moving away from their sphere of practice.³⁷ A chiropractor is a person who treats pain by manual adjustment of the spinal column etc., so as to release pressure on the nerves.³⁸ If he attempts anything outside the gamut of his sphere of professional activity, he invites liability. Accordingly many chiropractors have been convicted for manslaughter for causing the death of a paralyzed patient by advising him to fast for 35 days, taking off a diabetic patient from insulin culminating in his death etc.³⁹ In one case⁴⁰ a chiropractor performed a surgery on a patient. The patient died. The court convicted him for manslaughter. It was held that the degree of unskillfulness with which he acted was so shocking that it manifested virtually an incredible amount of ignorance utterly wanting in skill in surgery and anatomy.

Chiropractors lack knowledge of surgery. Yet if they venture to it, it manifests an extreme degree of callous attitude towards the consequences of the act and an extreme instance of pseudo doctor which needs to be dealt with iron hands.

It appears from the decisions of the American Courts that in many instances wherever they were convicted of manslaughter a direct connection was established between their act and the death of the patients. It is submitted that there is no need to examine such proximate connection wherever they have moved away from their sphere of practice. Accordingly it should be declared criminal negligence *per se* on the eventuality of the death of the patient.

A qualified doctor can claim certain exceptions from liability under the Indian Penal Code. But an unqualified practitioner is not permitted to plead those exceptions which can be discussed under the following heads.

Accident

It implies anything which is not predesigned or premeditated. It is an act of misfortune. Accordingly if such accident or misfortune occurs in the doing of a lawful act in a lawful manner by lawful means with proper care and caution if done without criminal intention or knowledge qualifies for exemption from criminal liability.⁴¹ Courts have exempted qualified doctors from liability in cases where the accident was inevitable and refused to indict a qualified doctor for criminal negligence wherever death had been the eventuality of treatment. A qualified doctor cannot be indicted for criminal negligence even if death of a patient occurs in the absence of a reckless act which has resulted in the same.

A quack cannot claim the privilege of an accident. The Supreme Court in *Bhupendra Singh A. Chudasama v. State of Gujarat*,⁴² has held that the basic requirement of the exception of accident under the Indian penal code is that the act which has resulted in injury to a victim vis-a-vis a patient should have been done with due care and caution. Playing doctor is nothing but playing with the life and health of a patient. So by any stretch of imagination it cannot be said that

³⁷ See supra n.36 at p. 364

³⁸ See supra n.36

³⁹ Ibid

⁴⁰ Ibid

⁴¹ See Sec.80 of the Indian Penal Code

⁴² AIR 1997 SC 3790

a quack exercises due care and caution in doing things in which he has no knowledge. Any otherwise conclusion defies the logic. He does not inform the patient that he is not qualified and still operates the latter, prescribes the medicine and suggests remedies which injure the latter. In the above case the court observed,⁴³“If a person sets out to be a doctor without knowing anything of the job and tries to do the best under the circumstances he would still be acting in bad faith because he has set himself up as a doctor without the appropriate education, training and experience... The two elements of consent on the part of the patient and of good faith on the part of the medical practitioner are interdependent and nobody can claim the benefit of this exception”.

Act likely to cause harm, but done in good faith

It is laid down that an act does not amount to an offence if it is done in good faith and without criminal intention irrespective of the fact that it is likely to cause harm.⁴⁴ A quack cannot claim this defense as it cannot be said that he acts in good faith. An act done in good faith is one which done with due care and caution. It is unethical to practice medicine without the knowledge of it. An unethical act does not amount to a bonafide or act done in good faith. It is a malafide act. On the other hand a qualified doctor stands on a different footing. Every medical procedure is beset with inherent risk albeit risk of death. A doctor knows that the procedure is likely to cause the death of a patient. But if he does that without any criminal intention for the benefit of the patient, he can claim exemption from criminal liability.⁴⁵

Consent

It is laid down that when any person gives consent either express or implied in good faith to suffer the harm or takes the risk of suffering a harm then the person who might cause the harm does not attract any liability.⁴⁶ Quacks cannot take the shelter of this provision. They may claim that the patient has given consent to suffer the harm. Consent to be one given in good faith requires an act done in good faith by the other party. The question is how a quack can claim that he has acted in good faith. Therefore the consent which is extracted from a patient cannot be genuine and voluntary one. In *Juggan Khan v. State*,⁴⁷ the court has stated that when a patient submits himself to the treatment of a medical practitioner either qualified or unqualified he renders an implied consent to suffer the harm and to take the risk. But the consent one given to a qualified medical practitioner becomes one given in good faith. But the consent given to a quack cannot be one given good faith when he does something which is not done by a qualified medical practitioner. Even otherwise it does not alter the situation.

Dispensation of the requirement of consent

Consent of a patient for medical treatment is insisted as a part of principle of bodily autonomy.⁴⁸ Accordingly a doctor should obtain the consent of a patient before the commencement

⁴³ Ibid.

⁴⁴ See supra n. 42 at Sec.81

⁴⁵ Id at Sec.88

⁴⁶ Ibid.

⁴⁷ See supra n.24

⁴⁸ See Mason and McCall Smith ,”Law and Medical Ethics” ,London ,5thEdn.(1999) p.246

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of treatment.⁴⁹ Otherwise he invites liability. The above requirement is not absolute. In an emergency situation a doctor cannot obtain the consent of a patient or there may be a situation where it is not possible to obtain consent. Under these circumstances if an act is done in good faith for the benefit of a person whose consent could not be obtained, it does not constitute a crime.⁵⁰ This is true of a qualified doctor. In case of a quack whatever act he does it is not an act done in good faith, but also it is said to cause harm to the patient rather benefit him. In effect, he cannot claim the benefit of the above provision.

Quackery and medical misadventure under the Consumer Protection Act, 1986

A patient for any deficiency in medical service can claim compensation from a doctor under the Consumer Protection Act, 1986.⁵¹ The burden of proof falls on the patient to prove the deficiency in the services rendered by a medical practitioner.⁵² But in case of quackery or medical misadventure it amounts to deficiency in service per se which dispenses with the obligation of a patient to prove deficiency in service on the part of a doctor. In *M. Jeeva v. Smt. Lalitha*,⁵³ the defendant was a registered nurse and midwife. She was running a hospital. The complainant was admitted to the hospital for caesarian operation. The defendant herself operated complainant which resulted in the rupture of the uterus, its removal and eventual death of a male baby. It was held by the National Commission that the act of the defendant being rash and reckless amounted to culpable negligence and accordingly there was deficiency in service per se.

The defendant in the above case was a nurse and midwife. A nurse or midwife is not educated and trained in administration of treatment and surgery. She is Para-medical staff who has to discharge her functions of nursing in accordance with the instructions of a qualified doctor. She is not a qualified practitioner. Naturally if she performs an operation the resulting calamity itself speaks its cause which need not be proved. Therefore any pretender to the knowledge of medicine should realize that administration of treatment or performance of operation is not his cup of tea.

License to practice a particular branch of medicine does not carry with it the right to practice any other branch of medicine whatsoever. It implies that he has obtained the prescribed educational qualification and training in that branch of medicine as mentioned in the license issued by the concerned authorities. Therefore one should confine the area of practice to the license. If he ventures to practice any other system of medicine other than one in which he is educated and trained it amounts to quackery or medical misadventure. In *Poonam Verma v. Dr. Ashwin Patel*,⁵⁴ the doctor was a diploma holder in homeopathy under the Bombay Homeopathy Practitioners Act. He had experience in administration of allopathic medicine. The complainant's husband complained fever. The doctor initially administered allopathic medicine for viral fever and thereafter for typhoid fever. On deterioration of the condition of the patient, he was shifted to a nursing home, where he breathed his last after 4½ hours of admission. There was expert evidence that there was nothing wrong in the medicine administered by the doctor that if any doctor trained in allopathic medicine were to treat the patient, he too would have administered the same

⁴⁹ Ibid .See also *Boase v. Paul*, (1931) D.L.R 442

⁵⁰ See Sec.92 of the Indian Penal Code

⁵¹ See Sec.14 of the Consumer Protection Act ,1986

⁵² *Indian Medical Association v. V. P. Shantha* (1996) AIR SC 550

⁵³ II (1994) CPJ 73 (NC)

⁵⁴ II (1996) CPJ 534(NC)

treatment. In spite of that the Supreme Court held that any person who practiced a particular system of medicine without the knowledge of it was a quack or charlatan, a pretender to the knowledge of medicine. Accordingly the complainant was awarded damages for deficiency in service perse.

It should be noted that the above case was decided on policy rather than on principle. It is evident from the facts that there was nothing wrong in the treatment rendered. The court was harsh in its decision that it was swept by the policy of law to crackdown and eradicate quackery.⁵⁵ It is immaterial that the quacks by virtue of their experience might have successfully administered treatment in the past. But if something goes wrong, the courts would give only deaf hears to their past experience and success.

Any practitioner who is learned in a particular branch of medicine should not venture to administer medicine in a branch in which he is a layman. Otherwise it amounts to quackery and if the patient sustains any injury, it attracts liability either civil or criminal or both as the case may be. In *R. R. Singh v. Prathibha*,⁵⁶ a patient was suffering from pain below the waist and both the legs. A practitioner in ayurveda medicine treated him in the allopathic stream. He administered drugs like betnesol, decadron and neurobin without consulting any allopathic doctor. The patient died. The District commission dismissed the complaint on the ground that there was no deficiency in service. The State Commission reversed the decision on appeal which was allowed by the National Commission. Accordingly the practitioner was directed to pay compensation of Rs.7,00,000/-. In this regard the National Commission observed⁵⁷ "...petitioner should have advised the patient to move to some renowned hospital. Doctor is not supposed to play with the lives of people for his personal gain...It is difficult to fathom as to how and why drugs like betnesol, decadron and neurobian were prescribed without consulting any allopathic doctor. It is difficult to understand how the practitioner switched over to allopathic medicine without any knowledge of the same. His very action smacks of negligence which may not be sufficient for conviction under Sec.304 part II. A doctor is not supposed to play with the lives of people for his personal gain."

In the above case the N.C refused to indict the practitioner for culpable homicide not amounting to murder as contemplated in II part of Sec.304 or under Sec.304A of the Indian penal code for criminal negligence. Instead he was directed to pay compensation. If the same case were to be decided by an American court the practitioner would have been convicted for manslaughter.

The Supreme Court has laid down progressive directions which would go a long way in curbing quackery. In *D. K. Joshi V. State of U.P.*,⁵⁸ it has rendered very valuable directions that District Magistrates and Chief Medical Officers of the state should recognize within a time limit unregistered medical practitioners, take necessary legal action and monitor the legal proceedings. Further the Secretary, Health and Family Welfare Department should monitor the actions taken by all the District Magistrates and Chief Medical Officers.

⁵⁵ The case was decided on policy rather on principle

⁵⁶ II 2012 C P J 534 (N C)

⁵⁷ Id at p.535

⁵⁸ (2000) 5 S.C.C. 80

STATUTORY CONTROL OF QUACKERY

The Indian Medical Council Act, 1954

This Act aims at regulating the modern scientific medicine through the Indian Medical Council and State Medical Councils which supervise the universities granting medical degrees by prescribing the conditions for the same and recognition of foreign medical degrees.⁵⁹ Complaints can be lodged against the quacks for practicing modern scientific medicine.⁶⁰ The name of a person who does not have required educational qualification can be removed from the register of medical practitioners.⁶¹ The Act further empowers the Council to constitute an Executive Committee for special purpose.⁶² In pursuance of the power so conferred the Delhi Medical Council has constituted an Anti – quackery Committee to device ways to control quackery and conduct survey to detect any malpractice.

The Dentists Act, 1948

The Act inter – alia seeks to curb quackery in the field of dentistry. Accordingly, if any unqualified person projects himself as a registered dentist for the first offence he invites penalty and subsequently if he continues the practice, in addition to penalty, he invites punishment by way of imprisonment.⁶³ If he uses the titles of dental practitioner, surgeon, dentist or their degrees, it also invites penalty.⁶⁴

The Indian Medical Central Council Act, 1970

This Act inter-alia regulates the Indian Medicines i.e. *Ayurveda*, *Siddha* and *Unanittibb*.⁶⁵ It contemplates constitution of committees for special purposes which can be used for curbing quackery in the respective field.⁶⁶ Quackery in *Ayurveda*, *Siddha*, and *Unanittibb* invites similar liability as contemplated above.⁶⁷

OTHER STATUTES

The Indian Medical Degrees Act, 1916, while recognizing the medical degrees in the Western medical science, it punishes any unqualified practitioner who holds himself out as having a medical degree in any western medical science.⁶⁸

The Pharmacy Act, 1948, contains a provision to the effect of removing the name of any pharmacist from the register of pharmacist for suppression of material facts.⁶⁹ It follows that an

⁵⁹ See the relevant provisions of the Act

⁶⁰ Id at Sec.15

⁶¹ Ibid.

⁶² Id at Sec.9

⁶³ See Secs.47 and 49 of the Dentists' Act, 1948.

⁶⁴ Id at Sec.48

⁶⁵ See the statement of objects

⁶⁶ See the relevant provision

⁶⁷ Ibid.

⁶⁸ See Sec.6 of the Act

⁶⁹ See Sec.36 of the Act

unqualified practitioner invites disciplinary action by way of removal of his name from the register.

The position is same under **The Homeopathy Control Council Act, 1973** which also contemplates the removal of the name of a practitioner from the register who does not possess any prescribed qualification in the sphere of homeopathy medicine.⁷⁰

The Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954

An unfortunate fact that the Indian masses both urban and rural because of their conservative beliefs fall prey of misleading advertisements which promise magical remedies for certain conditions like sexual impotency, menstrual irregularities, lack of sexual pleasure, miscarriage, conception etc. These advertisements are objectionable and the most part of it are given by the quacks. The above Act contemplates penalty and punishment that it seeks to curb medical fraud by any person including the quacks.⁷¹

CONCLUSION

It is evident from the above discussion that the term quackery is of wider amplitude. It signifies not only a person practicing medicine without the knowledge of medicine but also a manufacturer or seller of any product falsely claiming that a product has medicinal effect so as to lure a patient to purchase that product which amounts to medical fraud. The impact of quackery and medical fraud of the above type are so grave that the patients are exposed to grave risk of loss of life, limb and health hazards. As such it justifies a stringent legal control regime to rescue the patients from the clutches of unqualified practitioners and unscrupulous manufacturers of certain products claiming them as healers. The object of the legal control regime is to see that persons without the prescribed educational qualification are deterred from the practice of medicine and prevent objectionable and misleading advertisements in the greater interest of patients. Quackery has assumed a menacing proportion. A survey conducted in Delhi shows a staggering figure in the capital Delhi.⁷² Therefore one can easily imagine the figure for the entire country, which will certainly send a tremor in the spine of all of us. Therefore it is evident that quackery is flourishing as a profitable industry. More people approach quacks than the qualified practitioners. The obvious reason is the traditional nature of Indian society. Most of the illiterate people approach quacks for treatment. But the paradox is that educated people also do not lag behind the illiterate in approaching the quacks for their ailments. Therefore it is submitted that public awareness against quackery must be created as a strategic arm to strengthen the legal control regime which will go a long way in preventing the malady than curing it after it befalls.

The greatest lacuna of the legal control regime is lack of a comprehensive legislation to regulate it. It undoubtedly manifests a piecemeal effort. The whole mechanism is couched in a narrow legal framework cutting across a few limited statutes. It has no teeth to bite to eradicate the malady from the root which can effectively preclude its relapse. Therefore it is submitted that a comprehensive legislation must be laid down to check quackery in all branches of medicine.

⁷⁰ See Sec.3 of the Act

⁷¹ See Secs.3,4 &5 of the Act

⁷² There are 50,000 quacks in the city of Delhi alone. 50% of the people approach the quacks for their ailments.

Legal Control of Quackery: A Critical Analysis

The pluralism of medicine inter-alia has paved the way for different branches of medicine for same ailments. In India there prevails *Allopathy*, Homeopathy, Siddha *Aushadha*, *UnaniTibb* and *Ayurvedic* systems of medicine. Anyone who is trained in a particular system will be a quack or charlatan in other systems. If he ventures to practice any system without the knowledge of it, it would amount to quackery resulting in medical misadventure.

The consumer courts in India as discussed above, where any patient sustains injury as a result of such medical misadventure, consider it as an instance of deficiency in service per se which dispenses with the legal requirement of burden of proving deficiency in service on the part of the practitioner. The courts will not look into whether the practitioner has past experience of successfully treating the patients or exercised reasonable care. Rather as a matter of policy than principle the focus will be on whether practitioner is qualified or not. If unqualified he digs his own grave that law does not help a person who has violated it.

Another weak link in the chain is lack of co-operation and co-ordination between practitioners who practice different systems of medicine. Quackery in a particular branch of medicine is viewed as headache of the qualified practitioners in that branch by the practitioners in the branches of medicine that they are nothing to do that. The reason for that is the professional jealousy among the practitioners who practice various branches of medicine. The indifferent attitude can be wiped out only when all the qualified medical practitioners practice medicine without encroaching upon others' sphere confining themselves to their sphere of practice. They need to consider quackery as a common problem tormenting them. Therefore it is submitted that the medical professionals as a whole should find out ways of co-operation and co-ordination among themselves to root out the serious problem haunting them.

In this regard establishment of a National Quackery Prevention Council consisting representatives from various branches of medicine at the center and similar Councils at the state level can be thought of.

Generally the courts adopt a soft approach while imposing criminal liability on qualified doctors. It is sparingly imposed in rarest of rare occasions to prevent miscarriage of justice in the interest of the patients' vis-à-vis public. Qualified doctors can claim the exceptions contemplated under the criminal law but the unqualified practitioners are not permitted to claim that privilege. Though criminal law appears to fall on the quacks heavily in reality it is not so. Therefore it is submitted that criminal law should be made more stringent to control quackery effectively.

To conclude a comprehensive legislation should be brought out as a long term perennial solution to check quackery keeping in mind the suggestions made above in the backdrop of the bottlenecks and hiccups thereof.

RIGHT TO FOOD: A ROAD MAP TO ACHIEVE WELFARE STATE

Dr. Suresh V. Nadagoudar*

“Starvation is the characteristic of some people not having enough to eat. It is not the characteristic of there being not enough to eat. While the latter can be cause of the former, it is but of many possible causes.”

– Amartya Sen, Poverty and Famines, 1981

I. Introduction

‘Annadhatha Sukhibhava’ is an old age saying in India. It means the person who feeds the needy is blessed to be happy. Food is necessary for all living beings to survive. When a living being takes birth, the first thing which the life wants is food and water. It is a birth right of all living things on the earth. Mahatma Gandhi, the Father of the Nation, once said: “Without food it is difficult to remember God” and he also stated that hunger eats into the ethos of culture.

The right to food is a multidimensional right, the realization of which depends on many factors. In a normal situation people produce food required by them and excess production is sold in the open market which is bought by the people who do not basically produce food. But for the people who cannot afford food for the reason they are old, unemployed, poor, diseased, war, etc. is the duty of the state to provide food to them. The right to adequate food also implies that the food obtained must be of adequate quality and must qualify for minimum safety standard.

Starvation should be eradicated is the basic theme of human rights. It is the faulty distribution of food via markets that leads to the starvation of millions despite there being more than enough food to go around for everyone. The fundamental reason for such perverse deprivation in the midst of abundance is the widespread inability to buy food in the market due to insufficient incomes.¹

The evolution of the right to food is derived from the larger human right to an adequate standard of living contained in the Universal Declaration of Human Rights (UDHR), 1948. Article 25 (1) of UDHR asserts that, ‘Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services ...’ The International Covenant on Economic, Social and Cultural Rights (1966) developed these concepts more fully, stressing ‘the right of everyone to ... adequate food’ and specifying ‘the fundamental right of everyone to be free from hunger’. In 1996, the World Food Summit convened in Rome, requesting that the right to food be given a more concrete and operational content. In 2004, the 187 Member States of the General Council of the United Nations Organization for Food and Agriculture (FAO) adopted the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.

* Associate Professor and Chairman, University Law College, Bangalore University.

¹Aravind R.Ganesh, ‘The Right to Food and Buyer Power’, *German Law Journal*, Vol.11, 2010, p.1192.

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The most common constitutional provisions are formulated along the lines of the Universal Declaration of Human Rights, recognizing the right of everyone to an adequate standard of living, including food, clothes and shelter. Others refer to a decent living standard or life with dignity. For example Article 21 of the Indian Constitution speaks about right to life and livelihood which is treated by the Hon'ble Supreme Court of India as one of the basic right. It is the obligation of the state to be proactive in strengthening people's access to food. The state must fulfill the right directly whenever an individual or group is unable, for reason beyond their control to enjoy the right to adequate food with the means at their disposal. The state's role in strengthening the food security is more prominent in ensuring availability of food and ensuring access to the households, particularly for poor households.² And also it is the duty of the state to improve the food production, conservation and distribution of food through its policies.

India has achieved self-sufficiency in food production; however, there are still widespread chronic malnutrition and starvation deaths. The human right to food is being violated in India essentially due to failure of the Government to ensure an equitable distribution system; to effectively utilize funds for social welfare schemes that could, and under the human rights law must, be used to help lift individuals and families out of hunger and poverty; to monitor and administer food security and poverty alleviation schemes; and to ensure means of the purchase of food. The right to food is an expression of the responsibilities and obligations of states toward the individuals who bear the brunt of food security issues; as such it represents a useful tool to convey voters' expectations regarding food security to policymakers.³

In this background, the paper intends to highlight the constitutional basis for right to food and role of Indian judiciary in development of the said right thorough various decisions. Further, the development at the international arena in this regard has also been discussed. The salient features and scope of the National Food Security Act, 2013 have been explained. The paper concludes with suggestions to achieve the desired objective of providing food security to the poor and needy.

II. Right to Food and Indian Law

Although there is no explicit provision for the 'right to food' in the Constitution of India, the comparable human right provisions in the Constitution of India are found in few Articles of Fundamental Rights as well as Directive Principles of State Policy. Article 21 of the Indian Constitution provides the fundamental right to protection of life and personal liberty. Fundamental rights have two aspects - they act as fetter on plenary legislative powers and, secondly, they provide conditions for fuller development of our people including their individual dignity.⁴

² Dr. D. Anand, 'Right to Food and Role of State in the Constitution of India', *International Research Journal*, Vol I, Issue 11, 2010, p.59.

³ Graham Frederick Dumas, 'A Greener Revolution: Using the right to food as a Political Weapon Against Climate Change', *New York University Journal of International Law and Politics (JILP)*, Vol. 43, 2010, p. 107.

⁴ *Society for Un-aided Schools of Rajasthan V. Union of India & Others*, (2012) 6 SCC 1

The Directive Principles implicitly incorporates the right to food either in the form of non-justiciable right of the citizens (Arts. 39, 41) or in the form of directives in the nature of ideals of the state (Art.47) and these are:

- Right to adequate means of livelihood (Art. 39 a) Right of both sexes to equal pay for equal work (Art. 39 d)
- Right against economic exploitation (Art. 39 e-f)
- Right to work (Art. 41)
- Right to public assistance in case of unemployment, old age, sickness, and other cases of undeserved want (Art.41)
- The State shall endeavor to raise the level of nutrition and standard of living and to improve public health (Art.47)

To ensure this right and give meaning to the Directive Principle, the Government has drafted National Food Security bill. The object of the Law is to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of food at affordable prices to people to live a life with dignity and for matters connected and incidental to it.

III. The Supreme Court of India and Right to Food

Legal action is one of the means that can be used, in a democratic political system, to hold the state accountable to its responsibilities. As a result of aggressive campaigns and public interest litigation (PIL), over the last few years the Supreme Court of India has monitored the battle for the right to food. The problem is so acute that the Supreme Court was forced to intervene heavily on state and central governments on several occasions. Today, the directions issued by the Supreme Court are one of the major components for implementing the right to food. In brief, the interventions of the court had three major impacts:

- It converted the benefits of the eight nutrition-related schemes into legal entitlements;
- It directed all state governments to begin providing a cooked midday meal for all children in government-assisted schools; and
- It directed the state and central governments to adopt specific measures to ensure public awareness and transparency of these schemes/programmes.

The right to food can be seen as an implication of the fundamental “right to life”, enshrined in Article 21 of the Indian Constitution. Indeed, the Supreme Court has explicitly stated (several times) that the right to life should be interpreted as a right to “live with human dignity”, which includes the right to food and other basic necessities.⁵

In *Kesavananda Bharati v. State of Kerala*⁶, a landmark judgment, the larger Bench discussed the concept of the inviolable basic structure of the Constitution which cannot be amended. In this case, Mathew J. observed that the object of the people in establishing the

⁵ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

⁶ 1973, 4 SCC 225

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Constitution was to promote justice – social and economic – liberty and equality. The modus operandi to achieve these objectives is set out in Part III and IV of the Constitution. While discussing the other aspects he observed that “freedom from starvation is as important as the right to life”.

In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*⁷ the Court held that right to life means the right to live with basic human dignity. The Court held that while arriving at the proper meaning and content of the right to life, we must remember that it is a constitutional right which we are expounding, and moreover it is a provision enacting a fundamental right and the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content.

The Court further held that the fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The Court observed that the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival, and held that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, free movement and commingling with fellow human beings are part of the right to live with human dignity and they are components of the right to life.

In *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.*,⁸ the petitioners were living on pavement/slums in the vicinity of their place of work and they were forcibly evicted and their dwellings were demolished by officers of the Bombay Municipal Corporation. They challenged the act of the Corporation on the ground of violation of their rights under Articles 19 and 21. In that context, the Court held that the sweep of the right to life conferred by Article 21 is wide and far reaching. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. The Court also observed that persons have to eat to live.

In *Shantistar Builders v. Narayan Khimalal Totame*,⁹ the Court held that basic needs of man have traditionally been accepted to be three – food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to a decent environment and reasonable accommodation to live in.

Similarly, in *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*¹⁰ the Court quoted Article 25 of Universal Declaration of Human Rights and held that “Right to life includes the right to live with basic human dignity with the necessities of life such as

⁷ 1981, 1 SCC 608

⁸ 1985, 3 SCC 545

⁹ 1990, 1 SCC 527

¹⁰ 1992, 2 SCC 388

nutrition, clothing, food, shelter over the head, facilities for cultural and socio-economic well being of every individual. Article 21 protects the “right to life”. It guarantees and derives there from the minimum needs for existence, including a better tomorrow.

Thereafter, in *C.E.S.C. Ltd. v. Subhash Chandra Bose*,¹¹ the Court referred to the Universal Declaration of Human Rights, the International Convention on Economic, Social and Cultural Rights which recognize certain needs, which include the right to food, clothing, housing, education, the right to work, leisure, fair wages, decent working conditions, social security, the right to physical or mental health, protection of their families, as an integral part of the right to life. The Court also held that the Preamble and Part IV reinforce them compendiously as socio-economic justice, bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right.

In *Dena Nath v. National Fertilizers Ltd.*, the Court observed that the enforcement of the provisions to establish a canteen in every establishment under Section 16 is to supply food to workmen at the subsidized rates as the right to food is a basic human right.¹² In *P.G. Gupta v. State of Gujarat*¹³ the Court observed that the protection of life assured under Article 21 has given an expanded meaning of the right to life. It is settled law that all the related provisions under the Constitution must be read together and given the meaning of widest amplitude to cover the variety of rights which go to constitute the meaningful right to life. The Court also adverted to Article 11(1) of the International Covenant on Economic, Social and Cultural Rights which laid down that the States parties to the Covenant recognize the right of everyone to an adequate standard of living for himself and for his family, including food, clothing and housing, and to the continuous improvement of living conditions. And held that to the poor, settlement with a fixed abode and right to residence guaranteed by Article 19(1)(e) remain more a teasing illusion unless the State provides them the means to have food, clothing and shelter so as to make their life meaningful and worth living with dignity. It is also observed that food, shelter and clothing are minimal human rights.

Then in *Chamoli Singh & Ors. v. State of Uttar Pradesh & Anr.*¹⁴ Court held that the right to live guaranteed in any civilized society implies the right to food, water, a decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social, and cultural rights enshrined in the Universal Declaration of Human Rights and the Convention or under the Constitution of India cannot be exercised without these basic human rights.

In 2001, People’s Union for Civil Liberties approached the apex court and a land mark judgment was pronounced on right to food.¹⁵ A writ petition was filed as a Public Interest Litigation under Article 32 contending violation of Articles 21 and 47. In the final “prayer”, the petition requests the Supreme Court to issue orders directing the government: (a) to provide

¹¹ 1992, 1 SCC 462.

¹² 1992, 1 SCC 695.

¹³ 1995, Supp 2 SCC 184.

¹⁴ 1996, 2 SCC 549.

¹⁵ *People’s Union for Civil Liberties v. Union of India and ors.*, [(2003) 4 SCC 399].

immediate open-ended employment in drought-affected villages; (b) to provide “gratuitous relief” to persons unable to work; (c) to raise food entitlements under the Public Distribution System; and (d) to provide subsidized food grain to all families and the central government to supply free food grain to these programmes.

Various interim orders were passed from time to time directing the authorities to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. While considering the ICD scheme (Integrated Child Development Scheme) that intends to provide supplementary food to children of the age group 0–6 years and to the pregnant woman, the Court observed that a lot more deserves to be done in the field to ensure that nutritious food reaches those who are undernourished or malnourished or others covered under the scheme. The Court further directed that the *Anganwadi* Centres through which the ICDS is implemented, shall supply nutritious food/supplement to the children, adolescent girls and pregnant and lactating women. Court refused the argument of the government that there was scarcity of food and ordered that adequate food should be provided to the citizens. The case has been significant in not only catalyzing an Indian-wide movement for implementation of various food schemes but it has also become widely discussed in the global right to food movement and in research on right to food.

The order focused on (1) the Public Distribution System (PDS); (2) *Antyodaya Anna Yojana* (AAY); (3) the National Programme of Nutritional Support to Primary Education, also known as “mid-day meal scheme”; (4) the Integrated Child Development Services (ICDS); (5) *Annapurna*; (6) the National Old Age Pension Scheme (NOAPS); (7) the National Maternity Benefit Scheme (NMBS); and (8) the National Family Benefit Scheme (NFBS). The eight schemes were converted into legal entitlements.

IV. An Overview of the National Food Security Act, 2013¹⁶

The National Food Security Act received the assent of the President of India on 10th September 2013. The object of the Act as stated is to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto.

Defining food security¹⁷, which means the supply of the entitled quantity of food grain and meal specified under Chapter II. Right to receive food grain at subsidized prices by persons belonging to eligible households under Targeted Public Distribution System is the prime object of this legislation. Every person belonging to priority households, shall be entitled to receive five kilograms of food grain per person per month at subsidised prices specified in Schedule I from the State Government under the Targeted Public Distribution System and maximum a household is entitled to 35 kilograms of food grain under the system. The price of the subsidized food grain

¹⁶ Act No. 20 of 2013, published in Gazette of India on 10th September, 2013.

¹⁷ Section 1(6) of The National Food Securities Act, 2013.

shall be decided by the Central Government after considering various aspects dealing with State Government capacity to fulfill the same.

The law aims at reaching 75% of the rural population and 50% of the urban population under the scheme. The scheme is also to feed pregnant, lactating mother and children below 14 years. In India, 47 per cent children are underweight and many of these children are severely malnourished.¹⁸ Fifty percent of all childhood deaths are attributed to malnutrition. If a woman is malnourished during pregnancy, or if her child is malnourished during the first two years of life, the child's physical and mental growth and development may be slowed. This cannot be made up when the child is older it will affect the child for the rest of his or her life. Hence, the far reaching object of the present legislation is to reach children and mothers who are malnourished.

Every pregnant woman and lactating mother shall be entitled to meal, free of charge, during pregnancy and six months after the child birth, through the local *anganwadi*, so as to meet the nutritional standards¹⁹ and maternity benefit of not less than rupees six thousand, in such installments as may be prescribed by the Central Government shall also be provided as miscellaneous expenses during this period. This benefit is only to the women covered under the scheme or who is member of eligible household.

In case of children, every child who is above six months and below six years shall have appropriate nutritional meal of the standard specified in the law, free of charge, through local *anganwadi*, and the child below six months shall be promoted for exclusively breast feeding. In the case of children, up to class VIII or within the age group of six to fourteen years, whichever is applicable, one mid-day meal of nutritional standard specified, free of charge, every day, except on school holidays, in all schools run by local bodies; Government and Government aided schools shall be provided. The State Government has been cast upon a duty to identify and provide meals to children, free of charge, who are suffering from malnutrition. The State Governments shall implement schemes covering under the law in accordance with the guidelines given including cost sharing between Central Government and State Government.

In case the eligible person could not get the food grain, then he is entitled to food security allowance.²⁰ The eligible house hold under the scheme shall be calculated based on the population by the Central Government. The State Government shall identify the house hold eligible for *Antyodaya Anna Yojana* in accordance with the guidelines. The remaining households as priority households to be covered under the Targeted Public Distribution System, shall also be identified by the State Government as per guidelines. The identification of the house hold should be completed by the State government within 365 days of the coming into force this law. State Government shall continue to receive the allocation of food grains from the Central Government under the existing Targeted Public Distribution System, till the identification of such households is complete. The State Government shall place the list of the identified eligible households in the public domain and display it prominently. This is to ensure transparency in the scheme.

¹⁸ http://www.unicef.org/india/children_2356.htm

¹⁹ Section 4, of the National Food Security Act, 2013.

²⁰ Section 8 of The National Food Securities Act, 2013

Right to Food: A Road Map to Achieve Welfare State

Many reforms have been suggested under the law which the State Government and the Central Government is required to undertake. The reform shall include doorstep delivery of food grains to the Targeted Public Distribution System outlets, application of information and communication technology tools including end-to-end computerisation in order to ensure transparent recording of transactions at all levels, and to prevent diversion, leveraging "aadhaar" for unique identification, with biometric information of entitled beneficiaries for proper targeting of benefits under this Act, full transparency of records, diversification of commodities distributed under the Public Distribution System over a period of time, support to local public distribution models and grains banks, introducing schemes, such as, cash transfer, food coupons, or other schemes, to the targeted beneficiaries in order to ensure their food grain entitlements specified in the law and preference to public institutions or public bodies such as *Panchayats*, self-help groups and co-operatives in licensing of fair shops and management of fair shop by women organizations. This is to empower the women in India.

The women empowerment is also ensured by recognizing the eldest woman who is not less than eighteen years of age, in every eligible household, shall be head of the household for the purpose of issue of ration cards. Where a household at any time does not have a woman or a woman of eighteen years of age or above, but has a female member below the age of eighteen years, then, the eldest male member of the household shall be the head of the household for the purpose of issue of ration card and the female member, on attaining the age of eighteen years, shall become the head of the household for such ration cards.

There is a grievance redressal mechanism provided under the law.²¹ Every State Government shall put in place an internal grievance redressal mechanism which may include call centres, help lines, designation of nodal officers, or such other mechanism as may be prescribed under the legislation. The State Government shall appoint or designate, for each district, an officer to be the District Grievance Redressal Officer for expeditious and effective redressal of grievances of the aggrieved persons in matters relating to distribution of entitled food grains or meals and to enforce the entitlements under this Act. The qualifications for appointment, method and terms and conditions of appointment, salary and allowances, of District Grievance Redressal Officer and its powers shall be such as may be prescribed by the State Government. The same rule follows to other staff also. The officer shall hear complaints regarding non-distribution of entitled food grains or meals, and matters relating thereto, and take necessary action for their redressal. Appeal lies against the order of the District Grievance Redressal Officer to the State Commission.

Every State Government shall also constitute a State Food Commission for the purpose of monitoring and review of implementation of this Act.²² The State Commission shall consist of, a Chairperson, five other Members; and a Member-Secretary, who shall be an officer of the State Government not below the rank of Joint Secretary to that Government. In the panel there shall be at least two women, whether as a chairperson, or as a member or as a member-secretary. Apart from, there shall be one person belonging to the Scheduled Castes and one person belonging to the Scheduled Tribes, whether as a Chairperson or as a Member or as a Member-Secretary. This is to

²¹ Section 14 of The National Food Securities Act, 2013

²² Section 16, *Ibid*.

ensure that all the class is properly represented in the panel and grievances can easily reach the commission. The Chairperson and other Members shall be appointed from amongst persons who are or have been member of the All India Services or any other civil services of the Union or State having knowledge and experience in matters relating to food security, policy making and administration in the field of agriculture, civil supplies, nutrition, health or any allied field or who is of eminence in public life with wide knowledge and experience in agriculture, law, human rights, social service, management, nutrition, health, food policy or public administration or who have a proven record of work relating to the improvement of the food and nutrition rights of the poor.²³ The Chairperson and every other Member shall hold office for a term not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment.

The State Commission is entrusted with following functions-

- (a) monitor and evaluate the implementation of this Act.
- (b) either suo motu or on receipt of complaint inquire into violations.
- (c) give advice to the State Government on effective implementation of this Act.
- (d) give advice to the State Government, their agencies, autonomous bodies as well as non-governmental organisations involved in delivery of relevant services, for the effective implementation of food and nutrition related schemes, to enable individuals to fully access their entitlements specified in this Act.
- (e) hear appeals against orders of the District Grievance Redressal Officer.
- (f) prepare annual reports which shall be laid before the State Legislature by the State Government.

The State Commission shall, while inquiring into any matter referred to it, have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908, in matters relating to summoning and enforcing the attendance of any person and examining him on oath, discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court or office; and issuing commissions for the examination of witnesses or documents.²⁴ The State Commission shall have the power to forward any case to a Magistrate having jurisdiction to try the same. No proceeding of the Commission shall be invalidated for the reason of vacancy in it.

The Central Government is also vested with many obligations under this law. The Central Government shall, for ensuring the regular supply of food grains to persons belonging to eligible households, allocate from the central pool the required quantity of food grains to the State Governments under the Targeted Public Distribution System. It shall allocate food grains in accordance with the number of persons belonging to the eligible households identified in each State. It shall provide food grains at prices specified for the persons belonging to eligible

²³ Section 16 (3) of The National Food Securities Act, 2013

²⁴ Section 20 of The National Food Securities Act, 2013

households. For this the Central Government shall, procure food grains for the central pool through its own agencies and the State Governments and their agencies, allocate food grains to the States, provide for transportation of food grains, as per allocation, to the depots designated by the Central Government in each State, provide assistance to the State Government in meeting the expenditure incurred by it towards intra-State movement, handling of food grains and margins paid to fair price shop dealers and create and maintain required modern and scientific storage facilities at various levels. In case of short supply of food grains from the central pool to a State, the Central Government shall provide funds to the extent of short supply to the State Government to meet the obligations under the law.

The State Government shall be responsible for implementation and monitoring of the schemes in accordance with guidelines issued by the Central Government. Under the Targeted Public Distribution System, it shall be the duty of the State Government to take delivery of food grains from the designated depots of the Central Government in the State, at the prices specified, organise intra-State allocations for delivery of the allocated food grains through their authorised agencies at the door-step of each fair price shop and ensure actual delivery or supply of the food grains to the entitled persons at the prices specified. In case of non-supply of the entitled quantities of food grains or meals to entitled persons, it is the State Government who shall be responsible for payment of food security allowance. Every State Government is required to create and maintain scientific storage facilities at the State, District and Block levels, being sufficient to accommodate food grains required under the Targeted Public Distribution System, suitably strengthen capacities of their Food and Civil Supplies Corporations and other designated agencies and establish institutionalised licensing arrangements for fair price shops. The local authorities shall also be equally responsible for the proper implementation of this Act.

For ensuring transparency and proper functioning of the Targeted Public Distribution System and accountability of the functionaries in such system, every State Government shall set up Vigilance Committees.²⁵ The Vigilance Committees shall regularly supervise the implementation of all schemes under this Act, inform the District Grievance Redressal Officer, in writing, of any violation of the provisions of this Act and inform the District Grievance Redressal Officer, in writing, of any malpractice or misappropriation of funds found by it.

V. Conclusion

Food-related rights are recognized to some extent in a majority of countries, often on the same basis as the right to food is recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, the actual respect, protection and fulfillment of this right remains elusive and in most countries there is lack of clear definition and understanding of the content of these rights at the national level.

The right to food is underdeveloped as of yet; the understanding of the right, its content, limitations and application by oversight mechanisms, remain largely unexplored. The progress in the realization of the right to food is also very uneven in the world; while hunger and malnutrition

²⁵ Section 29 of The National Food Securities Act, 2013

have been largely eradicated in some countries, yet in others the situation remains critical, and many people have no effective entitlements and no effective ways of holding their governments accountable if they suffer from hunger and malnutrition. The ICESCR specifies the adoption of legislative measures for the realization of the rights recognized in the ICESCR, yet very few countries have taken legislative steps regarding the right to food beyond simple constitutional provisions, which, while being important first steps, probably do not suffice for effective action.

It is abundantly clear that the Supreme Court of India is leaving no stone unturned in interpreting various provisions of the Constitution to protect the “right to food” a basic human right, by taking into account the changing conditions and purposes, so that democracy in real form is maintained. The Court, from time to time, injects flesh, blood and vitality into the skeleton of the words used in different Articles of the Constitution, and gives colour and content to the expressions made therein, and also provides it with the skin of living thought.

The phrase “right to life” is given a wider meaning so as to serve the needs of the society. Now, the right to food has become an inviolable part of the basic structure of the Constitution. This is in conformity with the culture of India. The Indian concept of Dharma (religion) lays extraordinary emphasis on growing and sharing food in abundance.

The Act is passed to achieve the said right is also criticized. It is claimed that the Food Security law would put a massive burden on an already overburdened exchequer as the government would have to procure additional food grain. Not only would they have to find more storage but also spend extra to procure the grain. The additional procurement will drive up food inflation, even as fiscal overruns will create even more inflationary impetus. It is also claimed that the entire scheme entails throwing good money. Bandyng previous numbers, outlandish claims of leakages of food through the PDS is very common phenomenon. And more than this the law claims to fulfill 75% of rural population and 50% of the urban poor population of India by securing food to them. How this is all possible is a big question. However, the transparency mechanism if implemented properly, the law would be a big boon to the large poor population of India. Further, proper implementation of the programme and stringent punishment to erring officials and persons is a must. Majority opinion that, to have the law is to ensure welfare state which is what is reflected in the preamble of the Indian Constitution.

We have to try to achieve the said goal, because survival without food is not possible. Lack of food for human beings would undoubtedly generate problems of law and order and, in any case, the freedoms contemplated in the Constitution would be meaningless.

LIVELIHOOD ISSUES OF THE STREET VENDER- A CASE STUDY OF THE MARGINALISED IN THE URBAN WORLD

Dr. V. Sudesh*

I. Need for the study

The Doctrine of welfare State is based on the principle that the greater economic and social good of the greater number requires greater intervention of Government and adoption of public measure aimed at general economic development. The Constitution of India in Article 14 states that the State shall not deny to any person equality before law or equal protection of the laws within the territory of India. Article 19(1)(g) gives the Indian citizen a fundamental right to practice any profession, or to carry on any occupation, trade or business. These fundamental rights granted in Article 14 and 19 are enforceable against the State by invoking the “writ jurisdiction” of the High Courts or Supreme Court of India under Article 226 or 32 of the Constitution respectively. Further, the Directive Principles of State Policy, enunciated under Part IV of the Indian Constitution though not enforceable in the Courts, are fundamental in the governance of the country. The Supreme Court while interpreting these Directive Principles and their enforceability has held that the Government must keep these principles in mind while formulating new socio-economic legislation and must continuously strive to make these principles a reality.

Despite the above rights, street vendor move for, crisis to crisis in their daily lives as they face multifarious problems. Municipal authorities and police, alternatively harass the hawkers/street vendor by forcible removal, demands of illegal gratification or bribes, destruction of their goods and wares forcible removal, demands of illegal gratification or bribes, destruction of their goods and wares, demands to be given free goods, verbal abuse and physical manhandling or beating. Mandatory attendance in Courts for alleged offences under the criminal law compels the hawker to lose the days earning. Illiteracy of vendors helps corrupt and baton- wielding law officers get away, because it becomes difficult to identify them. In the same context, lack of access to legal services and courts, add to the problems of hawkers and venders. In the light of the above provisions it can be said that the street vendor need to be given the same protection as is given to other citizens and that there is need for the enactment of a separate legislation for socio-economic upliftment of the street vendor.

II. Objectives of the study

1. To know the legal status of street vendor.
2. To study the National Policy on Urban Street Vendors 2009 and its impact on street vendor
3. To know the social and economic status of the street vendor.
4. To conduct a field study of street vendor activity in BBMP limits, Bengaluru.

* Associate professor, University Law College, Bangalore University.

5. To know the number of men, women & children involved in street vendor activity.
6. To suggest model legislation which protects the interests of street vendor

III. Hypothesis

The following hypothesis is formulated for the purpose of the research:

1. The National Policy on Urban Street Vendors, 2009 provides the right to livelihood by ensuring appropriate legal status to street vending activities.
2. Street Vendors are a challenge for Urban Management.
3. Street Vendors provide services and products at affordable prices to urban consumers.
4. Street Vendors do not have any social and economic security.
5. The BBMP Bengalooru, does not have any scheme to regulate the street vendors as per the National policy, 2009.
6. The Government of Karnataka has not enacted legislation for the regulation and protection of the livelihood of street vendors.

IV. Methodology of the Study

The study pertaining to street vendor was done by using the empirical research technique. For the purpose of data collection various streets were randomly selected within the limits of BBMP, *Bengalooru*, wherein street vending activity is generally carried out. The questionnaires and proforma for the collection of data were finalised by first conducting a sample study and then field data collectors were engaged to record the information on the printed format. The interview for the purpose of collection of data was done in the local language of the street vendors/customers/police constables etc.

Further, the data collected from the respondents were presented in a Round Table Conference, wherein the data analysed in the presence of stake holders.

V. Findings

A) *Legal status*

Street Vendors (SV) comprise a very important segment of the unorganised working population in the country today. It is estimated that in several cities street vendor constitute approximately 2% of the population in metropolitan areas in the country. Street vending is not only an activity of self-employment to the urban poor but also a means to provide 'affordable' as well as convenient services to majority of the urban customers. However, notwithstanding the above fact, in recent years due to massive influx of population into urban areas and the consequent effect on vehicular and pedestrian movement on busy city roads, the street vendor activity is considered as nuisance on public roads. It was in 1966 in the case of *Pyare Lal v. New Delhi Municipal Committee and Anr*, the question of fundamental right to carry on street vending by sale of cooked food on public streets under Art.19 (1) (g) came up before the Supreme Court in the context of a resolution of the New Delhi Municipal Committee stopping such sale. A three-Judge Bench held that no person carrying on the aforesaid business of selling cooked food has a fundamental right to carry on street vending particularly in a manner that creates unsanitary and unhygienic conditions in the neighbourhood.

The legality of street vendor activity and the right to carry on business on public roads came to be highlighted when *Sodan Singha* street vendor in New Delhi's *Janpat* area was frequently evicted and his goods confiscated by the New Delhi Municipal Corporation (NDMC). He filed a PIL claiming that the action of NDMC violated his fundamental right to carry on business or trade under Article 19(1)(g) of the Constitution of India.

The Supreme Court in a significant judgement concluded that the hawkers and squatters have a fundamental right to carry on business on the public street, but the same should be regulated. It was further held that the right of a hawker to transact business, while going from place to place, is recognized in India for a long period. On the other hand it is certain that the public streets demand its use by the public and the streets are not meant to facilitate some citizens to carry on any private business. However, such a right of hawking for carrying on business on the streets cannot be denied if they are properly regulated and therefore the said right is subject to reasonable restrictions under clause (6) of Article 19. Further the court relying on the ratio in *Saghir Ahmad and Anr v. State of U.P and Ors* held that the streets in India are vested in the municipality and they have to be used by the municipalities as trustees. The learned judge while delivering the judgment observed:

“We as a court in a welfare State do realize the hardship to which many of the petitioners may be exposed if they are prevented from carrying on the business. The only solution may be adoption of the policy of full employment, which even according to leading economist like Keynes will alleviate the problems of the unemployed to some extent. But as students of economics we also realize that every human activity has the ‘optimum point’ beyond which it becomes wholly unproductive. It is for the government to take reasonable steps to prevent movement of people from rural areas to urban areas. That can be done by the development of urban centres in rural areas removed from each other at least by one hundred miles. This is more a matter of executive policy than for judicial faith. We hope and trust that in administering the laws in force the authorities will keep in view humane consideration.”

Further Justice *Kuldip Singh*, in a concurring but a different opinion, interpreted the right under Article 19(1) (g) “*in a nutshell the guarantee takes into its fold any activity carried on by a citizen of India to earn his living. The activity of course must be legitimate and not anti-social like gambling, trafficking in women and the like.*”

In several cases, the Supreme Court has felt the importance of framing regulations to regulate hawking business. The Supreme Court time and again has suggested the government to frame regulations for regulating citizen's right to carry on hawking business on the streets and further highlighted the significance of framing regulations to regulate hawking business by creating Hawking and Non-Hawking zones.

B) The National Policy on Urban Street Vendors, 2009 (NPUSV)

The NPUSV 2009 is the outcome of the long time demand in this regard by various NGOs associated with street vendor. Despite several judgements and directions by the apex court, the street vendor continued to be harassed by the law enforcement agencies and municipal corporations. In order to effectively represent the cause of the street vendor and to protect their interest, the National Alliance of street vendor of India (NASVI) in the year 1989 as an independent body federation of street vendor organisations. NASVI and SEWA initiated a survey

of Street vending in seven cities which led to the organisation of a National Workshop on problems faced by street vendor. The National workshop was held on May 29-30, 2001 at New Delhi, which was jointly organised by SEWA and Ministry of Urban Development, Govt. Of India. It was the result of this workshop that the first National policy of street vendor was drafted in Sep. 2002. However, with the change of the Govt. at the centre, a new version of the policy was framed in the year 2009.

The NPUSV, 2009 has attempted to facilitate the street vendor in the urban and metro areas and have laid down the procedures for their set up and regulations. The underlying principle of the policy is the acknowledgement of the fact that *“street vendor are often those who are unable to get regular jobs in the remunerative formal sector on account of their low level of education and skills. They try to solve their livelihoods issues through their own meagre financial resources and sweat equity.”* The policy upholds the general recognition of Human Rights of the most vulnerable section of the society and in particular the recognition of the positive role of street vendor in providing essential commodities to people at affordable prices and at convenient places. The broad objective of the policy is to provide for and promote a supportive environment for the vast mass of urban street vendor to carry out their vocation while at the same time ensuring that their vending activities do not lead to overcrowding and unsanitary conditions in public spaces and streets.

The specific objectives of the Policy are as follows:

- a) **Legal:** To give Street Vendors legal status by formulating appropriate laws and providing legitimate vending/hawking zones in urban areas and their enforcement.
- b) **Facilities:** To provide facilities for appropriate use of identified space including the creation of hawking zones in the urban development/ zoning plans, mentioned above;
- c) **Regulation:** To eschew imposing numerical limits on access to public spaces by discretionary licenses and instead moving to nominal fee-based regulation of access, where previous occupancy of the space by the Street Vendor for vending purposes, determines the allocation of space. The Municipal Authorities should regulate allocation of space based on previous occupancy. If demand for space is in excess of supply, a transparent system of selection such as lottery should be followed. All allotments should be based on payment of a prescribed fee fixed by the Municipal Authorities based on the recommendation of the TVCs.
- d) **Role in distribution:** To make Street Vendors a special component of the urban development /zoning plans by treating them as an integral and legitimate part of the urban distribution system;
- e) **Self-Regulation:** To promote self-regulation in matters relating to hygiene, including disposal of waste amongst Street Vendors both in the individually allotted areas as well as in areas occupied by the Street Vendors as a whole.
- f) **Organization:** To promote, if necessary, organizations of Street Vendors e.g. Unions / Co-operatives/ Associations and other forms of organization to facilitate their empowerment;
- g) **Participation:** To set up participatory mechanisms with representation by urban Vendors’ organizations, (Unions / Co-operatives/ Associations), Voluntary organizations, Municipal Authorities, the police, Residents Welfare Association (RWAs) and others for orderly conduct of urban vending activities;

- h) **Rehabilitation of Child Vendors:** to prevent vending by children and seek their rehabilitation where ever such practice exists, in conformity with the Child Labour (Prohibition & Regulation) Act, 1986;
- i) **Social Security:** To provide protective Social Security to take care of contingencies such as sickness, maternity and old age;
- j) **Promotional Measures:** to promote access to such services as credit, housing and upgradation of skills. For such promotion, the services of Self Help Groups (SHGs)/ co-operatives/ Federations/ Micro Finance Institutions (MFIs) etc., should be encouraged.

C) A Model Law Based on the NPUSV, 2009

A model law based upon the NPUSV, 2009 was framed in the year 2009. However, there were several issues which were unresolved. Some of the issues are:

1. **Preserving Natural Markets:** The model law has completely ignores the issue of preserving the natural markets. These are places where consumers automatically venture in to buying habits, since the vendors would spring up instantaneously to serve the immediate needs of the consumers for Eg. Vendors outside the railways station and bus depots
2. **Registration of Street Vendors ;** the model bill over-looks the aspects of issuing licenses first to exiting street vendor and later accommodating new vendors depending upon the availability of space.
3. **Eviction:** the NPUSV, 2009 policy lays down the eviction is the last resort. This aspect is not mentioned in the model bill
4. **Extent of space:** though it is generally agreed that 2% of the population is engaged in street vending activities, the model law does not specify the extent of space to be allotted for street vending.

After considering the above objections / issues a revised model Bill was drafted in the year 2011 known as “The Street Vendors (Protection and Promotion of Livelihood Bill, 2011 which is presently being debated and discussed by various groups.

D) Economic and Social Status – A Case Study of street vendor in Bangalore

There are various kinds of S V. Like in other cities, in *Bengalooru*, we can find several kinds of street vendor trying to sell their wares. They can be divided into **mobile/dynamic**, those who visit different streets/ places during their working hours and **immobile/static** street vendor, and those that stay on-site, having a regular/home-base etc. Mobile street vendor is further divided into **fully mobile** street vendor, the ones that keep on moving, and **partially mobile** street vendor, the ones that have several rest/stop locations. An illustration of the latter is, some sellers who sell in front of schools early in the morning (school children arrive, school about to start) and return there twice later in the morning and in the afternoon (school children having recess and children released from school, school is over). Between those times the sellers visit or relocate in other places where customers are plenty, such as markets, residential areas, office complex, etc. Static street vendor at the minimum have a piece of cloth or plastic mat thrown on the ground to display their ware.

By and large the population of street vendor is comprised of people coming from lower economic strata of the society. The unemployed youth in the urban areas also add to the population

of street vendor. There is migration of the rural population to urban areas due to economic reasons which factor makes the street vendor populous. Street vendor is seen as an immediate avocation to meet daily needs of survival by the migrating population. **On a social platform the street vending men, women and children are seen to belong to lower class in the social set up.** For many urbanites, these street vendor are hindrance to smooth movement of traffic and cause for congested roads and market places. While the city buildings try to touch the skyline, the street vendor are at the bottom and without any economic and social benefits. In the context of urbanisation and development the street vendors are the facilitators of urban market and places; without street vendors' existence, city is vacuum in its activities. The street vendors are facilitators to the urban working bodies and individuals. The ingress and egress of the travelling population are more in *Bengalooru* for various reasons; the street vendor welcome them by facilitating round the clock for meagre payment.

Field study is the most important part of the present study. Random sampling method was adopted to administer the questionnaire to the respondents. Separate set of questionnaire were administered to street vendor, customers & traffic police constables.

At the outset it may be stated that there is general lack of awareness among all the category of respondents with regard to the existence of a national policy on urban street vendor. The street vendor in *Bengalooru* represents different regions of India speaking different languages. street vendor belong to the different marginalised groups in India. However, they are highly skilled as regards learning the local language is concerned. The street vendor work in conditions which do not guarantee any fixed income from their daily business. They are unsure of their place of work. The common grievance by the street vendor is that have to face the harassment of eviction by the law enforces and corporation authorities. With no social security they face health related problems due to the exposure to pollution caused by vehicular movement. The street vendor live with the risk of motor vehicles ramming into them causing injury or sometimes death.

The average age of the street vendor is between 40-55, and the majority being male. The field survey established the facts the majority of street vendor are illiterates. Most of the street vendor carry on their vending business without obtaining license from the concerned authority. 99% of the street vendor interviewed are unaware of the NPUSV, 2009. Despite the Supreme Court recognise the valuable service provided by the street vendor; the ground reality is that hardly anything has been done to regulate their activity. Below is a news item published to put forth the above point:

Development in the city has no place for street vendor. Instead of reaping benefits from fast growth, street vendor seem to be losing out in the process. Urging the state to implement the revised National Policy on Urban street vendor 2009, hundreds of street vendors voiced their protest on Sunday June 8th 2010 Times of India for the delay. "I have been selling fruits close to Vijayanagar bus stop for the past 30 years. Now, officials are asking us to vacate the place because of Metro project. Earlier, my shop was demolished to give space for a parking lot for a hotel. Where am I supposed to go," asked Selvamma.

"We earn Rs 1,000 a day from the fruits we sell. But we are able to take home only Rs 600. We don't get any help from the government. Even the space we have to earn our livelihood is being taken away," she said. Demanding a safe working environment, street vendor who gathered at the convention urged the authorities to give them space to earn their livelihood without any harassment from police or corporation officials.

"Street vendors are forced to give their hard-earned money to corrupt police or corporation officials. The government should provide them the licence to carry on with their work. The policy for street vendor also underlines that they be given legal status and facilities for appropriate use of identified space, including creation of hawking zones," said R S Deshpande, director for Institute of Social and Economic Change (ISEC). The policy includes the provision to form town-vending committees under the municipal commissioner, he added. National Association of street vendor of India Karnataka Committee coordinator C Balakrishnan said there are at least 10 lakh street vendor in Bangalore.

"The policy for street vendor has provisions including pension and insurance. It has been implemented in states like Andhra Pradesh, Tamil Nadu, Bihar, Delhi, Gujarat, Maharashtra, Madhya Pradesh, Orissa, Rajasthan and Uttar Pradesh. Unfortunately, Karnataka is still lagging behind," he pointed out.

A majority of the customers interviewed (about 70%) admitted that they are dependent on the services provided by the street vendor and said that if the existing place of street vending is shifted it would cause them great inconvenience. Yet they asserted that the street vending activity results in inconvenience of free movement of men and vehicles on the roads. Like the case of street vendor, even the customers were unaware of any national policy for street vendor.

VI. Conclusions & Suggestions

The Constitution of India guarantees right to livelihood to all its citizens and the street vendor are no exception. However the street vendor's rights have received scant attention in urban areas. The Municipal laws consider street vending in public places as a crime. The street vendor are basically unorganised. Only recently some voluntary associations have been formed to safeguard their rights. Due to this fact they are often driven away from streets and are harassed by local and lower level law enforcement authorities. But every city dweller must not forget the value addition that these street vendor provides for a comfortable urban living.

The need of the hour is rather than considering eliminating street vendor completely from urban landscape, their vending must be regulated so that their livelihood is not snatched away from them. Thanks to the Supreme Court, the N.P.U.S.V, 2009 has recognised the rights of the street vendor. Although a model law, a Central Legislation in the form of the *Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill 2011* has been drafted, it has not been introduced in Parliament so far. The following specific suggestions are herein made for giving legal status to the street vendor:

1. The Parliament may consider the passing of street vendor (Protection of Livelihood and Regulation of Street Vending) Bill 2011 at the earliest.
2. The Government of Karnataka should enact a legislation based on the N.P.U.S.V, 2009.
3. The BBMP, *Bengalooru* authorities must stop evicting street vendor until the enactment of the legislation.
4. The BBMP, *Bengalooru* must provide for alternative space for vending activities until such time as vending zones are identified as per the N.P.U.S.V, 2009.
5. The BBMP, *Bengalooru* should give wide publicity about the N.P.U.S.V, 2009.
6. The State Government should formulate employment schemes on the lines of National Rural Employment Guarantee scheme for the Urban street vendor.
7. The Nationalised banking institutions should come forward to identify and to give small credit loans to the street vendor.
8. A separate local body is to be set up to regulate the activities of street vendor. since the present urban local body is messed up with other vital issues in managing the city.

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ABUSE OF DOMINANT POSITION UNDER COMPETITION LAW: LEGAL SUBTLETIES

Dr. Sairam Bhat*

Introduction:

The Competition Act, 2002, defines competition law as synonymous with the term antitrust, antimonopoly or fair trade laws in other legal jurisdictions. It is an Act to provide, keeping in view economic development of the country, for the establishment of a Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India.¹

The Monopolies and Restrictive Trade Practices Act, 1969, was a predecessor of New law as the Competition Act 2002.² The MRTP Act, 1969, has been introduced to avoid concentration of wealth in the hands of few people to the detriment of common people and to provide for control of monopolies and prohibition of monopolistic, restrictive and unfair trade practice and protect consumer interest.³ India adopted after its independence an era of command and control over its market economy, where there was too many regulations, rules and executive orders over business activity.⁴ Visible hand of government was found in every sector of economic activity. After the economic liberalization in 1991, economic Reforms have led to shift from command and control economy to economy based on free market principle.⁵ Need for competition Act 2002 arose because The MRTP Act, 1969 had various loopholes. The MRTP Act, 1969 was largely based on command and control regime and it had become obsolete in the era of globalization, privatization and liberalization. Certain offending trade practices like abuse of dominant position, predatory pricing, boycotts and refusal to deal, cartels collusions, price fixing, bid rigging etc., were not defined in it, hence could be dealt with.⁶ One argued that general definition of Restrictive trade Practice [RTP] did enable to try offences under the Act relating to anti-competitive practices. But definition being general definition, Courts gave different interpretations of same sections and spirit of law was not understood. Further Anti practices were not specified. They could not be identified.⁷ Enforcement of law had become difficult task to perform. Further, the orders of the MRTP Commission were restricted to passing 'cease and

* Associate Professor of Law, NLSIU, Nagarbhavi, Bangalore.

¹ Gazette of India extraordinary. Part ii, Section 1 published by authority number 12, New Delhi, Tuesday Jan 14, 2003.

² Statement of object and reasons of the MRTP Act is influenced by the U.K. Restrictive Trade Practices Act 1956 and Resale Prices Act 1964

³ The MRTP Act, 1969.

⁴ Dr. S. Chakravarthy; *Metamorphosis from MRTP Act, 1969 to Competition Act, 2002*;

www.cutsinternational.org/doc01.doc.

⁵ www.vaishlaw.com, competition law bulletin

⁶ Sec. 2(0) of the Act defined Restrictive Trade Practices as trade practices which prevent, distort and restrict competition

⁷ MRTP Act, 1969.

desist' orders which unlike the Orders of the Competition Commission of India [CCI] can impose penalty.

Better law in the form of The Competition Act⁸ had to be enacted because anti-competitive practices had to be identified and specifically defined thereby snatching away from offenders technical grounds to escape indictment. Appeals from orders of commission under Monopolies and Restrictive Trade Practices Act 1969 under Sec. 55 of the Act would lie to Supreme Court leading to lots of workload at higher judiciary. Need was felt to create Appellate system under the Competition Act itself -COMPAT.⁹ In various judicial decisions it has been said that wordings of MRTP Act¹⁰ have become inadequate and that it has to be redrafted to maintain spirit of law.¹¹

Competition Law on Abuse of Dominant Position

The Competition Act, 2002, mainly deals with three areas. It prohibits anticompetitive agreements, prohibits abuse of dominant position,¹² and regulation of combinations and it undertakes competition advocacy. These components are contained in Chapter II of Competition Act 2002.

In particular, Section 4 of the Act prohibition of abuse of dominant position.¹³ It defines what constitutes a 'dominant position'. However, the holding of a dominant position by an

⁸ By Sec. 66 of the Competition Act, 2002, the MRTP Act, 1969 is repealed and the matter before the MRTP Commission transfer to CCI.

⁹ See Sec. 53 A of the Competition Act, 2002. Competition Appellate Tribunal is headed by a retired Supreme Court Judge. BY Sec. 53 U, the COMPAT has the power in respect of contempt as similar to High Court. Appeal from COMPAT can be taken to the Supreme Court with 60 days. [Sec. 53T].

¹⁰ The MRTP Act, 1969 stands repealed with effect from October 14 2009. The pending cases will be disposed by the Competition Appellate Tribunal and pending investigations or proceedings relating to unfair trade practices referred to in Section 36A(1)(x) of the Monopolies Act, relating to "giving false or misleading facts disparaging the goods, services or trade of another person", stand transferred to the Competition Commission from the said date.

¹¹ Two doctrines govern The MRTP Act, 1969 namely reformist doctrine and Behavioral Doctrine Conduct of the entities / undertaking and bodies which indulge in trade practices in such a manner as to be detrimental to public interest is examined to check whether said practices constitute any monopolistic, Restrictive or unfair Trade Practices. In terms of reformist Doctrine the provisions of The MRTP Act provide that if The MRTP, Commission after enquiry finds out errant undertaking has indulged in Restrictive or unfair trade practice, it can direct such undertaking to discontinue or not to repeat the undesirable trade practice. MRTP act also provides for an assurance from an errant undertaking that it has taken steps to see that prejudicial trade practice does not exist anymore. The MRTP Act follows reformist or advisory approach. There was no deterrence by punishment.

¹² The government notified selected portions of the Competition Act for enforcement, relating to anti-competitive agreements (Section 3) and abuse of dominant positions (Section 4) with effect from May 20 2009.

¹³ Sec 4. (1) No enterprise shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-Section (1), if an enterprise.-(a) directly or indirectly, imposes unfair or discriminatory-(i) Condition in purchase or sale of goods or service or (ii) Price in purchase or sale (including predatory price) of goods or service.

Explanation - For the purposes of this clause, the unfair or discriminatory condition in purchase Or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or (b) limits or restricts-(i) production of goods or provision of services or market therefore; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or(c) indulges in practice or

enterprise or a group in itself is not prohibited. The Competition Act, 2002 prohibits *abuse* of such a dominant position by an enterprise¹⁴ or a group. The enforcement of Section 4 brings within its ambit all enterprises that enjoy a dominant position in the relevant market, including public sector enterprises or government departments¹⁵ engaged in any trade or business activity that is not covered under the sovereign functions of the state. In an inquiry under Section 4, unlike that under Section 3, an appreciable adverse effect on competition in the relevant market need not be proved. However, any of the six prohibited business practices listed in Section 4 is sufficient to bring the dominant enterprise within the ambit of the commission's scrutiny and instances of such prohibited activities in India are not scarce.

The Commission is empowered to enquire whether an enterprise or group has the dominant position and whether it has abused such dominant position on the basis of: (a) its own motion; (b) information received from any person, consumer or association or any trade association; or (c) on a reference received from the central government, state government or a statutory authority.¹⁶

Comparatively, in the UK two sets of competition rules apply in parallel. Anti-competitive behavior which may affect trade within the UK is specifically prohibited by Chapters I and II of the Competition Act 1998 and the Enterprise Act 2002. Where the effect of anti-competitive behavior extends beyond the UK to other EU-member states, it is prohibited by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

practices resulting in denial of market access; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the Subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation: For the purposes of this Section, the expression—

(a) "Dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—(i) Operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favor; (b) "Predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

¹⁴Under Section 2(h) of the Competition Act, the definition of 'enterprise' includes: "a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place of at different places, but does not include any activity of the government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

¹⁵For instance, if a public sector enterprise attempts to deny market access to a private enterprise that may be its competitor in any product market, a complaint of abuse of a dominant position would be brought against such public sector enterprise before the commission.

¹⁶ See Sec. 19.

UK and EU competition law prohibit two main types of anti-competitive activity:

- anti-competitive agreements (under the Chapter I and Article 101 prohibitions); and
- abuse of dominant market position (under the Chapter II / Article 102 prohibitions).

Both UK and EU competition law prohibit businesses with significant market shares unfairly exploiting their strong market positions.

Contravention of Article 102 or Chapter II can have serious consequences for a company:

- firms engaged in activities which breach these provisions can face fines of up to 10% of group global turnover;
- conduct in breach of Article 102 or Chapter II can be stopped by court injunction;
- firms in breach of Article 102 or Chapter II also leave themselves exposed to actions from third parties who can show they have suffered loss as a result of the anti-competitive behavior; and
- Breach of Chapter II can result in individuals being disqualified from being a company director.

Type of Behavior that constitutes ‘Abuse’:

When the business has the ability to act independently of its customers, competitors and consumers it is in a position of dominance, various elements have to be considered for Establishing if a company is dominant. But, as a general rule, if a business has a 50% market share there is a presumption that it is dominant. However, dominance has been found to exist where market share is as low as 40%.

There are two tests common to assessing whether Sec. 4 of the Competition Act applies: whether an undertaking is dominant, and if it is, whether it is abusing that dominant position. The first test raises two questions which are considered below: (i) the definition of the market in which the undertaking is alleged to be dominant (the relevant market); and (ii) whether it is dominant within that market.¹⁷ In addition, in determining whether Sec. 4 applies, it is necessary to consider in which territory the dominant position is held. Abusive conduct generally falls into one or both of the following categories: conduct which exploits customers or suppliers (for example, excessively high prices),¹⁸ or conduct which amounts to exclusionary behaviour, because it

¹⁷ See Sec. 4(2)(e) of the Competition Act, 2002.

¹⁸ Intellectual Property Rights (IPR) involve grant of exclusive rights to the right holders to exploit the results of their innovation so as to provide incentive to innovate. Competition Act, 2002 exempts the reasonable use of such rights by right holders from the provisions of Sec. 3 related to agreements. However, the actions by enterprises that shall be treated as abuse (specified under Section 4 (2)) shall stand applicable equally to IPR holders provided such rights are considered by the Commission to render the holder a dominant player in the relevant market.

removes or weakens competition from existing competitors, or establishes or strengthens entry barriers,¹⁹ thereby removing or weakening potential competition.

Exclusionary behaviour may include excessively low prices²⁰ and certain discount schemes, where its (likely) effect is to foreclose a market, as well as vertical restraints or refusals to supply where these (are likely to) foreclose markets or dampen competition. However, whatever the form of the behaviour in question, its likely effect on competition will depend on the circumstances at hand and the Competition authorities will assesses alleged abuses on a case-by-case basis.

In UK, Article 102 requires dominance in a substantial part of the European Union, but there is no requirement under Chapter II that a dominant position must be held in a substantial part of the UK, meaning that, in theory at least, dominance could be considered to exist in a fairly small area of the UK. For example Microsoft Corporation - A world's largest software company found abusing its dominant position in the marketing of personal computer operating system. The European Commission²¹ has imposed fine of US\$612 million equivalent to 2630 crores because Companies such as Novell²² and Sun-Microsystems, who were rivals to Microsoft were refused interface information and consequently they contended that they were unable to compete in work group server operating system (WGSOS). The other allegation relates to tying of WMP with Window-2000. Microsoft's contention is it is intellectual property. European Commission felt that in view of over whelming dominance, the veil of intellect property with Microsoft needs to be lifted and has directed Microsoft to disclose within 120 days complete and accurate documentation so as to allow non Microsoft group server to achieve interoperability.²³

In India, however, having a dominant position does not in itself breach competition law. The abuse of that position is prohibited. Imposing unfair trading terms, such as exclusivity; excessive, predatory or discriminatory pricing; refusal to supply or provide access to essential facilities; and tying (i.e. stipulating that a buyer wishing to purchase one product must also

¹⁹Barrier to entry of new enterprises into the relevant market is a major restraint on the dynamics of competition. When a dominant enterprise in the relevant market controls an infrastructure or a facility that is necessary for accessing the market and which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/services, the enterprise may not without sound justification refuse to share it with its competitors at reasonable cost. This has come to be known as the essential facility doctrine (EFD).

²⁰The "predatory price" under the Act means "the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors" [Explanation (b) of Section 4]

²¹ Art. 82 of the EU treaty provides that: 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.'

²² It started as a complaint from Novell over Microsoft's licensing practices in 1993, and eventually resulted in the EU ordering Microsoft to divulge certain information about its server products and release a version of Microsoft Windows without Windows Media Player

²³*Microsoft v Commission of the European Communities* Case T-201/04. 2007 II-03601

purchase all or some of his requirements for a second product); imposing unfair trading terms, such as exclusivity; excessive, predatory or discriminatory pricing; refusal to supply or provide access to essential facilities; and tying (i.e. stipulating that a buyer wishing to purchase one product must also purchase all or some of his requirements for a second product) amounts to abuse of dominance.

Checking Abuse of Dominant Position in India: Some Reflections

It is the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. In a perfectly competitive market no enterprise has control over the market, specially in the determination of price of the product. However, perfect market conditions are more of an economic “ideal” than reality. Keeping this in view, the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant or not. Secondly, dominance has significance for competition only when the relevant market has been defined. The relevant market means “the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market²⁴ or with reference to both the markets”. The Act lays down several factors of which any one or all shall be taken into account by the Commission while defining the relevant market.²⁵

In a landmark ruling the CCI held that DLF had abuse its dominant position.²⁶ In this case DLF announced the launch of a Group Housing Complex, known as ‘The Bellaire’ consisting of 5 multi-storied residential buildings to be constructed in DLF City, Gurgaon, Haryana. In accordance with the initial plans/advertisements, each of the five multi-storied buildings would consist of only 19 floors with a total of 368 apartments to be constructed within a period of 36 months. However, it imposed highly arbitrary, unfair and unreasonable conditions on the buyers, who were ‘Informant’ to the CCI in the current case. The Informant submitted that DLF had used its position of strength in dictating the terms of the Apartment Buyers Agreement (“Agreement”) and imposed unilateral and one-sided clauses. DLF had excluded itself from any obligations and liabilities; and on the contrary has compelled the Informant to agree to all the terms of the Agreement in Toto. The Informant has alleged that the various clauses of the agreement and the action of DLF pursuant thereto are prima facie unfair and discriminatory, thus attracting the provisions of Section 4 (2) (a) of the Acts.

The CCI after considering the information provided by the Informant held that a prima facie case existed and directed for an investigation by the Director General (“DG”). The DG after conducting an in-depth investigation held that the Act was applicable in the instant case and delineated the relevant market on the basis of services provided by developers for construction of ‘high end buildings’ in Gurgaon. The DG analyzed the dominant position of DLF by placing

²⁴ See Sec. 2 (f) of the Competition Act, 2002.

²⁵ See Sec. 2 (t) Ibid.

²⁶ *Bellaire Owner’s Association v. DLF Ltd. and HUDA* 2011 Comp LR 0239 (CCI).

reliance on each of the factors as mentioned in Section 19 (4)²⁷ of the Act and held DLF to be abusing its dominant position.

CCI imposed *penalty of Rs. 630 Crores on DLF Ltd. under Section 27(b) of the Act*, and directed DLF under Section 27(a) of the Act:²⁸

- i. *To cease and desist from formulating and imposing such unfair conditions in its Agreement with buyers in Gurgaon.*
- ii. *To suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of the order.*

The said order of CCI was challenged by DLF on several grounds by filing appeals before the Competition Appellate Tribunal ("*COMPAT*").²⁹

COMPAT³⁰ after the hearing the matter on 09.11.2011, granted stay against the orders of CCI imposed penalty under Section 27(b) of the Act subject to DLF furnishing an undertaking to pay 9% interest on the amount of penalty to be determined by COMPAT³¹ for the period from the date of order by CCI till the date of payment by DLF. COMPAT ordered that the directions of CCI for modifications of terms of the Agreement shall remain in abeyance. However, the direction of CCI to "cease and desist" with the implementation of the Agreement was not stayed. On the next date of hearing i.e. on 29.03.2012, COMPAT, remanded the matter, along with the draft modified terms and conditions submitted by the parties, to CCI, for determining the manner and extent in which the Agreement needs to be modified, under Section 27(d) of the Act, after considering the drafts modified Agreements submitted by the parties.

Accordingly, CCI after prolonged hearing of parties on the modified terms and conditions suggested by both sides, vide its order dated 03.01.2013 has modified the standard terms and conditions of the flat buyers agreement in a detailed order, which seems to have created a stir amongst the real estate sector as to whether these terms and conditions suggested by the CCI would apply to all builders flats in respect of the respective flat buyer agreements?

²⁷ As per this Section, the CCI shall take into consideration factors, like market share, size, resources, importance, economic power, vertical integration, monopoly, entry barriers etc.

²⁸ Further under Sec. 28 of the Act, the Commission may direct division of any enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

²⁹ The Competition Act 2002 was amended in September 2007 to provide for, among other things, the establishment of a Competition Appellate Tribunal to be headed by a judicial member to adjudicate appeals against commission orders and to determine compensation claims arising out of commission decisions. The appellate tribunal has since been constituted and is headed by a retired Supreme Court Judge.

³⁰ For more see Sec. 53 A of the Competition Act, 2002.

³¹ Among other powers, the COMPAT under Sec. 53 N can award compensation for any loss or damage caused to an applicant or Government as a result of any contravention by the enterprise in question.

Abuse of Dominant Position under Competition Law: Legal Subtleties

In this order, CCI has tried to remove the unfair and one sided clauses in the Flat Buyer Agreement which were till now common to most of similar agreements of other builders, at least in North India.³² The broad salient features of the modifications suggested are –

- iii.** Making time an essence of contract for both parties, which was earlier meant only to be complied with by the buyers by making timely payment of installments to the builders or to face penalty by heavy interests etc. There was no corresponding obligation upon the builder to follow the schedule for construction of the flat.
- iv.** Listing out the events of defaults and consequences thereof even for the builder which was conspicuously absent in the original agreement. The list, for the first time, prescribes identifiable milestones of construction, even though, admittedly, specific timelines are not provided (and perhaps were also difficult to be provided).
- v.** Rejection of the right of the company to make additional constructions.
- vi.** Curtailing the right of the builder to nominate either the Residents Welfare Association [RWA] or a maintenance agency "at its sole discretion" and to force a tripartite agreement upon the apartment owners or the RWA and empowering the RWA to modify and even cancel the said tripartite agreement
- vii.** Simplifying the extra ordinarily large clause regarding use of common areas by the flat owners and deleting the clause which excluded the ownership rights right of usages etc., of the land areas, facilities and amenities etc., from the scope of the agreement.³³

In another case against the BCCI, the CCI, investigated the matter with respect to the following issues:

- i.** Whether the Act is applicable to BCCI and whether BCCI is an ‘enterprise’ as defined u/s 2(h) of the Act.³⁴
- ii.** What would be the relevant market in the said case?
- iii.** Whether BCCI has a dominant position in the relevant market as determined?
- iv.** If so, whether BCCI has abused its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act?

³² Interesting two other cases were also filed against DLF before the CCI. For more see DLF Park Residents v. DLF Ltd Case no. 18 of 2010 and M/s Magnolia Flat Owners Association & Others. V. M/s. DLF Universal Limited & Others case 67/2010 [Decided 31.1.2012].

³³ The order of the Commission has been passed in Case No. 19 of 2010.
<http://www.cci.gov.in/May2011/Home/DLFOOrderModified.pdf>

³⁴ The DG drew support from the decision of Hon'ble Delhi High Court in WP(C) 5770/2011 in the case of Hemant Sharma and Others Vs. Union of India [8th Feb 2012], where while disposing the writ petition, Hon'ble High Court considered Chess Federation as an enterprise within the meaning of provisions of Section 2(h) of the Act. DG considered similarity in roles of BCCI and Chess Federation as National Associations for sport of Cricket and Chess respectively and accordingly based his findings.

The DG, CCI considered the conduct of BCCI when a rival competing league ICL was formed. The promoters of ICL stated that the application of ICL for grant of recognition was rejected by ICC on the influence of BCCI. They also stated that, right from the inception of ICL, BCCI took steps to ensure that cricket stadiums are not made available to ICL and also restrained layers from participating in the activities of ICL. As a consequence of actions of BCCI, ICL has at present suspended its operations temporarily. On the basis of above facts as analysed, DG held that BCCI is in a position of strength, in the relevant market. Finding the BCCI to have abused its dominant position, the CCI³⁵ On 8 February 2013, imposed a penalty of 52.24 crore (US\$9.6 million) on the Board of Control for Cricket in India (BCCI) for misusing its dominant position. The CCI found that IPL team ownership agreements were unfair and discriminatory, and that the terms of the IPL franchise agreements were loaded in favor of BCCI and franchises had no say in the terms of the contract. The CCI ordered BCCI to "cease and desist" from any practice in future denying market access to potential competitors and not use its regulatory powers in deciding matters relating to its commercial activities.³⁶

The CCI under Sec. 28 has wide and enormous powers to check abuse of dominant position. The CCI by an order in writing, direct division of enterprise that is enjoying dominant position to ensure that such enterprise does not abuse its dominant position. Such order of division may include transfer or vesting of property, rights, liabilities or obligations, adjustments of contract, creation, allotment, surrender or cancellation of any share or securities. Further the CCI has process the winding up of an enterprise or order amendment to the memorandum of association or articles of association also.

In another case complainant had availed services of Dr. L.H. Hiranandani Hospital Mumbai. He complained to the CCI that while availing maternity services of the hospital, he was not allowed to avail life cells umbilical cord stem cell banking services. Hospital had a tie-up with Crobank a company that provide services relating to collection and preservation of the cord blood and cord tissue. complainant alleged that there was tie in arrangement as well as abuse of dominance .CCI concluded that patients were forced to take services of crow banks if they wanted to preserve the stem cells services from Crobank while hospitalized in the said hospital. It was found that agreement between crow bank and hospital was prima facie exclusive in nature and in violation of Section 3(4) requiring further investigation by D.G. Hospital was also found dominant in relevant market based on market share of 75% that it commands in the market of providing maternity services in High-end multi-specialty hospital in the wards of S.L.N. and K.E. of Mumbai.(b) distinct brand value and reputation in relevant market and (c) a National

³⁵ After receiving under Section 19(1)(a) of The Competition Act, 2002, CCI, upon examination of the facts of the information, passed an order under Section 26(1), on December 09, 2010 recording its opinion that there exists a prima facie case, and directed the Director General (hereinafter "DG") to investigate into the matter.

³⁶*Surinder Singh Barmi v Board for Control of Cricket in India (BCCI)*; CASE NO.61/2010. Decided Date: 08.02.2013. Competition commission of India.

Accreditation Board For Hospitals And Healthcare Providers rating amongst the top 10 hospitals in western India. Condition that stem cell banking services of crobank had to be only availed was unfair condition and prima facie violation of Section 4 e.g. abuse of dominant position requiring further investigation by DG. CCI found prima facie evidence that the hospital have abused its dominant position under the competition act 2002 and directed the DG to investigate the matter.³⁷

In another case, *Ajay Devgan Film Pvt Ltd* alleged before CCI that *Yash Raj Films* abused its dominant position as it asked the exhibitors to give more screens to its upcoming release *Shah Rukh Khan* starrer “*jab tak hain jaan*” affecting ADES film “*son of sardar*”. Release of film was on one and the same day. ADF filed complaint against six parties namely *yash raj films*, *Yash Raj PP Associates*, *Yash Raj Puri* and company, *Yash Raj Pal Film Distributors Bangalore*, *Yash Raj Vandana Film Distributors* and *Yash Raj Kushgara Arts*. CCI however concluded that even if distributor books theater for two of its films simultaneously, theater owners have liberty either to agree or not to agree and therefore there is no restraint on the freedom of business of theater owners. The theater owner can wait for other films and can refuse to book their theatres simultaneously for two films. If the position of the single screen theater is non – significant no adverse effect would be caused on competition. CCI has held that market means market available throughout the year. While restraint order is being issued it should keep in mind the overall exhibition of market. On the basis of just big name no enterprise can be considered dominant. Claim of ADF that opposite parties were dominant was rejected. In an appeal filed by ADF before COMPAT, COMPAT did not stay the YRFs tie up with single screen theater across the country for the release of its film *Jab tak hain jaan*. The COMPAT said “huge economic interests are at stake for both the parties, films and there could be economic irreparable loss, if the release is stayed “. The tribunal noted that “it would not be proper on its part to freeze the agreements between YRF and the single screen film exhibitors.”³⁸

Conclusion:

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. The prohibition is on the abuse of the dominant position, not the holding of the position. The Competition Commission would find an undertaking's behaviour an abuse only after detailed examination of the market concerned and the effects of the undertaking's conduct.

Thus it may be concluded that CCI plays active role in promoting competition culture in India and prohibiting anti-competitive practices. Failure to execute orders of CCI or non-adherence

³⁷ The Quarterly newsletter of CCI, Fair Play, Promoting and Sustaining Competition in Market, Volume 3, October December 2012, Public Procurement and Competition Concerns, Seema Gaur, Editor and Sub Editor, Dr. Sanjay Pandey.

³⁸ *Ibid.*

results in stringent financial penalties prescribed under the Competition Act along with criminal liability. It could be penalty of 10% of average turnover of past 3 years, cease and desist order, void agreements, and division of dominant enterprise, damages and third party claims, if any.

CONSUMER ACTIVISM BY NLSIU STUDENTS: AN INITIATIVE OF MINISTRY OF CONSUMER AFFAIRS, GOVERNMENT OF INDIA.

Dr. Ashok R Patil*

1. Introduction

The United Nations Guidelines on Consumer Protection, 1985 and United Nations Principles on Business and Human Rights, 2011 have clearly stated that consumer rights are human rights. In India it is the duty of the State to give guarantee to every citizen of this country a right to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives from the directive principles of state policy. The directive declares in unequivocal terms that the state shall secure a social order for the promotion of welfare of the people and shall effectively work to achieve a social order in which justice, economic and political, shall inform all the institutions of the national life. The Article 19 (1)(g) of Constitution guarantees a right to all citizens to carry on any occupation, trade as business, thereby ensuring that the State cannot prevent a citizen from carrying on a business, except by a law imposing reasonable restrictions in the interest of the general public under Article 19 (6).

Now, the need for consumer protection is paramount in view of the fact that there is an ever-increasing population and consequently an increasing need for many goods and services for which there is no matching supply. In India consumer awareness has a very recent origin. The reasons appear to be lack of education, poverty, illiteracy, lack of information, and ignorance of legal rights and remedies available. Taking all of these into consideration the Indian Government established Consumer Dispute Reddresal Commission/ Forum under the Consumer Protection Act, 1986 (COPRA). It was set up mainly so that consumers could get justice. At present there are 35 State Commissions, one each in a State/UT (all are currently functioning), and 629 District Fora among which 601 District Fora are currently working.

It is because of a shift from *Caveat Emptor* to *Caveat Venditor* that Consumers are considered to be kings in a free market and the sellers are guided by the will of consumers. But even after 25 years of COPRA, the object of the COPRA has not been achieved satisfactorily because of manufacturers and Service Providers not doing business ethically and State Governments' failure in implementing COPRA properly. There are, however some agencies doing excellent work for protecting the interests of consumers. One of them is NLSIU.

* Chair Professor, NLSIU, Nagarbhavi, Bangalore

2. What is NLSIU?

The NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE came into existence through a Notification under the NATIONAL LAW SCHOOL OF INDIA UNIVERSITY ACT, 1986. It signified the culmination of joint efforts by the Judiciary, the Bar Council of India, the Karnataka Bar Council and the Government of Karnataka. Its main aim was to reform legal education and to establish a center of excellence for legal education and research in India under the leadership of founder director Padmashri. Prof. Dr. Madhava Menon. The Chief Justice of India is the Chancellor of the University, while the Chairman, Bar Council of India, is the Chairman of the General Council. These connections lend a stature and prestige to the School which is unparalleled in the history of legal education in India. NLSIU has been recognized for its innovative approach and experimentation in the pursuit of excellence in legal education since its inception.

3. NLSIU Chair on Consumer Law and Practice

A Consumer Law and Practice Chair (CLAP) was established in August 2008, at NLSIU by the Ministry of Consumer Affairs, Food & Public Distribution Department of Consumer Affairs, Government of India, New Delhi, to promote research, teaching, publication and training in Consumer Law and Practice. CLAP is acting as a “Think Tank” for the Research and Policy related issues on consumer Law and Practice and has also laid emphasis on developing Consumer Affairs as a distinct subject of study, both at Under Graduate & Post Graduate levels. A curriculum has been developed and it is being taught to the under-graduate students as well as post-graduate students in law at NLSIU. It is encouraging and supervising the candidates for research degrees, such as M.Phil, Ph.D and LL.D as well as in developing skills in this branch of law. Empirical research is also being carried out on various aspects affecting Consumer affairs, besides Publishing research articles in National and International Journals.

Further the Chair is providing necessary expert inputs for formulation of policy / programs / schemes of the Department of Consumer Affairs; identifying and disseminating best practices in the field of Consumer Protection Laws and Practice; publishing, in the form of books, monographs, pamphlets to fill existing knowledge gaps, with research studies. This has been made possible with the help of the CWF grant, organizing periodically, National Workshops, Seminars, Training Programmes, Guest Lectures, National Essay Competitions, Regional Consultations, Round Table Conferences, Students Field visits, short term training programs for the law teachers, Professionals, NGOs and others.

A Biannual News Letter “March of Consumer Law and Practice” on Consumer Affairs, containing a brief reports on the activities of the Chair, Legal developments in the field of Consumer Affairs is also being published. Comments on New Bills, legislations, summaries of leading judicial decisions of the Supreme Court and High Courts as well as the National Consumer Dispute Redressal Commissions and State Consumer Dispute Redressal Commissions is also a

part of its work profile. This newsletter is being sent, free of cost to all State Commissions and District forums of Karnataka and National Commission. All published Newsletters are electronically uploaded on the CLAP website <http://clap.nls.ac.in>. This year CLAP is launching an Annual International Journal entitled “International Journal on Consumer Law and Practice” which includes best practices of foreign countries and development at the International level on Consumer Laws.

As legal information to support consumers becomes readily available, it is envisaged that consumer awareness will also increase and consumers will be able to exercise their rights more proactively.

4. The Post Graduate Diploma in Consumer Law and Practice

For the first time in India a one year distant education Diploma in Consumer Law and Practice course has been started and it is aimed at sensitizing people about their Consumer Rights. This course provides opportunity for candidates to receive advanced instructions in the relationship and interplay between existing consumer related legislation and the changing economic and market scenario. The diploma is specially designed to meet the needs of those whose prior education has been in the field other than law and who would like to supplement their database with in-depth knowledge of consumer laws. The Five subjects which are dealt with are ‘Introduction to Law & Legal Systems’, ‘Development of Consumer Protection Law’, ‘Product Liability and Service Providers Liability’, ‘Alternate Dispute Redress Mechanism & Dissertation’. This Diploma is essentially a supplementary qualification, and intends to impart specialized knowledge and skills. This course is aimed at equipping every person in India with awareness about their Consumer Rights. Manufacturers and Service Providers are also trained to learn about Professional Ethics, as well as, Responsibilities and Liabilities. It helps all professionals like Lawyers, Doctors, Pharmacists, Health workers, Engineers, Software Professionals, Consumer Dispute Redress Forum Members, Company Executives, Journalists, Farmers, Non-Governmental Organizations, Government Officials and Manufacturers, Retailers, and Sellers with their day today activities.

Many senior officers of Ministry of Consumer Affairs, Govt. of India have enrolled for one year distant education course i.e. Post Graduate Diploma in Consumer Law and Practice at NLSIU.

With Government officials as well as lay consumers, especially the youth getting exposure and training to raise the general level of awareness, it is hoped that the manufacturers and the markets will also develop more ethical processes of production and promotion.

At NLSIU Consumer Protection Law is being taught as an independent subject for Under Graduate and Post Graduate Students and also as a Seminar Course on specific issues of consumer protection.

5. NLSIU Students Consumer Activism

The Students are actively involved in all the activities of the consumer chair. Every year while studying these courses, they visit consumer welfare departments like Bureau of Indian Standards, Legal Metrology Department, Public Health Institute Department, Drugs and Cosmetics Department, and Laboratories to get practical experience.

In India majority of consumer welfare legislations are good but implementation at the State level is very weak due to many reasons. Majority of the State Governments are not giving importance to these departments or their infrastructure, appointment and training of staff, updating lab equipment etc. In this regard the NLSIU students assist many Karnataka Government Departments in their duties. Some students went along with drug inspectors and inspected all Blood Banks of Bangalore to check routine activities of the Blood Banks; while others assisted the Legal Metrology Inspectors in testing Auto and Taxi meters in Bangalore; Students assisted Government officers in providing justice to Physically Challenged persons.

Further students have taken consumer protection issues very seriously and they have filed eight cases against Unfair Trade Practices before District Forums and State Commission of Karnataka; one Public Interest Litigation (PIL) filed before High Court of Karnataka on Implementation of Consumer Protection Act, 1986. All these cases are filed in their personal capacity to achieve the object of COPRA. The details of the cases are as follows:

a) Unfair Trade Practice: Price of Goods at Malls and outside

Aditya Banavar and others Vs. M/s Pepsi Co. Indian Holdings Pvt., Ltd and others, Complaint No.155/2011 (Date of Judgment 1st April 2011)

Aditya Banavar and four other students (now Advocates) filed a complaint at the Consumer Forum against Pepsi for unfair trade practice. The grievance was that the Maximum Retail Prices (MRP) of certain commodities in these malls have been deliberately labeled much higher than the MRP of the commodities outside the malls i.e., the MRP of a Pepsi Can is Rs. 25 outside the mall, whereas the MRP of the same is Rs. 50 in the mall. Similarly, a Nimbooz Pet Bottle costing Rs. 15 (MRP) is marked at Rs. 50 in the mall. Also, an Aquafina Water Bottle, whose MRP is Rs. 15 outside, is marked at Rs. 20 in the mall.

The students themselves argued the case before Bangalore District Consumer Forum and won it. Then Pepsi filed an appeal before Karnataka State Commission which is pending since 18 months, even though COPRA provides that the case has to be disposed-off within 3 months.

b) Unfair Trade Practice: Misleading Advertisements

NLSIU Students observed that in India, there is no comprehensive legislation to control misleading ads. False/misleading ads are not just unethical but also violate several rights of the consumers.

On basis of cosmetics advertisement claims like hair damage therapy, dandruff care, energy fresh spray, slimming lotions, fairness cream for men and sun control lotion students purchased these cosmetics and tested them on themselves. Using these products on themselves, the students found that the effect of these cosmetics did not match the claims made by the manufacturers. Then they issued a legal notice asking for many clarifications like scientific basis for the claims; Survey sample; Side effects; approval from State or Central Government Departments. But all of them did not clarify the queries asked in the legal notices. Then Students filed six cases in their personal capacity as consumers, before Karnataka State Commission and Bangalore District Forums for justice. One complaint has been filed before the Advertisement Standard Council of India (ASCI) on 27th September 2012 to test whether it works effectively for consumers or not. So far no complaint number or reply from ASCI has been received. The details of the cases on misleading advertisements are given below:

Sl. No	Case Name	Before Forum/Commission/ASCI/ High Court (Nature of Case)	Present Stage
1.	NLSIU Students V. L'oreal India Pvt Ltd (Garnier Men Cream) Complaint No.2119/2012	Karnataka State Commission Bangalore	Objections
2.	NLSIU Students V. Dove Damage Therapy Dandruff Care Shampoo Complaint No.2119/2012	-Bangalore District Consumer Forum -Misleading Advertisements- Unfair Trade Practice	Objections
3.	NLSIU Students V. Nivea Energy Fresh Spray Complaint No.2120/2012	-Bangalore District Consumer Forum -Misleading Advertisements- Unfair Trade Practice	Objections
4.	NLSIU Students V. Himalaya Herbals Fairness Cream Complaint No.2121/2012	-Bangalore District Consumer Forum -Misleading Advertisements- Unfair Trade Practice	Objections
5.	NLSIU Students V. VLCC Health Care Ltd. Complaint No.2122/2012	-Bangalore District Consumer Forum -Misleading Advertisements- Unfair Trade Practice	Objections

6.	NLSIU Students V. L'oreal India Pvt Ltd (Garnier Sun Control Cream) Complaint No.2123/2012	-Bangalore District Consumer Forum -Misleading Advertisements- Unfair Trade Practice	Objections
7.	NLSIU Students V. Vivel Active Fair Cream (ITC)	-Advertisement Standard Council of India (ASCI)	Objections
8.	NLSIU Students v. Govt. of Karnataka Public Interest Litigation (PIL)	High Court of Karnataka -Establishment of Consumer Forum/ Appointment of Members/ Administrative Staff/ Infrastructure	Interim Order directing for implementation

c) Public Interest Litigation (PIL) on Implementation of Consumer Protection Act, 1986 in Karnataka State

CLAP Chair has done empirical research on Implementation of Consumer Protection Act, 1986 in Karnataka State. On the basis of this report *Mr. Basavana Gouda* and four other students have filed a Public Interest Litigation (W.P. No.50856/2012) before Karnataka High Court. According to petitioners, more than half of the 30 District Consumer Disputes Redress forums, across the State, including the State Commission were either without a president or lacked the stipulated number of members. While there were no consumer forums in *Ramanagar, Yadgir and Chikkaballapur* districts, lack of administrative staff, proper Infrastructure, meager salary for members, no established district councils and State Councils etc. were also some other issues. On 2nd April 2013 the Hon'ble High Court of Karnataka has passed an Interim Order directing the State Government to fill up all the vacancies at the State Commission and the District Forums by 31st May 2013. The case has been adjourned to 3rd June 2013.

d) Drafting of Legislations

At present Indian consumers are exploited through misleading advertisements by majority of manufacturers and service providers. In this regard Ministry of Consumer Affairs, Food & Public Distribution, Department of Consumer Affairs, Government of India, New Delhi, has organised four regional workshops, at Bangalore, Kolkata, Guwahati, and *Ahamadabad* with all stake holders. The outcome of regional workshops was the need for comprehensive legislation to control misleading advertisements and as well as strengthening of existed regulators to control misleading advertisements more effectively. As a result Ministry of Consumer Affairs has asked NLSIU to draft a model legislation to control misleading advertisements.

e) Student Appointments as Legal Advisors to MNCs

Students are getting very good exposure of consumer protection during their five years at NLSIU. After completion of law degree, majority of students are joining Multi National Companies as Legal Advisors in India and are expected take care of consumer protection issues very effectively. It is hoped that general consumers will stand to benefit from these appointments within MNCs

6. Conclusion

It is a known fact that without active consumer's participation, the Government alone cannot protect consumers from being exploited by businesses. There are also plenty of International and National laws to take care of consumers, and their numbers are constantly increasing. However, there is no doubt that these can prove to be effective only when consumers are alert, and authorities sincere in their implementation. Future looks as the youth get trained to stand up for their rights and responsibilities as consumers, India's bright.

IMPACT OF THE PRINCIPLES OF ETHICS AND MORALS ON THE PROCESS OF CRIMINALISATION AND CRIMINAL LAW POLICIES

– AN APPRAISAL

Dr. Nagarthna A *

Introduction:

Ethics, morality and public morality have always influenced legal policies especially criminalisation in all societies. They are in fact the most important factors which sets social order and criminal law policies. Various legal systems have declared various acts as illegal and criminal for being against the principles of morality and ethics.

The paper aims to assess the role which morality and ethics plays as the factors of criminalisation and in framing the criminal law policies of States and with appropriate illustrations demonstrating the effect of morality and ethics on law especially criminal law.

Morals and Ethics – Conceptual Analysis:

Gert (2006) defines morality generally refers to a set of beliefs about what is good or bad, a code of conduct or a guide to behaviour that is considered to be overriding, but generally confined to a specific culture of society. It indicates certain acts as offensive to the sensibilities of the general populace.¹

‘Ethics refers to two things, namely, first to well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues. Ethics for example, refers to those standards that impose the reasonable obligations to refrain from rape, stealing, murder, assault, slander and fraud. Ethical standards also include those that enjoin virtues of honesty, compassion, and loyalty. And ethical standards include standards relating to rights, such as the right to life, the right to freedom from injury, and the right to privacy. Such standards are adequate standards of ethics because they are supported by consistent and well-founded reasons.’²

*Chief Investigator, Advanced Centre on Cyber Law and Forensics & Assistant Professor of Law, NLSIU, Nagarbhavi, Bangalore.

¹ For the purpose of this paper, the terms ethics and morals are used interchangeably and assigned same meaning.

² Manuel Velasquez, Claire Andre, Thomas Shanks, S.J., and Michael J. Meyer, What is Ethics available on <http://www.scu.edu/ethics/practicing/decision/whatisethics.html>, retrieved on 10th October 2011.

“A code of ethics is a set of moral beliefs and behaviors put in place by a group of people that all agree to live by once in place, the beliefs and behaviors help keep society on a status quo. They also give everyone involved a certain level of expectation.”³

Concept of Crime in the Context of Principles of Morality:

According to Joel Feinberg, Crime is “the expression of the community’s hatred, fear or contempt for the convict which alone characterizes physical hardship as punishment.”⁴ “Crime is a conduct, which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community..... Indeed the condemnation plus the added [unpleasant physical] consequences may well be considered, compendiously, as constituting the punishment.”⁵ It is this community’s condemnation, based on principles of morality, which distinguishes criminal liability from civil liability in terms of the punishment.

Morality as a Basis of Criminalisation:

The value of a human life, respect for others, a right to privacy and tolerance of difference, for example are moral values that seem to remain through shifting social upheaval, war and even massive social change. It is the interpretation and application of these basic values that shifts over time and may cause the reassessment of public law.⁶ While ‘ethics’ refers to ‘a set of principles of right conduct’, ‘a theory or a system of moral values’.⁷

According to Moore, there seems to be no distinction between law and morality and a [morally] good person is the one who will do what is lawful. Though all criminal laws are not completely based upon the principles of ethics and morality, yet it is to certain extent true that the laws often are influenced by them. Criminal laws are more influenced by such principles. They form to be the most important factor of criminalisation. Nevertheless, many laws are informed by, and created by, morality, especially those involving sex and sex acts.⁸ Similarly ethics need not by itself be laws, but law often incorporates ethical standards to which most citizens subscribe⁹ though not always.

The very reason to regard crimes as ‘wrongs against society’ unlike civil wrongs is the relationship between morals and criminalisation. ‘There is only one explanation of what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of

³ Kelly Banaski – Sons, A List of Ethics for Criminal Justice, eHow.com http://www.ehow.com/list_6596094_list-ethics-criminal-justice.html#ixzz1aIDrOuOu,

⁴ Bernard E. Harcourt, in ‘Joel Feinberg on Crime and Punishment: Exploring the relationship Between The Moral Limits of the Criminal law and the Expressive Function of Punishment’, quoting Joel Feinberg, The Expressive Function of Punishment, available at [http://wings.buffalo.edu/law/bclc/bclrarticles/5\(1\)/Harcourt.pdf.pdf](http://wings.buffalo.edu/law/bclc/bclrarticles/5(1)/Harcourt.pdf.pdf)

⁵ *Ibid.*

⁶ Belinda Carpenter and Sharon Haynes, Crimes against Morality, available on http://qut.academia.edu/SharonHayes/Papers/144952/Crimes_Against_Morality,

⁷ <http://www.thefreedictionary.com/ethics>

⁸ *Supra* at 8.

⁹ Manuel Velasquez, Claire Andre, Thomas Shanks, S.J., and Michael J. Meyer, What is Ethics available on <http://www.scu.edu/ethics/practicing/decision/whatisethics.html>,

behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.’¹⁰

Relevance to Criminal Justice Systems:

The very foundation of criminal justice systems across the world lies in the principle of ‘fairness’ which is further linked with the principles of morality and ethics. According to Elizebeth (Lisa) Thompson¹¹ “the concept of criminal justice assumes a person will receive the justice he deserves. Conflicts occur when, in very similar situations, the result of justice is different. Ethics and morals determine a standard for fairness in criminal justice.”

The principle of “Equals should be treated equally and unequal’s unequally” which is one of the fundamental principle of major legal systems including the criminal justice system emanated as a moral value. Plato, Aristotle and John Rawls philosophies of law is also linked with principles of morality and ethics. According to Rawls, corrective or retributive justice refers to fair punishments and criminal justice in general. Relevant factors in sentencing such as the nature of the crime and the motives of the offender result in increased or lesser sentences. Court precedence has determined these factors, in part, due to a sense of fairness.¹²

Relevance to the Machineries and Agents Administering Criminal Justice System:

For the justice system to work properly, especially the criminal justice system, a strong and clear code of ethics is critical.¹³ Ethics is particularly important for those who are in a position of power and prominence, as these individuals have the greatest influence on society.¹⁴ Members of the criminal justice system make extremely critical decisions every day and their choices have a profound effect on our lives. It is therefore imperative that these men and women do what is right and are free of biases.¹⁵ The code of conduct, role and responsibility of agents and machineries administering criminal justice system are also determined on the basis of principles of morality and ethics. To illustrate, every State requires its police officers to act according to “accepted moral standards including treating citizens without partiality.”¹⁶

The agents and machineries administering criminal justice system are required to adhere to the principles of fairness, well being of society, honesty, impartiality, confidentiality, etc which are all nothing but principles of morality and ethics. Thus, in criminal justice, a code of ethics is especially important for many reasons, the most important of which may be the very knowledge of

¹⁰ Patrick Devlin, *Morals and the Criminal Law*, at 179, retrieved from <http://faculty.berea.edu/butlerj/Devlin.pdf>,

¹¹ What is the Importance of Ethics & Morals in Criminal Justice? eHow.com, <http://www.ehow.com/facts/7158876-importance-ethics-morals-criminal-justice.html#ixzzlaIAiXEN5>.

¹² Elizebeth (Lisa) Thompson, What is the Importance of Ethics & Morals in Criminal Justice? eHow.com <http://www.ehow.com/facts/7158876importance-ethics-morals-criminal-justice.html#ixzzlaIAiXEN5>.

¹³ *Supra* at 13.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ *Supra* at 14.

the criminal justice system. Because this knowledge is so powerful, a strict code of ethics must be enforced to best facilitate society.”¹⁷

The Academy of Criminal Justice Sciences,¹⁸ in its code of ethics, explains as follows: "Members of the Academy are especially careful to avoid incompetent, unethical or unscrupulous use of criminal justice knowledge. They recognize the great potential for harm that is associated with the study of criminal justice, and they do not knowingly place the well-being of themselves or other people in jeopardy in their professional work."¹⁹

Cyndi Banks in "Criminal Justice Ethics: Theory and Practice," mentions numerous ethical issues including: "ethical problems in the use of authority," "ethical problems in information sharing," "ethical issues dealing with human right issues" and "ethical issues in the media reporting of crime."²⁰ Such conflicts and problems arise due to conflict in the perception of ethics which varies from person to person and situation to situation. Thus it is essential to balance the interests of public as well as private and thereby formulate general rules of ethics and morality which shall prevail the private ethics.

Mala in se are the crimes which are criminalised at all times and in all societies. Criminologists consider certain wrongs as '*mala in se*', that is, 'wrong in itself' thus deserving criminalisation for being 'immoral'. The Natural law School regards morals and ethics as the main source of laws and in fact they regard law and moral as one and the same. Being against natural law and principles of ethics and morality, they are condemned in all societies, irrespective of variations in political, social and economic factors of each society. Culpable Murder, rape, etc. are some of such offences criminalised under all legal systems. Child trafficking, obscenity, bestiality, etc. are also some of the offences criminalised for being immoral.

Changing morals:

What was regarded as moral and ethical at one time may be considered as immoral at another time and similarly vice-versa. As a result of these shifts in moral perceptions we have seen a massive increase in the legislation and regulation of non-normative sexual behaviour.²¹

Crimes of '*mala prohibita*' nature being dependent upon State's declaration to be criminalised are different in different States, some of which are based upon the principles of morality and ethics, specific to such States. In some States, they are criminalised while in other they are not. Bigamy, prostitution, publication, pornography, etc. are some of such acts which are criminalised in some States while not so in other.

¹⁷ Supra at 4.

¹⁸ The Academy of Criminal Justice Sciences (ACJS) is an international association established in 1963 to foster professional and scholarly activities in the field of criminal justice. ACJS has approximately 2,800 members, representing every state in the United States, many countries, and virtually every institution of higher learning with a criminal justice/criminology program. For details see: http://www.acjs.org/pubs/167_664_2906.cfm.

¹⁹ Why Is Ethics Important in Criminal Justice? | eHow.com http://www.ehow.com/about_6386561_ethics-important-criminal-justice_.html#ixzz1aIBjEGaL,

²⁰ *Ibid*.

²¹ Supra at 8.

In India also the decision of Naz Foundation case²² is one of the indications of such shift in moral perceptions of homo-sexuality. Homosexuality was once considered as immoral and hence criminalised under both English as well as Indian laws. Today, many don't regard it as unnatural, unethical and immoral in India. This shift is not just in the law but also in the general perception of the act and about its association with the principles of morality. It was the civil rights movement that raised awareness of civil liberties and human rights which also generated an attitude of greater tolerance of other acts that were previously regarded as immoral and which were in fact until very recently illegal, such as homosexuality, prostitution, etc.²³ At the same time, euthanasia committed to relieve another from pain may be considered by many as moral but may not be legal in many States.

Sometimes even an act declared as crime, if it is in conformity with public morality has made such a law a failure. The current approach of making beggary which is not '*mala in se*' (meaning 'wrong by itself') and not being immoral is however declared as a wrong for being '*mala prohibita*.' In this case, the anti-beggary law being against the principles of morality has failed to achieve its object of regulating beggary in India.

Morality and ethics in relation to punishment:

What is generally and socially condemnable deserves punishment. This social condemnation of an act is usually based on the principles of morality. It is moral delinquency which is usually regarded as an error deserving punitive sanctions in all societies. According to Professor Gardner²⁴ "the essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a courtroom; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment."

Jean Hampton in her essay 'The moral education theory of punishment' argues that punishment should be intended to teach the wrongdoer that her action is morally wrong and should not be repeated.²⁵ Thus the moral education theory of punishment "maintains that punishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for choosing not to perform an offence." Condemnation of criminal conduct by community in terms of principles of morality, clubbed with the essence of retribution, reformation or compulsion which will achieve the object of such punishment.

²² 2009 (160) DLT 277

²³ *Supra* at 8.

²⁴ *Supra* at 5.

²⁵ Jean Hampton, The Moral Education Theory of Punishment, 13 Phil & Pub Aff., Summer 1984 at 208, 213, quoted by Bernard E. Harcourt, in 'Joel Feinberg on Crime and Punishment: Exploring the relationship Between The Moral Limits of the Criminal law and the Expressive Function of Punishment' retrieved from [http://wings.buffalo.edu/law/bclc/Bclrarticles/5\(1\)/Harcourt.pdf](http://wings.buffalo.edu/law/bclc/Bclrarticles/5(1)/Harcourt.pdf)

Thus it is clear that criminal law to a large extent is “based upon moral principles. In a number of crimes its function is simply to enforce a moral principle and nothing else. The law, both criminal and civil, claims to be able to speak about morality and immorality generally.”²⁶

Public Morals V. Private Morals:

“Society means a community of ideas, without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.”

– Lord Devlin²⁷

In order to consider each for the purpose of criminalisation, both public as well as private morals are relevant factors. Just because an issue is relating to private morality and does not concern public morality, the criminal law will not over see it. ‘The law will not allow its processes to be used by those engaged in immorality of any sort, for example, a house may not be let for immoral purposes; the lease is invalid and would not be enforced. But if what goes on inside there is a matter of private morality and not the law’s business, why does the law inquire into it at all?’²⁸ Similarly suicide, attempted suicide, abortion, incest, etc are relating to private morals yet are criminalised by many legal systems.²⁹

The issue of legalising of homosexuality and prostitution was investigated by the Wolfenden Committee headed by Sir John Wolfenden who in his report said that law should not be concerned about immorality. The issue was further deliberated by jurists such as Hart, Lord Patrick and Lord Devlin. The main argument was that homosexuality should be decriminalised on the basis of freedom of choice and privacy of morality.³⁰ However Devlin argues that law without morality “... destroys freedom of conscience and is the paved road to tyranny” and hence the criminal law must respect and reinforce the moral norms of society in order to keep social order from unravelling.³¹ He finally suggested that Privacy should be respected; law should only

²⁶ Lord Devlin, “Morals and the Criminal Law”.

²⁷ “Morals and the Criminal Law” in *The Philosophy of Law* (ed R M Dworkin) Oxford (1977) at p 74, available on <http://www.ourcivilisation.com/cooray/btof/chap8ii.htm>.

²⁸ *Supra* at 12.

²⁹ *ibid.*

³⁰ Sixth Form Law, available at http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm

³¹ *ibid.*

intervene when society won't tolerate certain behaviour and law should be a minimum standard not a maximum standard.³²

When the issue of punishing victimless crimes such as homosexuality came, jurists expressed different views. John Stuart Mill proclaimed in 1859 that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."³³ While Justice White in 1986 said that "victimless crimes . . . do not escape the law [even] when committed at home and private consensual sodomy could be criminally prohibited by State."³⁴

Adding to the debate, Hart argued as to why the conventional morality of a few members of the population be justified for preventing doing what they want. Moving further ahead, Dworkin said that if behaviour is a Basic Liberty (like sex), this should never be taken away, even if someone has a different way of 'doing' sex.³⁵

Thus, it is clear that our society is based on certain social norms and conventions that suggest that, as a society, we share some common values.³⁶ Conflict between the two is seen in cases such as homosexuality, prostitution, etc are the issues upon which public morality differs from the private.

Morality In Relation To Factor of Harm:

"Immorality for the purpose of the law is what every right-minded person is presumed to consider to be immoral. Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does, this is what gives the law its *locus standi*."³⁷ Thus often, what is usually harmful to society and its members in general is perceived as immoral by the society and in turn criminal according to law.

Indian Criminal Laws vis-à-vis Principles of Morality and Ethics:

*'Criminal Law represents the morals, values and expectations of the society in which we live. ... the Criminal Law and Criminal Justice Administration are the touchstones of our society's morals and values, and they involve the pursuit of justice and fairness (especially for the under-privileged and powerless) more than any other area of the law. India rightly prides itself for its rich spiritual history and culture. In this regard, the nature of Criminal Law is also deeply spiritual.'*³⁸

³² *Ibid*

³³ Devlin, quoting John Stuart Mill, *On Liberty*, p. 75

³⁴ Bowers, 478 U.S. *National Journal of Sexual Orientation Law*, Vol. 4, Issue 1, at 186

³⁵ Sixth Form Law, available at http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm,

³⁶ *Supra* at 8.

³⁷ *Supra* at 12.

³⁸ Professor Stanley Yeo's take on criminal legal scholarship in India, Sunday, February 13, 2011, <http://breakingthecodeofcriminalprocedure.blogspot.com/2011/02/professor-stanley-yeos-take-on-criminal.html>.

Indian substantive criminal law, the Indian Penal Code like other criminal legal systems requires the proof of both actus reus and mens rea elements in order to establish criminal liability upon a person. These concepts of actus reus and mens rea are nothing but the notions of morals which considers punishing a person who has not committed a wrongful act or who has committed it but without a guilty mind is unethical and immoral. The grounds of general defences such as private defence, acts done due to necessity, acting in good faith, etc are all manifestations of moral values. Even provocation, exceeding private defence right while acting in good faith, etc which diminishes criminal responsibility are also based upon the principles of ethics and morality.

It is true that since time immemorial ethics and morality are playing an important role in conceptualising and thereby devising criminal law policies of India. India has recently witnessed violent outbursts over trivial incidents ranging from kissing in public, to holding hands or dancing in bars, all in the name of public morality.³⁹ Public opinion and social sanctions helps in effectively implementing criminal law policies, as long as they are in accordance with factors such as morals and ethics. Most of the socio-economic offences such as drug abuse, food adulteration, have been popular and effective laws in society for being in accordance with these factors. In fact the recent public demand for a strong anti-corruption law such as 'Jan lokpal' has back up of social claim for being in strong compliance with public moral and ethics. Various criminal laws enacted by Indian State have failed to impact society for being against the principles of morality.

The anti-beggary laws of India has failed to achieve its objective as it is considered more as a part of custom, community practice and morals. As the practice of begging and giving alms was socially accepted practice of India since time immemorial and got attached with principles of morality of the State.

The 2009 Delhi High Courts decision in *Naz Foundation vs. UOI and Others*⁴⁰ decriminalising homosexuality in a way has redefined the concept of morality in India and has raised new arguments relating to the relevance and priority of public and private morals. The court held that criminalisation of consensual sex between adults in private violates the constitution's guarantees of dignity, privacy, equality and freedom from discrimination / non-discrimination, based on sexual orientation. These four concepts, on which the entire decision was based in fact the versions of morality. "In order for the dignity of each person to be protected, there must be a right to privacy that protects against arbitrary state interference with personal autonomy. Similarly equality is meaningless without a corresponding prohibition non discriminating against certain classes of people."⁴¹ The court in this case clarified that public morality cannot be justified to limit fundamental rights by saying that "Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values is based on shifting and

³⁹ Some Reflections on Interplay of Law and Morality in Contemporary India, Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, January 29, 2008.

⁴⁰ 2009 (160) DLT 277

⁴¹ Alternative Law Forum, Bangalore, India, 'The Right that dares to speak its Name', *Naz Foundation vs. UOI and Others*, Decriminalising Sexual Orientation and Gender Identity in India, 2009, http://www.tarshi.net/downloads/The_right%20that_Dares_to_Speak_its_Name.pdf,

subjective notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interests, it must be “constitutional morality” and not “public morality”.

Crimes against morality:

Most of the criminals including India's have a separate category of offence criminalised in the name of 'crimes against morality'. According to the general perception, all crimes have a general moral basis, condemned as wrong or bad and proscribed by society, yet there is a specific group of offences in modern democratic nations labelled crimes against morality.⁴² All these offences have in common certain features, namely, they have a sexual basis and are often argued to do sexual harm, in both a moral and / or psychological sense, as well as physically, they are victimless crimes, especially when the acts occur between consenting adults, they are considered essentially private acts but they often occur, and are regulated, in the public domain and they all have only relatively recently (i.e. in the past 150 years) become identified and regulated by the state as a criminal offence. Crimes against morality in many societies, also includes drug use, gambling, adultery, bigamy.

In fact the offences in the name of moral turpitude is regarded by many legal systems including US and India as a separate category of crimes by their criminal laws moral turpitude means “conduct that is considered contrary to community standards of justice, honesty or good morals”⁴³ Indian Penal Code classifies crimes under various categories, namely, crimes against the state, human body, property, religion, marriage, morals, etc.

Should morals and ethics be considered in criminalising?

Laws regulating public morality have sometimes been criticized as contributing to a 'crisis of over criminalization'. Over criminalisation refers to the idea that laws regulating public reality may result in a substantial diversion of police, prosecutorial and judicial time, personnel and resources.⁴⁴

As a quick aside: it is unfortunate that the word "morality" has become associated with conservative values, because the obvious invalidity of those values to many people tarnishes their attitude towards morality as a whole. And that is a damn shame. When conservative groups advocate bigotry masquerading as "family values", we need to recognise the injustice of this, and instead stand up for what is right. But I digress - this isn't intended as a post about how liberals need to reclaim the moral high ground.

Morals are only one of the important sources of criminalisation and should not be over emphasised while criminalising an act. It is essential to consider other factors such as social

⁴² Carpenter, Belinda Jane and Haynes, Sharon L. (2009), Crimes against morality, In Hayes, Hennessy & Prenzler, Timothy (Eds.) Introduction to Crime and Criminology, 2nd edition. Pearson Education Australia, Frenchs Forest, New South Wales, pp. 149-165, available on <http://eprints.qut.edu.au/29013/>

⁴³ dictionary.alot.com, <http://www.answers.com/topic/moral-turpitude?cat=biz-fin>

⁴⁴ http://wps.prenhall.com/chet_schmallegger_crimlaw_3/36/9379/2401103.cw/-/2401142/index.html

perception; harm caused by the act, utility of such criminalisation, public policy, etc. The agitations in the name of 'moral policing' against celebration of Valentines Day is definitely condemnable and must not be brought under criminal law.

Morals are important considerations of policies, but no invasion of rights and liberties of individuals should be allowed in the name of morality unless it is morally justified. Thus, law must rely upon morals as long as they are safe and are for the benefit of the 'greatest numbers'.

Conclusion:

The criminal laws and policies and what manner in which criminal justice system should administer depend upon the principles of ethics and morality. Though it is inappropriate to say that the law in its entirety be modelled on ethics, yet it is true that ethics are its important considerations. Within the criminal justice system, ethics is germane to most management and policy decisions relating to punishment and is the rational used in making these decisions, such as whether to rehabilitate, deter, or impose just deserts.⁴⁵

Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two. This does not mean that it is impossible to put forward any general statements about how in our society the balance ought to be struck. Such statements cannot of their nature be rigid or precise; they would not be designed to circumscribe the operation of the law making power but to guide those who have to apply it.⁴⁶ Whenever ethical dilemmas emerge it is essential to formulate policies which do not deviate from general good and at the same time it must even respect the constitutional values which in itself are moral values. Ultimately what is essential is to integrate our law, policies and way of life with sound moral and ethical principles, as long as it is in concurrence with our basic constitutional values and public interest.

"Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government... the suppression of vice is as much the law's business as the suppression of subversive activities." - Devlin⁴⁷

⁴⁵ The Importance of Ethics in Criminal Justice, available at http://www.sagepub.com/upm-data/4031_Banks_Chapter_1_Proof.pdf, last visited on 2nd October 2011.

⁴⁶ *Supra* at 12.

⁴⁷ Devlin, The Enforcement of Morals (1959), See: Sixth Form Law, available at http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm,

DISPUTE-RESOLUTION THROUGH LOK ADALATS

Kim Rocha Couto*

Introduction:

The Legal Services Authorities Act brought about the establishment of Lok Adalats in 1987. The enactment distinctly demonstrates the State's approval and acceptance of alternative dispute resolution mechanisms different in form and character, to supplement the formal courts of law in the dispensation of justice. The recognition and inclusion of a special provision pertaining to Alternative Dispute Resolution¹ mechanisms in the Code of Civil Procedure, 1908² as additional forms of dispute –settlement besides the courts, have opened the doors to methods other than litigation in courts or tribunals for the resolution of disputes. Arbitration, conciliation, judicial settlement, settlement through Lok Adalats and mediation³ have received a shot- in- the- arm as effective, speedy and procedure wrangle- free dispute- resolution methods in India with various and specific enactments on the subject.⁴ While affording options for dispute- resolution to parties, the law obliges the courts to explore the possibility of settlement of disputes outside the court by the use of ADR methods.

Legislative recognition of ADR systems in recent years has shown on one hand, that the present system of administration of justice is less responsive to meet justice needs, and on the other hand, it reinforces the idea that formal and informal strategies of dispute resolution are able to co-exist in India and are capable of being harnessed in a spirit of synergy.

In this research article, an attempt is made to bring out the relevance of Lok Adalats as effective justice- dispensing mechanisms, in the country. Lok Adalats have much relevance in India on account of their suitability to advance equal access to justice for all. Their distinctive characteristics distance the economic, organizational and procedural barriers that prevent justice-seekers from accessing justice in India. The positive attributes of Lok Adalats are as follows:

* Assistant Professor V.M Salgaocar College of Law Miramar, Panaji, Goa

¹ In this article, Alternative Dispute Resolution is referred to by its acronym ADR

² Section 89 and Order X Rules 1A, 1B and 1C was inserted by an amendment in 1999.

³Section 89 Civil Procedure Code, inserted by Amendment Act, of 1999. (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for- (a) arbitration; (b) conciliation; (c) Judicial settlement including settlement through Lok Adalat; or (d) mediation.

⁴ Section 89 of Civil Procedure Code, Order 23 Rule 3 of the Civil Procedure Code, Order 32-A of the Civil Procedure Code, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act 1987, Industrial Dispute Act, 1947, Section 320 of Criminal Procedure Code, 1973, Section 9 of Family Courts Act 1984, among others.

(a) Less Formal Proceedings:

Lok Adalat proceedings are held without the typical formality of the courts. Their informality, as is the case with other forms of ADR, allows the public and particularly the disadvantaged sections of the population, to have easy access to them⁵. Unlike the formal atmosphere of the court –room which often tends to intimidate litigants in India and make them reluctant to approach the courts for justice, *Lok Adalats* as is the case with other modes of ADR, ensure an environment which is conducive for mutual discussion and allows strategies for dispute resolution to be worked out.⁶

(b) Less Procedures and Technicalities:

Another major advantage of *Lok Adalats* is that they are not afflicted with the rigorous rules of procedure. Although a procedure is laid down in the Legal Services Authorities Act, 1987, the focus is on the resolution of the dispute rather than on strict compliance with the legal provisions. This aspect of *Lok Adalats* ensures that too much time is not spent on the intricacies of law which in turn results in the quick and easy disposal of cases.

(c) Inexpensive and Expeditious Disposal of Cases:

The positive attributes of informality and simplicity in procedure associated with *Lok Adalats*, ensures brevity and speedy disposal of the proceedings. As the proceedings are summary in nature and as no provision for appeal is made, *Lok Adalats* ensure the resolution of the dispute speedily and economically.

Further, the costs incurred in engaging the services of a lawyer are also reduced as there is no insistence on legal representation. Even where lawyers represent their clients, the concise and simple nature of proceedings help to bring down the costs, as only a reasonable amount of time is required to be spent on disposal of such proceedings⁷. Thus, as is generally true of alternative dispute resolution systems, *Lok Adalats* which are an indigenous form of dispute resolution can bring about an efficient resolution of disputes, as they minimize the time for final resolution, while conserving the resources of the parties involved and public institutions at the same time.⁸

(d) Participatory:

Lok Adalats provide disputants an opportunity to resolve their disputes with the help of their panel members. The presence of lawyers is neither mandatory nor specifically prohibited for the proceedings. It follows therefore that parties are free to approach these forums in person, thereby maximizing the chances of a settlement with their opponents on an informal level platform. The flexible approach of the *Lok Adalats* as is the case with other alternative dispute resolution systems, allows parties to mould and design their own remedies as would help in the

⁵ Spain R. Larry, “Alternative Dispute Resolution for the poor: Is it an alternative?” 70 N.D. L. Rev. 269 1994, pg.269.

⁶ Reuben Richard, *Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice*, 47 UCLA L. Rev. 949 1999-2000.

⁷ ADR procedures generally involve less complexity and costs. 1985 Wis. L. Rev. 1366 1985 pg.1366

⁸ 76 N.Y.U. L. Rev. 1771 2001

Dispute -Resolution through Lok Adalats

eventual settlement of the dispute⁹. Moreover, any settlement entered into, is reflective of the parties' own consent and does not represent a diktat from an outsider¹⁰. Thus *Lok Adalats* ensure an involvement and participation of the disputing parties in the dispute - resolution process.

(e) Accessibility:

With less time and money spent on *Lok Adalats*, they are more accessible than courts as far as the cost, procedure and time spent on disposal are concerned. While expenses on lawyer's fees and process fees are avoided, the time spent on disposal of such cases is also less as the procedure stipulated in the law¹¹ is simple and flexible. These attributes of *Lok Adalats* cumulatively enhance their accessibility and effectiveness in providing justice.

(f) Collaborative Proceedings:

Lok Adalats are collaborative or integrative in approach and are not adversarial. They are concerned with the solution of the problem by accommodation of the interests and needs of the disputing parties. Thus, the remarkable aspect about *Lok Adalats* is that it brings the parties to the dispute together for mutual discussions with the hope of an amicable settlement.

(g) Transparency:

Unlike ADR processes which are held in private and are confidential in nature¹², proceedings before the *Lok Adalats* are conducted in public in the presence of the concerned parties, the panel members and advocates whenever they represent their clients.¹³ Thus there is transparency in the system and parties are in a position to know all the facts concerning their dispute as it is held before them.

(h) Amicable Settlement of Disputes:

The main thrust of *Lok Adalats* is resolving the dispute in a manner acceptable to the parties without affecting their relationship. The amicable settlement of the dispute enables parties to preserve their relationship without letting it get strained. Thus *Lok Adalats* have the potential to deliver justice to the satisfaction of both the parties with the help of the concerned judges and lawyers¹⁴. In effectualizing this objective, the panel members simultaneously function as conciliators, mediators, negotiators or arbitrators depending on the requirements of each case. This attribute which is evident in *Lok Adalats* facilitates the amicable settlement of the dispute.

⁹ Spain R. Larry, *ADR for the Poor: Is it an alternative?*, 70 N.D. L. Rev. 269 1994.

¹⁰ Agarwal Nomita, *Alternative Dispute Resolution*, Nyaya Deep, January 2006, pg.71

¹¹ Legal Services Authorities Act 1987

¹² Bhat Ishwara, *Law and Social Transformation*, Eastern Book Company, Reprint, 2012 at pg. 872

¹³ Section 75 of the Arbitration and Conciliation Act 1996 imposes a duty on the conciliator to keep confidential all matters relating to conciliation proceedings including the settlement agreement except in certain circumstances.

¹⁴ Patel Girish, "Crippling Lok Adalats" *Combat Law*, Vol.6 Issue 6, December 2007 page 53.

(i) Resolution of Dispute at any Stage:

Lok Adalats not being formal in terms of the procedure that is required to be followed, it is possible for parties to bring their dispute for resolution at any time i.e. in the pre-litigative stage or even where the dispute is already pending before the courts. Parties can approach the *Lok Adalats* directly even where the dispute has not been submitted to the court. Or where the dispute is already pending before the court, it can be referred for resolution to the *Lok Adalat* at the option of the parties. All that is required is willingness on the part of the disputing parties to resolve their dispute in an amicable manner. This aspect allows the dispute to be settled at an early stage before the escalation of the dispute and brings to an end the dispute in the event of settlement.

(j) Familiar Concept:

Dispensation of justice through methods such as conciliation adopted by the *Lok Adalats* in contemporary times are familiar to the Indian people since long. Although *Lok Adalats* as such did not exist in ancient times¹⁵, references indicate that Indian people have been disposed to conciliated settlements with community intervention rather than adjudicated decisions through adversarial process of formal Courts¹⁶. In short, as aptly observed by Justice *Ramaswamy*, “resolving disputes through *Lok Adalats* not only minimizes litigation expenditure, it saves valuable time of parties and their witnesses and facilitates inexpensive and prompt remedy appropriate to the satisfaction of both the parties¹⁷”

(k) Legal Expertise:

The interesting and unique aspect about *Lok Adalats* is that they are justice delivery mechanisms that have a combination of both judges and lawyers. Their legal acumen and expertise on the one hand, enables them to provide the parties with an effective solution, and on the other hand, makes them capable of adjusting to the needs of the situation so that parties can arrive at a solution. At the same time, the inclusion of a social worker in the composition of the panel, ensures that justice is not too legalistic. This fact makes the decision of the *Lok Adalat* easily acceptable and smoothly enforceable.

(l) Finality:

No appeal lies from an award of the *Lok Adalat*, which is based on a settlement between the parties. This legal provision clearly demonstrates that a definite end to the dispute is envisaged, which in other circumstances, would have continued by recourse to appellate forums or Courts. Being able to resolve disputes expeditiously, the dispute is brought to an end at the earliest, thereby preventing it from further escalating.

¹⁵ References are found to bodies such as *Kula, Sreni and Puga* in ancient times in India. See *Altekar, A.S., State and Government of Ancient India*, Motilal B. Publishers, Delhi, pg.250

¹⁶ Madhava Menon N.R. “Lok Adalat : Peoples Programme for Speedy Justice,” 12 Indian Bar Review, 129 at 132 (1986).

¹⁷ www.academia.edu

(m) Wide and Varied Jurisdiction:

Any matter which is pending before the court of law or is in the pre-litigative stage in as much as it has not yet been brought before the court, can be submitted to *Lok Adalat* which are empowered to settle the dispute by the way of compromise. Civil and criminal matters can be submitted to *Lok Adalat* for settlement but any dispute related to an offence not compoundable under any law cannot be settled by *Lok Adalat*, even if the parties to the dispute agree to its submission.

(n) Justice – Delivery Mechanisms:

Lok Adalats ensure justice which is prompt, simple, inexpensive and effective in accordance with the standards laid down in the international human rights law relating to access to justice¹⁸. Furthermore, they are also useful techniques for ensuring social justice,¹⁹ as stipulated in the Indian constitutional scheme. *Lok Adalats* thus efficiently ensure the expansion of the scope of access to justice for justice-seekers in India.

Difficulties associated with Justice- Dispensation through Lok Adalats:

Although, *Lok Adalats* have a number of attributes, some legal scholars carry certain apprehensions about their effectiveness in providing justice. In the first place, it is believed that *Lok Adalats* compel parties to settle for less than what they are legally entitled to, thereby working to the injustice of one of the parties. This argument however is baseless as settlement or compromise resting on give and take, forms the underlying philosophy of *Lok Adalats*.

Secondly, the success of *Lok Adalats*, it is often assumed, rests entirely on the willingness of the parties to settle their disputes and not with the effectiveness of *Lok Adalat* panel as such. In reality however, *Lok Adalats* while ensuring participation of the parties in the justice -dispensation process, rely on the active assistance of the Panel, who guided by principles of equity, justice, fair play and other legal principles, enable the parties to reach a compromise or settlement.

Thirdly, it is opined that where the *Lok Adalats* are not successful in reaching a compromise, the parties would have to approach the court for trial of the suit, all the same. In such a case, *Lok Adalat* proceedings having ended in futility, the parties may have also lost their right to approach the courts, by virtue of the law of limitation. This situation would lead not just to a wastage of time and money, but also the loss of the right to sue in the court of law thereby leaving no remedy for the parties.

¹⁸ Access to justice refers to the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.

¹⁹ Krishna Iyer, "Processual justice to the people", Lecture at the Indian Council for Legal Aid and advice, 1975, pg.59.

"Social justice means at the jural level, law with a heart that weeps for the poor, hands that wipe their tears and head that plans antipoverty rights".

Fourthly, as it is based on a settlement between the parties, no appeal lies from an award of the *Lok Adalat*. This bar has created unfounded apprehensions that justice may be denied for want of provisions of appeal. However, as the settlement is arrived on the consent of both the parties, no appeal would lie from it²⁰.

It is feared that the system of *Lok Adalats* is meant to supplant or substitute the regular courts of law. *Lok Adalats* are not intended to supplant the courts. Rather they are a unique and informal forum to dispense justice where disputing parties are able to actively participate in the decision-making process. Such an occurrence is not envisioned by the law, as the system of *Lok Adalats* has been created to ensure that justice is not denied on economic or other considerations, in keeping with the mandate of social justice under Article 39-A of the Constitution of India.

Concluding remarks:

Despite the various apprehensions, it is clear that *Lok Adalats* are a positive step towards ensuring effective access to justice. Although indigenous and traditional, they are modern in their approach and technique, dispensing justice suitable to the Indian conditions. Imperfections if any, in the functioning of the *Lok Adalats*, may be rectified by appropriate amendments to the Legal Services Authorities Act 1987. The co-operative and participatory efforts of citizens, lawyers and judges will go a long way in ensuring the success of *Lok Adalats*—India's own dispute resolution system.

²⁰ No appeal is maintainable against a consent decree as per section 96(3) Code of Civil Procedure 1908.

HUMAN DIGNITY: THE PALISADE AGAINST STATE EXTREMISM

B.S. Patil *

Concept of Human Dignity

Every individual is presumed to be a free and responsible person; however, law prefers to treat every individual in proportion to his ability in any given circumstances. An individual with a reduced autonomy is entitled to appropriate protection according to the principles of subsidiarity, human dignity, justice, charity and vicarious consent.¹ But the question that arises is, whether the dignity of a person is correlated to his ability to perform? In the present day context an individual is free to a larger extent but he functions with a reduced autonomy. This reduced autonomy is desirable in the larger interest of the society, but the authority reducing such autonomy, being the State, the individual needs appropriate protection against this mighty entity. Any such protection accorded, has to be aimed at ensuring the dignity of the individual. The regulation of the limitation and the attempt to protect dignity of individual becomes meaningful if the concept of Human Dignity is clear. In the concept of 'Human Dignity', the latter part of the word denotes the 'state of being noble' and the 'state of being dignified'.² If the suffix 'Human' is added to the word 'dignity', then the sense of special treatment or the state of being dignified, gets universalized.

Human dignity therefore transcends social order as the basis for the Rights and is neither granted by the society nor can be legitimately violated by the society. Thus human dignity forms the conceptual basis of human rights. While providing a foundation for many a normative claims, one direct normative implication of human dignity is that, every human being should be acknowledged as an inherently valuable member of the human community and as a unique expression of life, with an integrated physical and spiritual nature³. Even though human dignity is the conceptual basis for human rights, it has remained an abstract concept. This abstract nature of the concept has actually aided overall development of the new genera of human rights and this intangible concept could be explained on the lone foundation of human rights.

Evolution of Concept of Human dignity

The concept of 'Human Dignity' and 'Human Rights' have a concurrent origin. Human rights are the pathway for every individual to achieve the destination of 'Human Dignity'. While tracing the origin of Human Rights Law, the most common phrase used to describe it is, "Human Rights Law is as old as people are"⁴. But it is not true. It has a recent origin. In the early civilization, the laws were considered to be given by the God or were created by force and

* Assistant. Professor, V.M. Salgaocar College of Law Miramar, Panjai, Goa

¹ Available at http://www.ascensionhealth.org/ethics/public/key_principles/human_dignity.asp

² *Black's Law Dictionary*, West Group, Saint Paul Minn, 7th edition, 1999 at 468

³ Id

⁴ Chhatrapati Singh, '*Conceptions of Humanity and Social Development*' Edited by Upendra Baxi 'The Right to be Human', Lancer International, New Delhi, 1987 at 25.

maintained by force, accompanied by claims of superiority on account of rank, race, etc.⁵. As the law was given either by God or by force, the main object was maintaining law and order, maintaining the hierarchy at the cost of individual rights and needs, and prolonging the obedience through force and fear. The law never had the inbuilt capacity to protect human dignity. But even under these circumstances, it always protected the individual dignity of the men in the helm of affairs and the men who mattered. It was individual dignity which was protected based on capacity and status and was never universalized to be called as 'Human Dignity'.

The notion of Human Dignity was absent in the legal conceptions of the Romans and the Greeks. This seems to hold equally good of the Jewish, Chinese and all other ancient civilizations that have since then come to exist. The domination of this ideal (i.e., Human Dignity and Human Rights) has been an exception rather than the rule, even in the recent history of the West⁶. When the ruler of the State is considered to be the representative of the God, and has a divine permission to rule, he is presumed to be incapable of committing a wrong and thus exercises unabridged rights. On the contrary, Human Dignity and Human Rights concepts hits at the base of the concepts of 'divine permission to rule', 'king can do no wrong' and 'exercise of unabridged rights', and rather imposes a duty on the ruler to respect the dignity of individuals and prescribes limitations on the rights of the ruler. When the earlier concept was given recognition, naturally the entire concept directly in disagreement (Human Dignity and Human Rights) was sacrificed.

On a similar pattern the Hindu societies in India, Nepal and Pakistan maintained the caste system, which did not recognize human dignity. The system created different groups of individuals and fixed the ranks of society into the three upper classes, and defined their privileges. The fourth class consisted of people with minimal rights. The position of untouchables was even bad, as they were secluded from any kind of societal position and were outside the purview of any system of rights⁷.

Though the notion of 'Human rights' and 'Human dignity' was never recognized and enforced practically, it had enjoyed theoretical recognition. The earliest recognition of this idea is found in the Hebrew account which describes Adam, whose name means 'Humanity', as being created in the 'image of God'. This old text written in the seventh century B.C supports the idea of rights that all enjoy by virtue of their common humanity⁸. This normative implication of the conception of Human Dignity created greater impact on the Catholic moral thought as it pertains to a range of right to life, issues including health care ethics etc. For example, Catholic morals provide the foundational principle for the understanding of distributive justice, the common good, the right to life and the right to health care⁹.

Nevertheless, the concept of human dignity was understood by early civilizations. But it was not given recognition, nor enforced and was provided a mere lip service. The present jurists may also have overstepped the limits while interpreting the ancient texts and undue regard and recognition has been provided to the ancient texts. So for all practical purposes, Human Dignity

⁵ Harlan Cleveland, 'The Chain Reaction of Human Rights', in "*Human Dignity- The Internationalization of Human Rights*", (Alice H. Henkin (Ed),1979) ix

⁶ Isaiah Berlin, "*Two Concepts of Liberty*" in *Four Essays on Liberty*, Oxford University Press, 1969

⁷ Elaine Pagels 'The Roots and Origins of Human Rights', in "*Human Dignity- The Internationalization of Human Rights*", (Alice H. Henkin (Ed),1979) ix 3

⁸ *Supra* no 4 at 2

⁹ Available at http://www.ascensionhealth.org/ethics/public/key_principles/human_dignity.asp

and Human Rights have their origin in the present generation. The present generation has achieved the initial objective of providing recognition, but the struggle is still on to reach the goal of providing human dignity to each individual.

Human Dignity: Forced on the Humanity or Need of the Humanity

During early period of the civilization, the role of law was entirely different from that of today. The law mainly dealt with the law and order situation. Under this scheme, only the Criminal Law and Law of Property found place. The qualitative change in the role of law was brought about by the Napoleonic Code titled 'The Rights of Man'. Thereafter, the law did not remain a mere description of the social arrangements and a mode of regulation, but essentially became an instrument of reform.

This new found role of reforming the society for the purpose of development had to be guided properly. In this regard many principles of law were proposed, but most of them faced objections. The major objection to the universal application of the Human Rights was raised by the principle that, 'it is impossible to be just in an unjust society'. This rule was further reformed to be stated as 'it is inhuman to be just even in a just society'. The proposal made was popularly known as the '*Matsyanyaya*'¹⁰ (Justice of fish). It means that 'A big fish not only will, but must eat small fish'. So the elimination of an inferior human race is a part of the law of nature, and the law therefore ought not to interfere with the rules of nature. However the concept of Human Rights goes against this very basic requirement of the rules of nature. It encourages the survival of every individual irrespective of their capabilities. The issue that arises is whether this jungle law of survival of the fittest can be emulated in a civil society? If this jungle law has to prevail, what is the purpose of formulating the society? Reason being that where the jungle law prevails, the society cannot remain civilized.

But the proponents of '*Matsyanyaya* theory' have projected this jungle law in a more sophisticated manner through principles like, 'free competition', 'survival of the fittest', 'maximization of self interest' and 'might is right'. These principles put all the human beings in one category and state that whoever survives is the one entitled to right to life. What would be the criteria to decide as to who will be appropriate for survival? With respect to the jungle, it is much easier to understand that the healthiest, the strongest and the most adaptable are the ones eligible to survive. But are they actually suitable and therefore best for a society?

The society is an antithesis to jungle. As the social world is not natural, it is not at all like nature. It is another order created by man where rules of nature cannot be adopted without suitable changes. The major challenge before the law is to choose the fittest person to survive. It is easy to recognize the fittest under natural circumstances (read it as jungle), but in society it is not that easy. Is the learned but poor man more worthy of survival, than the one who has proven his excellence or competence in amassing wealth? Should the muscular he-man be preferred over the weaker, so that his progeny shall inhabit the earth?

¹⁰ *Supra* No 4 at 2

The anarchists and the liberals say that, 'precisely because we do not know who or what is the most worthy of survival and the most deserving of care in society, let us not decide a priori'¹¹. Under these circumstances it is necessary to invoke the rules of equality, independence and dignity and treat each other accordingly, whether rich or poor, strong or weak. By doing this we create the conditions in which the best can emerge. By changing the role of law, man gives himself a chance to excel and survive perpetually through social development. The human dignity and human rights are the basic requirements of an individual; for his happiness in particular, and for survival of the human race in general. The law needs to ensure the same. Once the law is able to protect the dignity of every individual in the society, the society will take care of itself and grow, because law has successfully provided the required atmosphere for all individuals to survive and excel in absence of artificial hurdles created by the misguided social order. In furtherance of the above object and to protect the concept of Human Dignity, the civilization has developed a group of rights known as 'Human Rights'. These are the freedoms, immunities and benefits, that according to modern values all human beings should be able to claim as a matter of right in the society in which they live.¹²

Conceptual maturity of the notion of Human Dignity

The concept of Human Dignity changes with the change in the approach of the State. A capitalist State feels that a free market is capable of protecting human dignity. A Socialistic State feels that the protection of the rights of the society or a group automatically gives recognition to the individual's rights. The Marxists feel that the civil and political rights precede over the social and economic rights of an individual. The discussion is always concentrated on the point of what constitutes human dignity? But never on the point whether human dignity needs to be protected. This suggests the passing the initial stages of growth of the Concept of human dignity. But the need of protection of human dignity is no longer debated; rather the debate now is about what constitutes human dignity and how it is to be protected?

In the light of the above discussion, the role of the Constitution assumes importance. Being the basic law of any legal system, the Constitution is bound to address the need of protection of human dignity. Once the Constitution acknowledges the need for its protection, all the laws passed under it have to qualify the test of constitutionality. This ensures protection of the principle of Human Dignity. But the Indian Constitution provides for its protection and also prescribes a socialistic approach for the overall development of the society. The dichotomy in approach may tend to create conflict.

Socialism: An ally or foe of Human Dignity?

The Constitution is the base for the survival of a legal system. This document provides the do's and don'ts to the State. The study of the Indian Constitution reveals a Socialistic approach. Understanding of this special approach is very essential for the present study, as Socialism is an antithesis to individual rights. It implies more than a mere subordination of an

¹¹ *Supra* No 4 at 26

¹² *Supra* No 1

individual to a group, and also implies more than a mere subordination of the rights to the duties. It places economic development ahead of the political-civil rights¹³.

The concept of Socialism has brought about a change in the thinking process of the State and has also changed its role. The function of the government now, is not merely of a 'watchdog', but also of maximizing security, liberty, autonomy, and to work under the principle, 'governing best when it governs least'. In addition to bridging the dichotomy of Natural and Positive Law, the twentieth century has brought a comfortable marriage between the emphasis on the individual, his autonomy and liberty; and the emphasis on Socialism, the group and the economic and social welfare for all.

This synthesis of Human Rights and Socialism gave rise to equality as a cardinal human right. At the time of advent of Human rights, the eighteenth century rights theory had provided limited coinage to the concept of equality and gave preference to liberty because liberty is the basis for protection of human dignity. But in the nineteenth century the concept of socialism exalted equality and set it high above liberty, because the synthesis of human rights and Socialism gave rise to a new thinking. The need was felt to accord an equal treatment to every individual irrespective of his capacity, status, utility and identity for the purpose of protecting human dignity. This change led to the frequent use of a slogan during French revolution i.e. "Liberty is the watchword of the middle class, equality of the lower". Our century has also sought to transform equality of opportunity, from a mere theory to a greater reality, breaking down social, religious and other barriers. The growth of concepts in our century, however, has not always been from liberty to equality and to social welfare. If capitalism has conceded to welfare at least in practice, socialism has conceded to liberty at least in principle¹⁴.

Socialism and Individual Dignity: Source of Conflict between Legislature and Judiciary

Socialism is the part of Indian Constitution from the date of proclamation. Even though the word 'Socialist' was absent, the concept could be read into the Preamble with the help of words 'Justice- social, economic and political'. In spite of the existence of the concept, the word 'Socialist' was introduced into the Preamble¹⁵ at the later stage through an amendment.¹⁶ The socialistic approach of the Constitution had a direct impact on the protection of individual rights and dignity. Under the same guise the Constitution authorized the 'progressive income tax', which reflects a philosophy of distributing burden of citizenship in relation to the capacity. This approach probably made possible the transformation of the State into a Welfare State responding to economic and social rights.

The ideal of Socialism was given complete recognition during Neharuvian Era, where a 'Distributive Justice Concept' was adopted and was popularly known as 'Neharuvian Socialism'. Some accept individual human rights approach and stress on individualism, but the socialists

¹³ Louis Henkin, *'The Rights of Man Today'*, (Steven's and Sons, London, 1979) 29

¹⁴ *Ibid* at 32

¹⁵ Many jurists are of the opinion that the preamble cannot be subjected to amendment, as the people of India enacted and gave it to themselves on 26th Nov 1949. As it is enacted on a particular date, subsequent amendment will render the date meaningless.

¹⁶ The words 'Socialist, Secular' was inserted by the Constitution (42nd Amendment) Act, 1976

condemn individualism as atomism, preferring to stress fraternity, sociability and community as the way to individual dignity and fulfillment¹⁷.

This conflict resulted into a major stand-off between the Judiciary and the Legislature. Under the socialistic approach the State tried to introduce land reforms to achieve distributive justice. This attempt of the State directly violated the fundamental rights enshrined under Art 19 (1) (f) as it then existed and Art 31, which mainly dealt with the fundamental right to property. In the beginning of 1950's it led to litigations¹⁸ and the judiciary protected the rights of the individual ignoring the State policy. To nullify the effects of judicial action the legislature went ahead with series of amendments to the Part III¹⁹. Finally the legislature removed the right to property from the part III and inserted it as a constitutional right under Art 300A²⁰. This conflict continues till date. The judiciary continuously expands the concept of Human dignity whereby the rights qualifying to be human rights are ever increasing. This attempt of the judiciary has not been well received by the State and the tug of war has resulted into a synthesis of both the concepts and has yielded a new blend of rights. As a formula of understanding it has been held that, rights are never absolute and virtually every right under certain circumstances gives way to some public good. But some individual rights and freedoms, such as speech, press, assembly, religion, and privacy, are fundamental. The invasions are looked at by suspicion and are sharply scrutinized and sustained only for compelling State interest²¹.

Constitutionalism and Human Dignity

Constitution is the basic document of a State. It sets limitations on the role of the government. As the government has grown in gigantic proportions, developed boundless economic power and transformed the law and societal setup to amplify its role and relevance, it has posed a serious threat to human liberty and dignity. As a safeguard against the mighty government, the Constitution has been created to limit its powers. Constitutionalism is reflected in the form of care for dignity and the autonomy of the individual human being, all individuals being entitled to be treated equally.

Constitution implies a limited government. Constitution also implies best promises, though Constitutional promises often remain unfulfilled. But these promises at least tell us, what the society aspires, where individual rights stand in its political system and scale of values, and how the rights fare in fact²². Protecting the liberties of people is seen as the principal reason for limiting the role of the state. A principal limitation in the Constitution is in the nature of fundamental rights and therefore Constitutionalism is identified with the idea of respect for individual rights. The Constitution and Federal set up are the limits which can be put on the will of the State.

¹⁷ Louis Henkin, '*The Rights of Man Today*', (Steven's and sons, London, 1979) 35

¹⁸ Wazir Chand v. Himachal Pradesh AIR 1954 SC 415, Jagdish Chand Radhey Shyam v. State of Punjab AIR 1972 SC 587, PTI v. Union (1975) 3 SCR 499, Kerala v. Mother Provincial (1971) 1 SCR 734 etc

¹⁹ See Constitution (1st Amendment) Act, 1951, Constitution (16th Amendment) Act, 1963, Constitution (44th Amendment) Act, 1978

²⁰ The Constitution (44th Amendment) Act, 1978

²¹ Rights cannot be absolute, and fundamental rights are not an exception to it. Art 19(2) to 19(7) of Constitution of India provides restrictions on the freedoms, and all the restrictions are in the state interest.

²² *Supra* at 13

Human Dignity: The Palisade Against State Extremism

In the age of Constitutionalism, the trend is to create a written Constitution as against the unwritten. The written Constitution helps to maintain the limitations on Federal and State Governments and on their particular branches, and promotes the judicial role as Constitutional arbiter. Along with this, the doctrine of separation of powers and federalism help to preserve individual rights by preventing concentration of governmental power. All these limitations are to protect individual against tyranny and the arbitrary acts of the State.

The notion of protection of individual dignity came to the fore due to the advent of Constitutionalism. A series of attempts of protection have led to a series of new mechanisms which were set in motion. Judicial review is one such unique U.S. contribution to Constitutionalism, individual rights now being its principal beneficiary. Similarly, the contribution of India lies in protecting the individual's rights and dignity in the form of recognizing Public Interest Litigation.

Originally, the declared Constitutional rights were essentially political. Presently, in the system of government established by the Constitution, the fundamental rights are primarily designed to protect 'the people' from tyranny and repression. The right of the people to be secure and the principle of rule of law implied 'due process of the law', protection of property against confiscation and the catalog of rights for those who might be accused of crime, etc. These are rights which are basically designed to safeguard the respectable citizenry. Most of these safeguards are found in the oldest Constitution of U.S. But it is the largest Constitutional democracy (India) which has in fact achieved the freedom from slavery, guarantee of equality and universal suffrage, which the U.S. could ensure only after prolonged struggle and unrest. In India, the Constituent Assembly guaranteed these rights at the first instance.

Due to the expansion of the concept of human dignity, the rights which were originally political in nature were expanded into the realms of economic and social rights. For example, the freedom of speech and press which now protects not only political and religious, but also economic, commercial advertising, is also an extension of a political right²³. Another example is of labour picketing which is a form of freedom of Association, which is used as an act (a technique) to improve bargaining power in a negotiation process during industrial dispute. It is a case of use of political freedom to meet the economic needs²⁴. The inevitable consequence of expanding and proliferating rights has led to the emergence of the principle of 'balancing' the individual liberty and public interest and determining the limits of each.

²³ The matter as to freedom of speech and commercial advertisement was raised before apex court in *Hamdard Dawakhana v. Union of India* AIR 1960 SC 554. The Supreme Court rejected the contention, but in *Tata Press Ltd v. Mahanagar Telephone Nigam* (1995) 5 SCC 139, Court held that the freedom of speech and expression includes commercial advertisements because the independent press can survive only if there is a continuous flow of revenue. Economically fragile press will not be able to discharge constitutional duty.

²⁴ In *All India Bank Employees Association v. National Industrial Tribunal* AIR 1962 SC 171, the issue raised was whether political right of freedom of association can be used to increase the bargaining power and declare strike to put management of an industry under economic pressure, to attain economic gain? The Supreme Court held that Freedom of Association will not guarantee the effectiveness of the strike or collective bargaining. But in *Dharam Dutt case* (2004) 1 SCC 712, Court held, that the Fundamental rights can be restricted by legislation, but its usage for economic gain cannot be curtailed as long as the association fulfills the requirements of the legislation.

The Human Dignity and Indian Constitution

An overview of the Constitution reveals that it serves as a blue print to the Government which acts as a fence against wielding of power by the successive Governments and also indicates the intention of the framers and contemporary leaders towards ideals like human dignity.

The duties of the State towards citizens are enshrined under Part III and IV. The Fundamental Rights under Part III are broadly categorized as negative duties imposed on the State, wherein the State is asked not to execute certain acts invading the rights of an individual. The Directive Principles of State Policy are provided under Part IV. These are positive duties imposed on the State, wherein the State is required to achieve certain targets.

This classification of rights into different parts was done by roughly locating the Civil and Political Rights under Part III and Social and Economic Rights under Part IV. At the inception of the Indian Constitution, i.e. during 1950's the Fundamental Rights (read as Civil and Political rights) were given more importance by the judiciary and it had more enforceability. The reason for the differential treatment predominantly depends upon individual cases, but it could broadly be understood that fundamental rights are more important for the purpose of protecting human dignity. Another reason could be the negative nature of the right which makes it easily enforceable independent of the economic situation of the State.

This differential treatment by the judiciary continued for a major duration in the independent India. It was in 1980's, that the judiciary established balance between the two parts of the Indian Constitution and held that the balance between the Fundamental Rights and Directive Principles of State Policy is part of the basic structure²⁵ and the two categories of rights should not compete with each other but they should complement each other²⁶. In the same decade, the judiciary adopted a new trend of shifting the rights enshrined under Part IV in to Part III, thus reducing the line of demarcation between the two²⁷. The development of rights that are described as promises, confirms the essentially open character of the Indian Constitution, as it is always subject to present synthesis of principles with the contemporary values both home grown and imported²⁸. Old assumptions are reexamined, stereotypes are penetrated and those rights are accepted today which were not conceived a decade ago²⁹.

²⁵ *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666, *Unnikrishnan v. State of Andhra Pradesh* AIR 1993 SC 2178, *Jilubhai v. State of Gujarat* AIR 1995 SC 142

²⁶ *Id*

²⁷ The rights enshrined under directive principles of state policy were often shifted under Fundamental rights to provide more enforceability. Right to Education was recognized as a fundamental right under Art 21 in *Unnikrishnan v. State of Andhra Pradesh* AIR 1993 SC 2178, *University of Delhi v. A V Chandal* (2000) 10 SCC 648, *Right to Environment in M.C.Mehta v. Union of India* (1999) 6 SCC 9, *M.C.Mehta v. Union of India* (1996) 4 SCC 351, *M.C.Mehta v. Union of India* (2002) 10 SCC 191, *M.C.Mehta v. Union of India* (2003) 10 SCC 561, *Right to shelter in Shivsagar Tiwari V. Union of India* AIR 1997 SC 2725

²⁸ The open character of the Indian Constitution was exhibited from the beginning. Principles based on contemporary values such as Secularism and freedoms of religion were adopted. Similarly the Indian Constitution was also influenced by the principles developed in the west such as 'Dignity' adopted from the development of International Law; Federal system and fundamental rights from U.S.; Directive Principles of State Policy from Ireland.

²⁹ The growth of international human rights provides uniformity in gaining human dignity. When 1990 decade was declared as the 'Decade of Disabled', the member states worked towards achieving equality and liberty to the disabled. This contemporary development provided an opportunity to the Indian legislature to protect the existing rights

Human Dignity: The Palisade Against State Extremism

In the early period the judiciary was hesitant to implement the socio-economic rights. Later, the open character and flexibility of the Constitution made it possible for the judiciary to give equal protection to all kinds of rights, protecting the dignity of an individual. This is a major shift in the thinking process of the judiciary. Initial understanding of the concept of human dignity was in the light of civil-political rights of an individual, where in the liberty was taken care of and enforced with devotion. But the trend of judiciary in providing equal status to socio-economic rights along with civil-political rights is a major change in the concept of human dignity; where in principles of equality got its due recognition as an indispensable part of human dignity. The judiciary was encouraged to the extent of declaring that non-availability of funds cannot be considered as a defense for not fulfilling the requirements of human dignity.

The concept of Human dignity is a part of the Art 21 of the Constitution. The right to life under the Article has been accorded such an interpretation by the courts so as to successfully include human dignity within its ambit. In the initial years, the right to life was the right not to be deprived of life without legal excuse. It mainly dealt with the negative duty on the State. Later due to judicial activism the right came to be viewed as something more than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed³⁰. It was also held that the right to life equally prohibits the mutilation of the body... through which soul communicates with the outer world...³¹. By adding the concept of liberty, the provision became more than mere freedom from physical restraint or the bonds of the person.³²

This restricted approach changed when the concept of human dignity was added to the principle of right to life. The judiciary interpreted the right to human dignity to include bare necessities of life such as nutrition, clothing and shelter along with the facilities for reading, writing and ability to express oneself in diverse forms³³. It also includes moving about freely and mixing with fellow human beings. Further the Court gave a breathing space to the Government by providing an exception clause in the form of economic capacity. It was held that the magnitude and the content of human dignity depends on the extent of the economic development of the country³⁴. Even though human dignity is a concept applicable to all human beings living in the world, the same cannot be universalized due to difference in the strength of commitment of the State to human rights and the extent to which it is realized. So the concept of human dignity also depends upon the particular State and its institutions. The position of human rights thus differs markedly in different societies.

Right to Life includes rights under 39(a) and Art 41³⁵ of the Constitution of India. This right is manifested in different forms like protection of health and strength of the workers, men and women, just and human conditions of work and maternity relief, human dignity for persons of a tender age, including a child's right against abuse, opportunities and facilities for it to develop in a healthy manner and in condition of freedom and dignity and also the educational facilities.

³⁰ Dr L.M.Singhvi, "*Constitution of India*", (Modern Law Publication, New Delhi, 2nd edition, volume 1, 2007)354

³¹ *Munn v. Illinois* (1877) 94 US 113 (142): 24 L.ed. 77 quoted in AIR 1978 SC 1675.

³² *Ibid*

³³ *Francis Coralie v. Union Territory* AIR 1981 SC 746

³⁴ *Ibid*

³⁵ *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180

Conclusion

The concept of Human dignity is a pre-requisite to differentiate between other living beings and the human beings. The individual dignity was not recognized in the early period of evolution of the civilized society due to the lack of appreciation and understanding of the concept, but its violation was kept at minimal. The behavior of the earlier society can be subjected to excuses such as, law had a divine origin, duty of the king was restricted to maintaining law and order, and most importantly society was at the preliminary stage of development. The present society cannot give excuses but has to strive to protect the dignity of individuals.

Constitutionalism is a potent weapon to create barricades against the excesses of the State. In the recent years the need for protection has increased manifold, mainly due to the increase in the role of the State. The State has not only grown in magnitude, but also in its role, with its intervention in the life of individual at its peak. Initially the State had graduated from *lassize faire* to social welfare State and presently it has usurped the role of paternalistic State. As a result, the State is having a very active role as compared to its responsibility in the past.

This development in the role of the State has its own advantages. The contribution of the State in making the life of its citizens trouble-free and uncomplicated is remarkable. But a system without inbuilt mechanism of protection against excesses and a system which entirely depends upon the mercy of commitments of the persons in the helm of affairs does not survive for long. It is 'Constitutionalism', which steps in at this stage and tries to develop the mechanism for protection. In India, Constitutionalism is a well-developed concept, and the fact that it has survived this long, itself signifies its greatest achievement. This success is attributable to the well-developed 'ism' and the basic document evolved called 'Indian Constitution'.

In the present day, the role of the Indian Constitution has multiplied. Constitutionalism was developed in order to protect the individuals against the State. Presently, the interaction between States is ever increasing and Globalization has posed new challenges and threats. Constitutionalism now has to develop further to meet the current demands of globalization. History has proved that the Constitution is the best option for protecting individual dignity. The present challenge only demands slight change in the approach, rather than creating a separate Constitution for each State. The need of the present day therefore is to implement World Constitutionalism.

ABSOLUTE LIABILITY AND THE CHANGING POWER EQUATIONS.

Mrunmayi M. Vaidya*

The only constant phenomenon in a society is progress. It is an important trait of the society. Development is therefore, inevitable. One of the methods of betterment of civilization is the carrying out of number of the activities which entail public good and contribute to the development of the individual personality. However, each of the developmental activity invariably causes damage to the surroundings and the cost of development is borne by humanity and the environment.

Protection of the environment has been stressed as the duty¹ of every individual for the betterment of his life as well as the coming generations. This in turn calls for sustainable development. The concept of sustainable development signifies the aspect of balance to be struck between the need for the development and the protection of the environment. As human beings, we are expected to judiciously utilize the resources that are placed at our disposal by the nature.

Sustainable Development and the Indian Judiciary

The Judiciary has been very articulate and sensitive with regard to protection of the environment. We have witnessed a plethora of judgments which highlight the responsibility of individuals and of enterprises in the protection and preservation of the environment². The Courts have time and again issued orders and directions to the Government to take appropriate measures to ensure the same. There are a number of legislations³ on environmental protection which the Judiciary has interpreted in the light of their noble objectives. Moreover, it has enunciated that the right to life as ensured by the Constitution of India under Art. 21 includes right to live in healthy environment⁴.

The Judiciary has always been in favour of the economic progress of the country, but has also been very critical and careful about its effect on the environment. It is very conscious of the fact that we cannot undo the damage done to our surroundings and that we owe a greater

* Assistant. Professor, V.M. Salgaocar College of Law Miramar, Panjai, Goa

¹ See, C.M. Jariwala, "Changing Dimensions of Indian Environmental Law", in Law and Environment (P. Leelakrishnan (ed.), Lucknow: Eastern Book Co., 1992) p.1 at 2. Ancient texts like the Manu Smriti, Kautilya's Arthashastra, etc have a mention of this.

² *Municipal Council, Ratlam v. Shri Vardhichand and Others*, (1980) 4 SCC 162; *Rural Litigation and Entitlement Kendra v. State of U.P.* (1985) 2 SCC 431; *M.C. Mehta v. Union of India*, (1987) 1 SCC 395; *Subhash Kumar v. State of Bihar* AIR 1991 SC 420; *M.C. Mehta v. Union of India* (1998) 8 SCC 206; *Almitra Patel v. Union of India*, W.P. No. 88 of 1996; *T.N. Godavarman Thirumulkpad v. Union of India*, W.P. No. 202 of 1995; *Hinch Lal Tiwari v. Kamala Devi*, (2001) 6 SCC 496, etc.

³ Legislations on Environment include the Water (Prevention and Control of Pollution) Act 1974, Air (Prevention and Control of Pollution) Act 1981, Environment Protection Act 1986, Indian Forest Act 1927, Forest (Conservation) Act 1980, Wildlife (Protection) Act 1972, etc.

⁴ *Rural Litigation and Entitlement Kendra v. State of UP* AIR 1985 SC 652.

responsibility to next generation to provide safe and clean environment. This has led to the evolution of a very significant principle called *Absolute Liability Principle* which can be termed as Indian judiciary's biggest contribution to Environmental Jurisprudence.

Damage to Life and Environment: Liability of Industries

There is no second opinion that it is necessary to set up industries on a large scale for the purpose of mass production and economic growth. This may necessitate the handling of certain chemical substances which may be inherently dangerous and capable of causing hazard to human life, property and the environment. However, these industries or enterprises cannot be shut down merely for these reasons. But at the same time there can be no compromise with the right to life and safety of individuals. At such a juncture, it calls for deciding what would be the nature of responsibility of such enterprises, when they are allowed to operate with the inherent risk of causing injury to public at large. It is in the wake of this concern, that the principle of Absolute Liability has been evolved by the Indian Judiciary.

The Background

The Absolute Liability principle was enunciated in *M.C. Mehta v. Union of India*⁵ which involved the Oleum Gas Leak at Delhi in December 1985. The incident which occurred a year prior to the present case prompted the judiciary to give a serious thought to the disasters which can result from the handling of dangerous substances on a large scale by an enterprise.

The Bhopal Gas Leak Disaster

It was on the night of 2nd -3rd December 1984 that the Nation witnessed the worst of the industrial disaster ever. There was leakage of the deadly poisonous Methyl Isocyanate (MIC) through a storage tank of one of the units of the Union Carbide India Limited situated at Bhopal, Madhya Pradesh. The inhalation of the gas resulted into instantaneous death of several people as well as animals. Number of them contracted various kinds of ailments inflicting untold miseries. Around 23 thousand people are said to have died over a period of time. The leak had a disastrous effect on the environment⁶.

The leak caused short term health effects like coughing, vomiting, eye irritation and suffocation. The acute symptoms were burning which was felt in the respiratory tract, changes in formation of the lungs, cerebral oedema, tubular necrosis, etc. It left the survivors with permanent problems like respiratory diseases, eye problems, immune and neurological disorders, female reproductive system failures, heart diseases as well as abnormalities among the children who were born after the disaster. This required to be tackled. Safety measures were not in place and the Government did not seem to be in a position to manage the situation or provide proper relief to the victims.

⁵ AIR 1987 SC 1086

⁶ The area around the plant was used as a dumping area for hazardous chemicals. Tube wells in the vicinity had to be abandoned. The soil and water samples collected from near the factory and inside the plant were toxic to fish. The soil and the groundwater was polluted in the area. The gases immediately caused visible damage to the trees and within a few days, all the leaves fell off.

Absolute Liability and the Changing Power Equations

The incidence was so grave that it received the attention even at the international level. The whole of the humanity woke up to the misery that such disasters can inflict on the human race and the risk involved in it. The damage was irreparable. It made the environmentalists, the executives, the entrepreneurs and others to think and decide how far and in what circumstances such enterprises should be allowed to operate.

Endless litigations were filed claiming compensation which were then consolidated through a single litigation which was filed in the District Court of Bhopal⁷. It was in the mean while that the earlier discussed Oleum Leak took place.

The Oleum Leak

On 4th and 6th December 1985 a major leak of Oleum gas took place from one of the factory unit of Shriram Foods and Fertilizers Ltd situated in Delhi. All the units of the factory were situated in a single premises of 76 acres which was surrounded within the radius of three kilometres by a population of approximately 2,00,000. It resulted in death of one and suffering of several others. The leak was a result of mechanical and human errors.

The Court was called upon through a Writ Petition titled *M. C. Mehta and Another v. Union of India* and another⁸ to decide about the liability of such corporations to pay compensation to the victims of such occurrences. It was the time when the whole world had woken to the hazardous effects that chemical leaks can have. This prompted the Court to give a serious thought to the issue of liability of such enterprises which imperil the lives of public at large. The principle of law being applied in such situations was the Strict Liability Principle⁹ which was the contribution of the English legal system. The principle had its own inherent limitations. The Supreme Court therefore evolved an altogether new principle of liability which came to be called as the 'Absolute Liability Principle'.

Absolute Liability Principle

The Court was basically faced with a very serious issue of what should be the extent of liability of an enterprise which is engaged in inherently dangerous activity in case any accident occurs due to which people die or get injured.

Till this time the Courts in India were following the Strict Liability Principle, which imposes liability for non-natural use of land but which operates with exceptions¹⁰. The Court felt that this principle was not efficient enough in present times to tackle the problems posed by the large scale industries which are engaged in handling of hazardous chemicals. Therefore it

⁷ The Union of India was given the authority to represent all the victims of the tragedy through the passing of the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985.

⁸ 1987 AIR 1086

⁹ Strict Liability Principle as laid down in *Ryland v. Fletcher* [1866] L.R. 3 H.L. 330, stated that a person who brings anything on his land which has the tendency to cause mischief if it escapes, keeps it at his own peril. If the thing escapes and causes damage, the owner will be liable to pay compensation. The liability will not arise in five cases which have been made out as an exception. It includes Plaintiffs own fault, Plaintiffs consent, Act of God, Act of third party, Statutory Authority.

¹⁰ There were five exceptions recognized which included Plaintiff's default, Act of God, Plaintiff's consent, Act of third party and Statutory Authority as defenses.

enunciated a new principle stating that “An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area owes an absolute non-delegable duty to the community to ensure that if any harm results to anyone, the enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity must be conducted with the highest standards of safety and if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm irrespective of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part.....”.

Further the Court said that the permission to carry on such a dangerous activity for making profit is not a license to risk others life and property. Such permission is subject to the condition that the enterprise would absorb the cost of any accident arising on account of such activity. This is also justified by the fact that it is the enterprise which alone has the resources to discover risk and give warning or take proper precautions for protection.

It was a progressive and an appreciable step where the Court has mentioned the imposition of exemplary damages on such enterprises for the harm that they cause. The imposing of damages has to be correlated to the magnitude and the capacity of the enterprise. More prosperous the enterprise; more the amount of liability. This would have a deterrent effect on all other similarly placed enterprises. These enterprises have to be made liable not to pay ordinary damages¹¹ but exemplary damages. These are meant to be punitive to the concerned enterprise as well as an example for all those others who are engaged in similar activities.

The Court also stated in unequivocal terms that this principle does not operate with any of the exceptions which operated in case of the Strict Liability Principle. Therefore, the term ‘Absolute liability’. This judgment paved the way for the judiciary to do real justice in the matters of environmental hazards in its own way.

The Principle in Application

The principle enunciated by the Supreme Court was much appreciated by all the Courts in the litigations on the issues affecting environment and damage to life and property. It was a ready principle available to be used in the litigation which came up in the Bhopal Gas Leak case decided by the District Court of Bhopal as well as in revision to the High Court of Bhopal. The compensation which was awarded to the victims by these Courts was however based on the settlement reached by the Union of India and the Union Carbide Corporation¹².

The principle was also referred in later litigations like the *Indian Council of Enviro-Legal Action v. Union of India*¹³. The sludge discharged from the manufacture of ‘H’ acid remained as

¹¹ Ordinary damages are proportionate damages where the liability to pay is proportionate to the harm caused.

¹² There was an appeal preferred to the Supreme Court, during the pendency of which the Central Government reached a settlement with the Union Carbide Corporation for the sum of 713 crores in 1989. It was termed as an ill bargain by many.

¹³ AIR 1996 SC 1466

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lethal even after the units of the chemical industry stopped production. It destroyed the whole village, spreading disease, death and disaster¹⁴.

In another case, *Vellore Citizens Welfare Forum v Union of India*¹⁵ the Supreme Court has also gone to the extent of applying the principle of Absolute liability to cases where there was non-toxic pollution. This was a case involving discharge of untreated effluent by industries in Tamil Nadu.

The point to be highlighted here is that the Court not only agreed to the aspect of liability of the enterprise for the damage caused to individuals but also stated that the polluter has to bear the remedial cost to restore the damaged ecology. It also held that once the activity carried on was hazardous, or inherently dangerous, the enterprise carrying on such activity was liable to make good the loss caused to any other person by his activity, irrespective of the fact whether he/she took reasonable care while carrying on his/her activity¹⁶.

The Principle also resulted in the enactment of the Public Liabilities Insurance Act of 1991¹⁷ which provided for insurance coverage to any member of public affected by the hazardous activity. It also resulted in the passing of the National Environment Tribunal Act 1995¹⁸, the object of which is to impose absolute liability in cases where death or injury to a person (other than a workman) or damage to any property or the environment results from an accident involving a hazardous substance¹⁹. Provision was also made for setting up of Environment Relief Fund. The Schedule to the Act lists out the category of absolute offences²⁰. However, it has been repealed by Sec 38 of a new legislation titled the National Green Tribunal Act enacted in 2010²¹.

There are also instances of constitution of Green Bench²² for hearing matters relating to the Environment which involve technicalities. There has been wide application of the principle of Absolute Liability by the Court in various cases involving the fixation of damages. The principle also influenced the various legislations²³ which came to be enacted in pursuance of it.

¹⁴ P. Leelakrishnan, 'Environmental Law in India' (First Reprint 2000, Buttersworth India, New Delhi) 136

¹⁵ AIR 1996 SC 2715.

¹⁶ V. Venkatesan, 'Bhopal Gas Disaster- Judicial Failure' Frontline, 19th Nov 2010.

¹⁷ Act No. 6 of 1991

¹⁸ Act No. 27 of 1995

¹⁹ The Act defines an "owner", as a person who owns or has control over the handling of any hazardous substance at the time of the accident. Such an owner is liable to compensate the victims on a no-fault basis.

²⁰ Dr. Usha Ramnathan, "Liability and Environmental Damage: An Indian Experience" COP/MOP 1 Biosafety Protocol IELRC Side-Event on Liability, 26 February 2004.

²¹ Act No. 19 of 2010

²² In *M.C. Mehta & Anr. Etc v. Union of India & Ors. Etc* 1987 AIR 965, the Supreme Court had made a suggestion to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environment Courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to the Supreme Court from the decision of the Environment Court.

²³ Ex. Hazardous Waste (Management and Handling) Rules 1989, Manufacturing, Storage and Import of Hazardous Waste Chemical Rules, 1989, etc.

Conclusion

The issue of the protection of environment has acquired great importance in present times due to the negative impact that we can witness around us. It has become necessary to preserve the environment and prevent it from being degraded. The Scientists, the Government, the Environmentalists, as well as the International Community has been striving to come up with solution to restore the damage which has already been caused by mankind. At such a juncture, the role of the Court becomes all the more important as the Judiciary is the guardian of the rights of individuals.

The Judiciary has pronounced significant judgments, given strict directions and made sound recommendations to the appropriate governments time and again to take measures to protect the environment. Its contribution through the evolution of the Principle of Absolute Liability is a giant leap serving as deterrence to large scale enterprises who take for granted that they have a licence to pollute and destroy the environment.

The Judiciary deserves appreciation. However, the value of the principle in terms of its actual implementation has become doubtful in the present scenario. The corporations in today's world are the centres of power²⁴. They control the economy and also the administration²⁵. Politics is shored up at their will. At such a juncture, is it really possible to enforce liability against such mighty giants? Is it possible to even book them for a trial? If the Judiciary in fact imposes liability on basis of the principle, will it be given effect to? Will there be a political will to go against the corporations on whose finance the system thrives?

The effect of the principle seems to be withering away. Circumventing the judgements of the Court is not a difficult task for the mighty corporations²⁶. Such and number of other issues spring up due to the Corporations now being the strongholds. The Corporations are posing a threat to the legal system. The changing power equation, demands a different and a more fulfilling

²⁴ Available at <http://www.globalissues.org/article/59/corporate-power-facts-and-stats>. In September 2011, an analysis of over 43,000 transnational corporations (TNCs) has identified a relatively small group of companies, mainly banks, with disproportionate power over the global economy. The report is called Top 200: The Rise of Corporate Global Power. Of those companies,

- There was a core of 1318 companies with interlocking ownership.
- The 1318 companies represents around 60 per cent of global revenues by collectively owning through their shares the majority of the world's large blue chip and manufacturing firms — the “real” economy.
- An even tighter 147 (about 1%) of these were described as “super entities” that controlled 40 per cent of the total wealth in the network.
- Of the 100 largest economies in the world, 51 are corporations; only 49 are countries (based on a comparison of corporate sales and country GDPs).
- The Top 200 corporations' sales are growing at a faster rate than overall global economic activity. Between 1983 and 1999, their combined sales grew from the equivalent of 25.0 percent to 27.5 percent of World GDP.
- The Top 200 corporations' combined sales are bigger than the combined economies of all countries minus the biggest 10.

²⁵ The political parties are funded by the Corporations as a lot of money is required during the elections. The Corporations are involved in lobbying thus making the politicians to yield to their requirements. The government so formed also frame or amend policies to suit the corporations.

²⁶ The safe passage of Warren Anderson (the main accused in the Bhopal Gas leak Disaster Case) is the best example. The Court has convicted and sentenced him for the offence but he cannot be brought back to the country for execution of the punishment.

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strategy to be adopted not only by the Judiciary but also the executives. Though the task seems difficult, it can be achieved with stringent laws and persons with integrity. Generating a genuine sense of Corporate Responsibility would also be important. With all these factors combined, ***Absolute Liability Principle*** would definitely ensure ***Absolute Justice***.

CONCEPTS OF RIGHT AND DUTY: WESTERN AND INDIAN DEBATES

Dr. Devidas G. Maley*

I. Introduction

Basically human civilizations are based on the concept of 'duty' not 'right' irrespective of east or west. People of earlier civilizations were used to doing their respective work (duty) seeking food etc. individually. There should not be any dispute regarding the origin and genesis of the concept of 'right' whether it is western or eastern. The concept of right is an essential element and requirement of entire humanity irrespective of nations and races. Human beings tend to have some basic tendencies and attributes which will be common to all races and religion, which requires basic conditions to live as a human being. Such conditions will be created by empowering human being through entitlement ultimately resulting into the concept of right. The concept of right is most essential for the survival of people as a human being without which his life is incomplete and will be miserable. The concept of right has taken its birth as late as compared to the concept of duty. India may be a forerunner of upholding the concept of duty (*Dharma*) to the highest level for that the Indian society is being regarded as duty-oriented, which required every human being must perform his duty (*Dharma*) without expectation and depending upon others whether they perform their duties or not that is being called as *Dharma* by which tried to seek and achieve '*Sarve Jana Sukhino Bhavantu*' (all people should be happy). However, this shloka doesn't reflect the real conditions of the whole population of India but a small portion of the people who are really happy by exploiting the masses of the nation putting a greater challenge to '*Sarve Jana Sukhino Bhavantu*' shloka even today. The majority of the people of India are living in below poverty line presently. Many are dying due to hunger and malnutrition. This is so, because the so called Indians either did not observe their duty (*Dharma*) perfectly or might have forgotten their duties (*Dharma*). Even though Indian society based on duty (*Dharma*) concept but greater than this, it is really based on *Varnashram* system supported by all ancient scriptures which does not allowed the Indian society to grow in an equal and horizontal manner led towards inequality, poverty, hierarchy resulting into social and religious superiority and inferiority divisions and complexes in society. This has hindered the masses to grow in an equal and equitable manner in India. The so called superior in caste Brahmin were used to occupy highest position and power which naturally led towards exploitation of the poor and *avarnas* (casteless) or low caste become the tool of the ruling affecting the interest (rights) of the masses in India.

This paper highlights the essentiality of right when the duty is not been observed whether it is in east or west.

II. Concept of Right

Jurisprudential study of right has been commenced by W.N. Hohfeld. W.N. Hohfeld suggested the word 'claim' as a substitute for 'right', but continued to use the term 'right'. A claim

* Assistant Professor, Gulbarga University

is, therefore, simply a sign that some person ought to behave in a certain way.¹ Some writers use the term 'demand' for right. John Salmond state that, rights are concerned with interests, and interests are advantages of a man, can be defined as "interests protected by rules of right that is by moral or legal rules."² Further he defines the legal rights as "a legal right is an interest recognized and protected by a rule of law".³ According to Holland "right is one man's capacity of influencing the acts of another, by means, not of his own strength, but of the opinion or the force of society".⁴ The term right in narrow sense may be a claim. But its wider meaning includes claims, liberties, powers and immunities.⁵ Each of these has their correlative, namely duties, no-claims, liabilities and disabilities respectively.⁶ The term right does not having any lucid meaning without its correlative duty. Each right is having its corresponding duty in another. Rights can be classified into several kinds such as legal rights, moral rights or natural rights, human rights, fundamental rights, constitutional rights, statutory rights and private right. Legal right is an interest which is advantage to the person recognized and protected by a rule of law.⁷ The meaning of moral right or natural right is that "a moral or natural right is an interest recognized and protected by a rule of morality."⁸ Human rights are those rights which are been possessed by the human being because of their very birth. Fundamental rights are such rights which are incorporated into and guaranteed by the constitution of a country considering them as fundamental devoting a particular part of the Constitution. Constitutional rights are those rights whatever rights have been incorporated in and granted by the constitution of the country to its citizens. Statutory rights are those rights are been provided by various statutes/legislations in a country. A private right means the people by entering into a contract can create their own rights and obligations binding on them.

III. Concept of Duty

The term 'duty' is drawn from du-ti translated from dabhar in Old Testament and from opheilo in the New Testament. The term dabhar, which, meaning originally "speech," or "word," came to denote any particular "matter" that had to be attended to. The "duty" is expressed by opheilo, "to owe," "to be due" in the New Testament.⁹

The meaning of the term "duty" is: the moral necessity to perform certain actions for no reason other than obedience to some higher authority, without regard to any personal goal, motive, desire or interest.¹⁰

The concept of duty is older than a right it take its roots in the process of civilization itself. This can be remembered in the words of Mahatma Gandhi, 'Civilization is that mode of conduct which points out to man the path of duty'. A duty is roughly speaking an act which one

¹ R W M Dias, Jurisprudence, 5th Edn., (New Delhi, Aditya Books Private Limited, 1994) P. 25

² P.J. Fitzgerald (Ed.), Salmond on Jurisprudence, 12th Edn., (Bombay, N.M. Tripathi Private Limited, 1966), P. 217

³ Ibid, P. 218

⁴ Thomas Erskine Holland, The Elements of Jurisprudence, 13th Edn., (Delhi, Universal Law Publishing Co. Pvt. Ltd., 1924), P. 82

⁵ Supra Note 1, P. 23

⁶ P.J. Fitzgerald (Ed.), Salmond on Jurisprudence, 12th Edn., (Bombay, N.M. Tripathi Private Limited, 1966), P. 224

⁷ P.J. Fitzgerald (Ed.), Salmond on Jurisprudence, 12th Edn., (Bombay, N.M. Tripathi Private Limited, 1966), P. 218

⁸ Ibid.

⁹ <http://www.biblestudytools.com/dictionary/duty/>

¹⁰ <http://aynrandlexicon.com/lexicon/duty.html>

ought to do, an act the opposite of which would be a wrong. To ascribe a duty to a man is to claim that he ought to perform a certain act. Yet, not all the acts which a man ought to do constitute duties. His duties he owes to others by virtue of his position or station. The servant has a duty to serve his master, the child to obey his parent and so on. Moreover a duty consists in positive acts, not in mere abstaining from acting: a duty not to do something, except in so far as this is a manner of describing a duty to do something else – a duty not to reveal something is a negative way of describing a positive duty to keep it secret – is a duty of a rare and unusual sort.¹¹ A duty can be equated with an obligation. An obligation in its popular sense is merely a synonym for duty. However, duty and obligation can be contrasted. Obligations are merely one class of duties, namely, those which are the correlatives of rights in *personam*.¹² Obligations are a man has through having taken them upon himself of his own choosing e.g., the obligation that results from making a promise.¹³ An obligation is the *vinculum juris*, or bond of legal necessity, which binds together two or more determinate individuals. It includes, for example, the duty to pay a debt, to perform a contract, or to pay damages for a tort, but not the duty to refrain from interference with the person, property, or reputation of others.¹⁴ But, R.W.M. Dias speak in different manner, a duty is a species of obligation and defines that, duties are prescriptions of conduct towards the achievement of some end, moral, social or other.¹⁵

The weaknesses of duty are many such as: (1) If one were to accept it as an anti-concept, the anti-concept “duty” destroys the concept of reality: an unaccountable, supernatural power takes precedence over facts and dictates one’s actions regardless of context or consequences; (2) “duty” destroys reason: it supersedes one’s knowledge and judgment, making the process of thinking and judging irrelevant to one’s actions; (3) “duty” destroys values: it demands that one betray or sacrifice one’s highest values for the sake of an inexplicable command—and it transforms values into a threat to one’s moral worth, since the experience of pleasure or desire casts doubt on the moral purity of one’s motives; (4) “duty” destroys love: who could want to be loved not from “inclination,” but from “duty”?; (5) “duty” destroys self-esteem: it leaves no self to be esteemed; (6) if one accepts that nightmare in the name of morality, the infernal irony is that “duty” destroys morality. A deontological (duty-centered) theory of ethics confines moral principles to a list of prescribed “duties” and leaves the rest of man’s life without any moral guidance, cutting morality off from any application to the actual problems and concerns of man’s existence. Such matters as work, career, ambition, love, friendship, pleasure, happiness, values (insofar as they are not pursued as duties) are regarded by these theories as amoral, i.e., outside the province of morality. If so, then by what standard is a man to make his daily choices, or direct the course of his life?¹⁶

IV. Concept of Dharma

The concept of *Dharma* is wider than the concept of duty. Duty is one aspect of *Dharma*. *Dharma* (*Sanskrit*: "way of righteousness." From *dhri*, "to sustain; carry, hold") refers to the

¹¹ P.J. Fitzgerald (Ed.), Salmond on Jurisprudence, 12th Edn., (Bombay, N.M. Tripathi Private Limited, 1966), P. 216

¹² *Ibid*, P. 448

¹³ *Ibid*, P. 216

¹⁴ *Ibid*, P. 448

¹⁵ R W M Dias, Jurisprudence, 5th Edn., (New Delhi, Aditya Books Private Limited, 1994) P. 229

¹⁶ <http://aynrandlexicon.com/lexicon/duty.html>

underlying order in nature and human life and behavior considered to be in accord with that order.¹⁷ *Dharma* is the way of transcendence guides us back to our true nature, our original position as loving servants of god. It can be supported with the following *sloka*:

Sa vai pumsam paro dharmo

Yato bhaktir adhoksaje

Ahaituky apartihata

Yayatma suprasidati

The occupation [dharma] for all humanity is that by which men can attain to loving devotional service unto the transcendent Lord. Such devotional service must be unmotivated and uninterrupted to completely satisfy the self.

Srimad-Bhagavatam 1.2.6

In India used to assign and substitute the meaning of dharma as ‘duty’, which has been ignored, not respected and not performed effectively. This has resulted in great disparities in the Indian society in terms of caste system. This can be supported by this statement: ‘in the latter part of the twentieth century we’ve experimented with the abandonment of a sense of duty and responsibility in favour of an ethic of self-gratification’.¹⁸

Indian jurisprudence is basically embedded in *Dharma* as propounded in the *Vedas*, *Puranas*, *Smritis*, epics such as *Ramayana* and *Mahabharata* and other Indian scriptures. It is very much difficult to define the term *Dharma*. It is a Sanskrit expression of the widest import. There is no corresponding word in any other language. It is futile to attempt to define it. It can only be explained. It has wide varieties of meanings for instance, the word *Dharma* is used to mean justice (*Nyaya*), what is right in a given circumstance, moral, religion, pious or righteous conduct, being helpful to living beings, giving charity or alms, natural qualities or characteristics or properties of living beings and things, duty, law and usage or custom having the force of law.¹⁹

The word *Dharma* has such wide meaning as to cover rules concerning all matters, such as spiritual, moral, and personal as also civil, criminal and constitutional law, it gives the precise meaning depending upon the context in which it is used. For instance, when the word *Dharma* used to indicate the giving of one’s wealth for a public purpose, it means charity; when it is referred to the giving of *Dharma* to a beggar, it means giving of alms; when it is said that in a given case *Dharma* is in favour of the plaintiff, it means law or justice is in his favour; when it is said that it is the *Dharma* of the sons to look after their aged parents, it means duty; when it is said that it is the *Dharma* of a debtor to repay the debt to the creditor, it means a legal as well as pious obligations. Similarly the word is used to in the context of civil rights (civil law), it means that it is enforceable by the State; in the case of a criminal offence (criminal law) it means breach of a duty

¹⁷ <http://veda.wikidot.com/dharma>

¹⁸ A. C. Bhaktivedanta Swami Prabhupada, *Dharma: the Way of Transcendence*, The Bhaktivedanta Book Trust, Mumbai, 1996, P. ii

¹⁹ M. Rama Jois, *Legal and Constitutional History of India* (Universal Law Publishing Co. Pvt. Ltd., Delhi, 1984) p.1

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which is punishable by the State; and when *Dharma* is used in the context of duties and powers of the king, it means constitutional law (*Rajadharma*).²⁰

Mahabharata quotes that:²¹

Dharanad Dharm Ethyahrudharmho Dharyate Praja|

Yetha Syad Dharnsamyuktam Sa Dharmetinishchay||

Dharma sustains the society

Dharma maintains the social order

Dharma ensures well being and

progress of humanity

Dharma is surely that which fulfils these objectives

[Karna Parva Ch. 69, Verse – 58]

V. Concept of Duty in Western Thinking

There was a belief that the concept of right is of the West origin. At the same time western philosophy also stressed the importance to the concept of duty as well. This can be put forward in the immortal words of Jesus Christ that, once he said, ‘Render unto Caesar the things that are Caesar’s, and unto God the things that are God’s’, crystallized centuries of practical wisdom. The outstanding feature of Jewish philosophy is its insistence on duties. According to Jewish the liberties are ascertained with reference to duties, for they are the residue that remains after the delimitation of duties deduced from the co-partnership between God and Man in developing the human race towards holiness. Modern theories, which reach towards the idea of the paramountcy of duties over ‘rights’.²² The Roman philosopher Cicero stress on the duty of the human being towards law by saying in this manner, ‘we are the slaves of the law in order that we might be free.’²³ Further, Saint Thomas Aquinas says, ‘there is a duty to obey human laws in so far as they are reasonable’.²⁴ Feudalism in Europe, in prescribing the duties owed by a vassal to his lord, inspired also the idea of ‘right’, far no more could be demanded of him than was due.²⁵ Thomas Hobbes has advocated a new view of natural law as a system of ‘rights’ in the individual. It is a far cry from the ancient ideas of it as laying down duties.²⁶

²⁰ M. Rama Jois, Legal and Constitutional History of India (Universal Law Publishing Co. Pvt. Ltd., Delhi, 1984) p. 9

²¹ Used in Sansad Bhavan Se Sandesh: Bharat (Message from Parliament House: Bharat), (Vijnansehawar Research and Training Centre in Polity – Martur, Gulbarga – Karanataka) p. 1

²² M. Rama Jois, Legal and Constitutional History of India (Universal Law Publishing Co. Pvt. Ltd., Delhi, 1984) p. 73

²³ R W M Dias, Jurisprudence, 5th Edn., (New Delhi, Aditya Books Private Limited, 1994) P. 76

²⁴ *Ibid*, p.78.

²⁵ *Ibid*.

²⁶ *Ibid*, p.80.

VI. Interfacing the Concepts of Right and Duty

Duty is the prime principle of whole ancient philosophy irrespective of western or eastern origin. All religions teach upholding the duty than the right. Thomas Hobbes rightly described the nature of human being, that man is basically selfish, solitary, poor, nasty, brutish and short.²⁷ His nature of this kind has created dominance of the some and discriminations resulting in exploitation of the individuals in society. Exploitations and discriminations specifically taken to fulfill the selfish interests of some the cream people in the society such as rulers on ruled, rich on poor, male on female, strong on weak, higher class on lower class and superior castes on inferior castes e.g., *Dalits* etc., these kinds of exploitations and discriminations are common to human race irrespective of East or West. Fighting against feudalistic and exercise of arbitrary authority of the state which are the sources of exploitations and discriminations was the main efforts of the day. The same has been started against the state which is highest order in the society where it requires cleaning it. The natural law came into account to describe the legal system initially to subordinate it to the eternal or Gods law as advocated by the Jews and further carried forward by the roman lawyers. Reformist especially John Locke and Rousseau advocated for Rights and liberties of individuals. During the 20th century natural law appears as justice oriented than the rights and liberties for which the main propounder is John Rawls in his theory of justice. The movement of the natural law resulted in asserting the natural rights and finally culminated in human rights adopting a specific legal instrument of Universal Declaration of Human Rights in 1948. Though the concept of right appears to be western concept but is the foundation for human welfare which has been recognizing, respecting adopting in each modern democratic nation.

Indian society is fundamentally based on concept of duty from ancient period itself cannot be disputed. If it is truly duty based society we would not have any kinds of exploitations and discriminations, wide gap between rich and poor, straight forward hierarchy in terms of caste and its bad face the untouchability in our society.

Though India may be a duty oriented society, but we should have to think that the Indians have forgotten to perform their duties for which we in India find lot of gaps and discriminations in the society in terms of caste prejudices, gender biases and the new concepts of religious minority prejudices etc. This is so because India have followed tendency of duty without right which is meaningless. Duty without right leads towards inhuman tendency and duty becomes useless the same has happened in India for which the social reformers of India have been very much influenced with the modern justice system which can be achieved by exercising right and liberties as introduced by the western philosophers. The full-fledged personality of an individual in a society can be achieved only through the concept of right. For enabling the people of India to exercise their rights, India have adopted the human rights into Constitution of India as Fundamental Rights and also made provisions for granting other constitutional rights. The fundamental rights recognized by the constitution are:²⁸

²⁷ *Ibid*, p.79.

²⁸ Constitution of India - Part III, Fundamental Rights.

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- 1) Right to equality, including equality before law, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, and equality of opportunity in matters of employment
- 2) Right to freedom of speech and expression, assembly, association or union, movement, residence, and right to practice any profession or occupation (some of these rights are subject to security of the State, friendly relations with foreign countries, public order, decency or morality)
- 3) Right to life and personal liberty
- 4) Right to education
- 5) Right against exploitation, prohibiting all forms of forced labour, child labour and traffic in human beings;
- 6) Right to freedom of conscience and free profession, practice, and propagation of religion;
- 7) Right of any section of citizens to conserve their culture, language or script, and right of minorities to establish and administer educational institutions of their choice; and
- 8) Right to constitutional remedies for enforcement of Fundamental Rights.

It is only in 1976 the fundamental duties chapter has been inserted by bringing the Forty-Second amendment to the Constitution. This shows that the framers of the Constitution were well aware of the fact that the country needed the recognition of fundamental rights than the fundamental duties. The following are the fundamental duties and states that it shall be the duty of every citizen of India -

- 9) To uphold and protect the sovereignty, unity and integrity of India,²⁹
- 10) To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious; linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity women,³⁰
- 11) To value and preserve the rich heritage of our composite culture,³¹
- 12) To protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures,³²
- 13) To develop the scientific temper, humanism and the spirit of inquiry and reform,³³
- 14) To safeguard public property and to abjure violence,³⁴
- 15) Who is a parent or guardian to provide opportunities for education to his child or ward between the age of 6 and 14 years.³⁵

India has taken so much of serious attempts to achieve equality, justice and accomplishing welfare of the people of India in a speedy manner as possible. In this direction it has enacted excellent legislations for empowering the women, children, and old age persons, weaker and oppressed sections of the society. Such enactments specifically are, the Hindu Succession Act, 1956 as amended in 2005; the Immoral Traffic in Women (Prevention) Act, 1956; the Dowry

²⁹ Article 51A(c) of the Constitution of India

³⁰ Article 51A(e) of the Constitution of India

³¹ Article 51A(f) of the Constitution of India

³² Article 51A(g) of the Constitution of India

³³ Article 51A(h) of the Constitution of India

³⁴ Article 51A(i) of the Constitution of India

³⁵ Article 51A(k) of the Constitution of India

Prohibition Act, 1961 amended in 1986; the Indecent Representation of Women (Prohibition) Act, 1986; the Commission of Sati (Prevention) Act, 1987; the Medical Termination of Pregnancy Act, 1971; the Equal Remuneration Act, 1976; the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; the Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2002; the Protection of Women from Domestic Violence Act, 2005; the Child Labour (Prohibition & Regulation) Act, 1986; the Child Marriage Restraint Act, 1929; the Prohibition of Child Marriage Act, 1986; the Juvenile Justice (Care and Protection of Children) Act, 2000; the Bonded Labour System (Abolition) Act, 1976; the Protection of Human Rights Act, 1993; the Persons with Disability Act, 1995; the Maintenance and Welfare of Parents and Senior Citizens Act, 2007; the Protection of Civil Rights Act, 1955; the Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act, 1989; the Prohibition of Employment of as Manual Scavengers and their Rehabilitation Act, 2013.

VII. Conclusion

Western jurisprudence is right-oriented whereas most of the Eastern jurisprudence is duty-oriented is true to some extent. The dominance and exploitation may be there due to arrival of UNO, WTO, IMF, World Bank but they are not the direct results of the right concept. Because we take our own country India which is fully duty-oriented but in which we find that to a greater extent the dominance and exploitations are there in India since ancient period where there were no any such international institutions like UNO, WTO, IMF, World Bank etc. Dominance and exploitations are the direct outcome of the selfish tendencies of the human being which leads towards capitalistic conditions of human society. The same kind of tendency was there in India developed by the Aryans whose advent to India in ancient period introduced several new practices, code of conduct and gods to their selfish interest sidelining the Indian origin Dravidians. Aryans brought Vedas, Upanishads and other scriptures which are all toned one way that was classifying the society in hierarchical order by introducing *Varnashrama* system. Varna system played its havoc to marginalise the masses on the basis of gender and caste. Women become slaves and *Dalits* had no mention and no place in the Varna system because of the reason they are treated as *avarnas* or *panchamas*. Masses suffered much dominance and exploitation in an unexplainable and indescribable manner. Duty concept have failed in India to address social problems such as inequality, gender bias, caste system supported by untouchability which further generated many numerous problems in India like poverty, prostitution, sati system, bonded labour, unemployment, dowry deaths etc. It is only after the religious and social reformation movements in India have paved the way for empowerment of women and upliftment of the Dalits. The concrete steps has been taken to eradicate these social problems by adopting social and secular Constitution by ensuring fundamental and other constitutional rights further supported by particular legislative enactments to address the particular problems arose due to such ill and irrational practices in India.

We should have to rethink in bringing such an educational system especially the legal education which must avoid the occurring the consequences of the historical mistakes in modern legal education which should be reflect the inclusive growth by which only we can see the overall development of the nation.

JUDICIAL SCRUTINY AND ENFORCEMENT OF FOREIGN COMMERCIAL ARBITRAL AWARDS IN INDIA - WITH SPECIAL REFERENCE TO BHATIA INTERNATIONAL CASE AND THEREAFTER

Dr. Jyothi Vishwanath*
Srinivas C. Palakonda*

I. Introduction

Since post-1991 liberalization policies, India has emerged as an economic power and a popular market for foreign investment. Earlier it was largely isolated from the world markets in the guise of protecting its economy and self-reliance. With stiff import tariffs, export taxes and obligations; restricted foreign direct investment (FDI), the economic scene was much dissatisfactory.¹ Of late, Indian foreign trade shows a flourishing trend.² Due to strong government support, FDI has grown immensely³ resulting into progressive national economy.⁴ This liberalized approach has accelerated FDI in broad range of economic sectors, thereby supplementing domestic capital, technology and skills and catalysed economic growth. Though the ground is set suitably for international commercial opportunities, much depends on a foreign friendly dispute resolution mechanism. Smooth enforceability of foreign awards in India is considered extremely important by the foreign investors. Instilling confidence in them that the international arbitral awards, delivered in unfortunate commercial disputes, will be subsequently dealt reasonably, upheld and enforced expeditiously is extremely important.⁵

*Assistant Professor of Law University Law College, Bangalore.

* Lecturer in Law, K.L.E.Society's Law College, Bangalore.

¹ FDI was restricted by upper-limit equity participation & government approvals were needed for nearly 60% of new FDI in the industrial sector. Due to this, FDI averaged only around \$200 million annually between 1985 & 1991. - http://en.wikipedia.org/wiki/Economy_of_India

² It is 19th largest exporter & 10th largest importer in the world. Since liberalization, India's international trade has increased. Contribution of total trade in goods & services to the GDP rose from 16% in 1990-91 to 47% in 2008-10. India accounts for 1.44% of exports & 2.12% of imports for merchandise trade & 3.34% of exports & 3.31% of imports for commercial services trade worldwide. Major trading partners are the European Union, China, U.S.A. & U.A.E. Major export commodities include engineering goods, petroleum products, chemicals & pharmaceuticals, gems & jewellery, textiles & garments, agricultural products, iron ore & other minerals. Major import commodities include crude oil & related products, machinery, electronic goods, gold & silver. -*Id.*

³ India has recently liberalized its FDI policy & allows 100% international investment in the retail segment. The real estate sector is performing well, much of the credit goes to the relaxed FDI regulations though sectors like arms, coal, nuclear, mining & railways are still outside FDI domain. -<http://business.mapsofindia.com/fdi-india>

⁴ India has strived hard to draw FDI from all over the world through financial collaborations, capital markets via euro issues, preferential allotments or private equity, joint ventures. Sectors like services, automobile, computer hardware & software, power, telecommunications, metallurgical industries, real estate & housing, petroleum & natural gas, construction, chemicals with the exception of fertilizers have attracted the maximum FDI as per a fact sheet brought out by the Dept of Industrial Policy & Promotion. -*Id.*

⁵ International arbitration can be of two forms *viz.*, public law arbitration between states & commercial arbitration. For details refer Alan Redfern & Martin Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 360 (1986).

Bridging the gap between mediation and court litigation, presently the “quasi-judicial” process of arbitration is an important dispute resolution mechanism between transnational trading parties. Inclusion of an arbitration clause in a trade agreement countenances an advance opportunity to opt a forum for dispute settlement, arbitral locale, rules and applicable procedure thereto and substantive laws governing the contract.

Since court litigations in India are often perceived to be lengthy and burdensome,⁶ arbitration appears to be the only viable alternate for foreign traders for enforcing their rights. Great upsurge in international commercial arbitration is observed in India since the enactment of the Arbitration and Conciliation Act, 1996 (ACA, 1996). Expecting easy enforceability of foreign arbitral awards may prove risky in view of the judicial ratios in India, since they face unique hurdles of being set aside in India.

Amidst this backdrop, this paper attempts to shed light on the law relating to commercial arbitration and enforcement of foreign arbitral awards in India and emphasizes the need to provide the alternate dispute settlement scenario more conducive and appealing to the foreign investors. The paper examines the concepts of commercial arbitration, domestic and international arbitration, foreign arbitral award; considers the international scenario regarding these aspects; analyzes the Indian law relating to enforcement of foreign awards; deals with the linkage between the seat of arbitration and the resulting extent and manner of judicial intervention during the arbitral proceedings and thereafter; scrutinizes the relevant judgments in this regard and delineates the crucial aspects craving attention.

II. Conceptual Clarifications

Arbitration, known as compromise or *compromissum*, was a mode of terminating controversies under the civil law⁷ and refers to any arbitration whether administered by permanent arbitral institution or not.⁸ International Commercial Arbitration means the one relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the Indian law with at least one of the parties being an individual, national or habitually resident in a country other than India or a body corporate incorporated in a country other than India or a company or an association or a body of individuals with central management and control being exercised from a country other than India or the Government of a foreign country.⁹ Arbitration is international if the parties have their place of business in different states; or the place of arbitration or the place where the substantial part of the obligations of the commercial relationship is to be performed is outside the state in which the parties have their place of business; or the parties expressly agree that the subject-matter of the agreement relates to more than one country.¹⁰

⁶ Around 42 lakh cases are pending in Indian High Courts & 2.7 crore cases in lower courts. These figures are revealed by the Supreme Court & disclose pendency up to 31/12/2010 for Supreme Court & 30/12/2010 for High Courts & Lower Courts. Pendency in High Courts & Lower courts has gone up by 3.8 percent & 2.5 percent respectively. - <http://barandbench.com/brief/2/1518/pending-litigations>.

⁷ 76th Report of Law Commission of India on Arbitration Act, 1940, p.5.

⁸ Section 2 (1)(a), ACA, 1996.

⁹ Section 2 (1)(f), ACA, 1996.

¹⁰ Article 1(3) of the UNCITRAL Model Law.

Arbitration turns international when any one of the components is foreign *viz.*, tribunal, administrator, arbitrator, party, law or foreign venue.¹¹

The term commercial covers matters commercial in nature, whether contractual or not. Arbitration agreement covers a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.¹² An award means an arbitration award¹³ and under Part I, ACA, 1996 is considered as domestic award.¹⁴ A foreign award is an arbitral award on differences between persons arising out of legal relationships whether contractual or not, considered as commercial under Indian law made in pursuance of a written arbitration agreement to which either New York or Geneva Convention applies.¹⁵

III. Recognition and Enforcement¹⁶ of Foreign Arbitral Awards – Procedural Facets

Recognition¹⁷ of an award differs from enforcement,¹⁸ the approach being different in different treaty conventions.¹⁹ An award may be recognized without being enforced but if it is enforced, then it is necessarily recognized by the court ordering its enforcement.²⁰ Enforcement of a domestic arbitral award, being enforcement in the country where the seat of arbitration exists, is relatively an easier process than that of a foreign award, the latter made complex being the domain of treaty obligations. Enforcement of an foreign arbitral award is more diverse than that of a foreign judgement.²¹

A significant aspect of a foreign award lies in its capability of being transited from the country where it is made within one framework of laws to other states having different legal

¹¹ Thomas Oehmke, INTERNATIONAL LAW, 2 (1990).

¹² Section 2(a), ACA, 1996

¹³ Section 2(b), ACA, 1996.

¹⁴ Section 2 (7), ACA, 1996.

¹⁵ Section 44 & 53, Part II, ACA, 1996.

¹⁶ Enforcement refers to applying legal sanctions for ensuring that the award is carried out by the party against whom it was made. In the case of individual defaulters, legal sanctions can be seizure of property, assets, forfeiture of bank accounts & in some cases imprisonment due to refusal to obey court orders. In case of corporate defaulters, enforcement is sought against its property & assets like stock in trade, bank & trading accounts. -ALAN REDFERN & MARTIN HUNTER, *supra* note.5, at 336.

¹⁷ The successful party seeks recognition of the award if ever proceedings are brought against him in respect of a matter already been dealt with & made subject of the award & can rely on the award by way of defence or set off & can request the court to recognize the award as binding on the parties. -ALAN REDFERN & MARTIN HUNTER, *supra* note.5, at 337-338.

¹⁸ *Id.*, at 335-336.

¹⁹ NYC, 1958 deals with recognition & enforcement while GC, 1927 speaks about recognition or enforcement.

²⁰ Judicial enforcement of an award presupposes recognition of the legal force & effect of the award & ensures that it is carried out by using the available legal sanctions. Enforcement goes a step further than recognition. The court enforcing an award does so as it recognizes it as validly made & binding on the parties to it. Recognition & enforcement run together, each are being part of the other. Recognition acts as a shield blocking attempts to raise, in fresh proceedings, issues already decided in arbitration but enforcement acts as a sword. It is a positive action taken to compel the unwilling losing party to obey the award. -*Supra* note.16.

²¹ This is because the wide variety of international & regional conventions dealing with recognition & enforcement of the international awards is much more developed & widespread than those dealing with enforcement of foreign judgments. - *Id.*, at 338.

systems and qualify for recognition and enforcement. An effective award denotes valid enforceability elsewhere than in the country where it is made since usually the enforcement is sought in a country where the losing party has its place of business, residence, bank accounts or trading assets etc. The party seeking enforcement needs to locate the country where the losing party has assets available to meet the award and seek enforcement there.²² The losing party may wish to challenge the award *i.e.*, get it modified or set aside completely while the winning party is interested in having it recognized and enforced *i.e.*, bring it into effect.²³ Thus an international commercial arbitration is characterized with the place of enforcement being usually foreign to the place of arbitration.

Enforcement issues fall outside the purview of the arbitral process but within the judicial domain. Lack of coercive powers with the arbitral tribunals necessitates their reliance upon the judiciary. Since the task of an arbitral tribunal concludes with making award, it does not ensure recognition and enforcement of the award, the international arbitral process wholly depends upon the national systems for the said purpose. Though the procedure and extent of recognition and enforcement of a foreign award differs from country to country, international conventions, more particularly the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (NYC, 1958) has successfully endeavored to strike an appreciable degree of uniformity in this regard. Much depends on the international conventions to which one is a party and the relevant provisions of law of the place where enforcement is intended.

IV. Role of International Instruments - International Commercial Arbitration and Foreign Arbitral Awards

The alertness of the International community over the cruciality of recognition and enforcement of the international awards reflected in the adoption of the century old Geneva Protocol of 1923²⁴ (GP, 1923) and the Geneva Convention of 1927²⁵ (GC, 1927) which substantiated to be the first step in recognizing the growing global importance of international commercial arbitration for the development of international trade and commerce, though they stand largely superseded by the NYC, 1958. NYC, 1958, UNCITRAL Arbitration Rules and UNCITRAL Model Law, the three pillars of international arbitral dispute mechanism, are supplemented by the national legal instruments in this regard.

Governed by a complex set of established international laws along with the different municipal laws, international arbitration appears to be pleasantly fearful. It is governed by the laws governing the arbitration proceedings; laws governing the substantive matters involved in the dispute and the laws governing recognition and enforcement of the arbitration agreement and award.²⁶ International legal approach is considered under the following heads:

²² ALAN REDFERN & MARTIN HUNTER, *supra* note.5, at 338.

²³ This happens when the losing party refuses to oblige the award voluntarily.

²⁴ This Protocol ensured that states parties to it would support the international commercial arbitration at the beginning & at the end of the arbitral process.

²⁵ These conventions were promulgated under the auspices of League of Nations.

²⁶ These laws may coincide since the law governing the arbitral proceedings usually being the national law of the place of arbitration may also be the law applicable to the substantive matters in issue. -ALAN REDFERN & MARTIN HUNTER, *supra* note.5, at 1.

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Conventions:

*GP, 1923*²⁷ aimed²⁸ at ensuring international enforceability of arbitration clauses obliging the parties to resort to arbitration for solving their disputes instead of courts²⁹ and at ensuring enforceability of the awards made pursuant to arbitration agreements in place where arbitration was seated.³⁰ With limited range and effect, Protocol applied only to the agreements made between parties' subject to the jurisdiction of different contracting states. Since each contracting state ensured execution of awards made in its own territory and not the awards made elsewhere, little was done for international enforceability of arbitration awards.

*GC, 1927*³¹ ensured recognition and enforcement, within the territories of contracting states, of awards made pursuant³² to arbitration agreements covered under *GP, 1923*.³³ *GP, 1923* envisaged enforcement of the awards only within the state territory where they were made, *GC, 1927* appreciably ensured valid enforcement in the territory of any of the contracting states provided the award was made in a contracting state pursuant to an agreement covered by *GP, 1923* and the parties thereto were subject to jurisdiction of the contracting states.³⁴ Enforcement is subject to many conditions³⁵ including finality of the award in the country where it was made and it not being contrary to the public policy of the country where it is sought to be enforced³⁶ and on production of required proof.³⁷

NYC, 1958,³⁸ the key international treaty aims at recognition and enforcement of arbitration agreements and foreign awards against the contracting parties' states being signatories to *NYC, 1958* and the dispute being commercial. As a considerable improvement over the *GC, 1927*, it furnishes a simpler and effective mechanism for enforcing foreign awards. With 148 state parties,³⁹ India one amongst them,⁴⁰ no later Convention is its equivalent in effectiveness⁴¹ in the

²⁷ This protocol was signed at a meeting of the Assembly of the League of Nations on 24th September 1923.

²⁸ ALAN REDFERN & MARTIN HUNTER, *supra* note.5, at 44, 341; these two objectives relating to enforceability of arbitration agreements & awards finds place in a modern version in the *NYC, 1958*.

²⁹ First Objective as set out in Article 1, *GP, 1923*.

³⁰ Second & subsidiary objective as set out in Article 3. *GP, 1923*.

³¹ This Convention was drawn on 26th September 1927 in Geneva.

³² Article 6, *GC, 1927*.

³³ Article 1, *GC, 1927*.

³⁴ Article 1, *GC, 1927*.

³⁵ The conditions provided in Article 1, *GC, 1927* provide that award is made pursuant to a submission to arbitration; subject matter of the award is capable of settlement by arbitration under the law of the country where it is sought to be relied; arbitral tribunal is constituted as per the agreement & law of the land.

³⁶ Article 1(d)(e), *GC, 1927*.

³⁷ The original award or its authenticated copy, documentary proof regarding its finality & fulfillment of other conditions of the Convention has to be proved. -Article 4, *GC, 1927*; parties seeking recognition & enforcement need to establish that the award was made pursuant to an agreement to which the *GP, 1923* applied & the parties were nationals of any contracting states.

³⁸ It was signed on 10th June 1958 at New York.

³⁹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

⁴⁰ India signed this Convention on 10/06/1958; ratified it on 13/07/1960 & it came into force on 11/10/1960.

⁴¹ Many Conventions were adopted later but none were as effective as the *NYC, 1958*. (i) The European Convention on International Commercial Arbitration, 1961, made in Geneva under the dominion of Trade Development Committee of the UN Economic Commission for Europe, applies to international arbitrations to settle trade disputes between parties from different states, whether European or not. (ii) Washington Convention, 1965 [Convention on the Settlement of Investment Disputes between States & Nationals of Other States] also known as ICSID Convention (158 states being signatory to it as

concerned area.⁴² It replaces⁴³ the GP, 1923 and GC, 1927 as between the states being parties to both of them and allows the states to make reciprocity⁴⁴ and commercial reservation.⁴⁵ It recognizes and enforces an award, made in a state which is not a party to the NYC, 1958, in any state which is party to it.⁴⁶ A state party to NYC, 1958 undertakes to enforce awards in pursuance of its local procedural rules upon production of the award and agreement⁴⁷ and may refuse to enforce on various grounds,⁴⁸ public policy⁴⁹ being one amongst them. Burden of proof lies on the party resisting enforcement since refusal to enforce an award can be devastating.⁵⁰

Model Rules and Laws: The regulations adopted by the United Nations Commission on International Trade Law⁵¹ regarding international arbitration are categorized as **UNCITRAL Arbitration Rules**⁵² and **UNCITRAL Model Law**⁵³ on International Commercial Arbitration. The former permits the parties to agree that their contractual disputes shall be referred to arbitration under the UNCITRAL arbitration rules,⁵⁴ thereby the arbitration procedure enumerated therein comes into operation.⁵⁵ The latter recognizes an arbitral award as binding and enforceable

on 25th July 2012 & India is not a signatory) -<https://icsid.worldbank.org/ICSID> accessed 26th December 2012 at 10.10 am. (iii) Strasbourg Uniform Law, 1966 (signed only by Austria & Belgium). (iv) Moscow Convention, 1972 (signed by Eastern European states) provides for compulsory arbitration of commercial disputes between different economic organizations of different Council for Mutual Economic Assistance. (v) Panama Convention, 1975 signed by the governments of Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Uruguay & Venezuela. Many more regional conventions having only regional enforcement were entered. -For details refer ALAN REDFERN & MARTIN HUNTER, *supra* note.5.

⁴² Loukas A.Mistelis, (ed.), *CONCISE INTERNATIONAL ARBITRATION*, 1 (2010).

⁴³ Article VII.2, NYC, 1958.

⁴⁴ At the time of signing, ratifying or acceding, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition & enforcement of awards made only in the territory of another contracting state. -Article 1 (3). The reciprocity reservation narrows down the field of application of NYC, 1958.

⁴⁵ A contracting state is free to declare that it will only apply the Convention to differences arising out of legal relationships, whether contractual or not, considered as commercial under the national law of the state making such declaration. -Article 1 (3). Even this reservation narrows the application of the Convention since the relationships regarded as commercial by one state may not be so regarded by other contracting state.

⁴⁶ Article 1.1, NYC, 1958 allows recognition & enforcement in a country though made in a different state.

⁴⁷ Article IV, NYC, 1958.

⁴⁸ These grounds are incapacity of the parties or invalidity of the arbitration agreement [Article V.1 (a)]; denial of a fair hearing [Article V.1 (b)]; excess of authority or lack of jurisdiction [Article V.1 (c)]; procedural irregularities in constitution of the arbitral tribunal [Article V.1 (d)]; invalid award since it is set aside or suspended by the competent authority of the country where the award was made [Article V.1 (e)].

⁴⁹ Article V. 2(b), NYC, 1958.

⁵⁰ Refusal means that winning party fails to get loser's assets seized in the country where enforcement is sought but may enforce the award in any other country where the losing party has assets since he holds a valid award.

⁵¹ The abbreviated form of this is UNCITRAL.

⁵² United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1976 was adopted by the General Assembly on 15th December 1976.

⁵³ This was adopted by the UNCITRAL on 21st June 1985. For details refer LOUKAS A.MISTELIS, *supra* note.42, at 581-655; M.J.Chapman. (ed.), *COMMERCIAL AND CONSUMER ARBITRATION STATUTES AND RULES*, 301-312, (1997).

⁵⁴ Without altering the original structure of the text, its spirit or drafting style, these rules were recently revised in 2010, *w.e.f.* 15 August 2010, to suit current practices in international trade & changes in arbitral practice over the past 30 years; to enhance the efficiency of arbitration.

⁵⁵ The rules enumerated in 41 Articles deal with notice of arbitration, calculation of time, representation of parties, composition of arbitral tribunal, number of arbitrators, sole arbitrators, appointment of three person panel, replacement of arbitrator, arbitral proceedings, place of arbitration, statement of claim & defence & amendments thereto; pleas relating to jurisdiction of the arbitral tribunal, evidence, hearings, interim measures of protection, experts, closure of hearings, award,

upon written application to a competent court irrespective of the country in which it was made,⁵⁶ upon production of original agreement with translations,⁵⁷ original award or its certified copy. Enforcement can be refused on many grounds⁵⁸ including public policy.⁵⁹

V. International Commercial Arbitration and Foreign Arbitral Awards-Indian Legislative Framework

The process of settling differences finally and conclusively by the party chosen tribunals is not unknown to the ancient Indian Hindus.⁶⁰ Similar to Narada,⁶¹ Yajnavalkya referred to three⁶² popular courts viz., *puga*,⁶³ *sreni*⁶⁴ and *kula*.⁶⁵ Great sanctity was attached to the arbitral awards during the British period, setting aside was allowed only on sworn statements of two credible witnesses regarding gross corruption and partiality of the arbitrators.⁶⁶ The first sophisticated legislative endeavor, Indian Arbitration Act, 1899,⁶⁷ was later consolidated with the II Schedule to Civil Procedure Code, 1908 and later on into the Act of 1940⁶⁸ which said little about international arbitration and foreign awards. Being a consolidating and amending statute⁶⁹ and based on UNCITRAL Model Law,⁷⁰ ACA, 1996 gives impetus to enforcement of foreign arbitral awards⁷¹ and consists of 4 Parts, 86 Sections and three Schedules. Part I, divided into ten Chapters, deals with Domestic Arbitration. Part II, divided into two Chapters, deals with enforcement of foreign awards. Chapter I in part II deals with international commercial arbitration under NYC, 1958 and Chapter II deals with GC, 1927. Part III and Part IV of the Act deal with conciliation and supplementary provisions respectively.

form & effect of award, termination order, interpretation of award, correction of award, additional award, costs of arbitration, arbitrators fees, apportionment & deposit of costs. For details refer LOUKAS A.MISTELIS, *supra* note.42, at 171-230.

⁵⁶ Article 35 (1), UNCITRAL Model Law.

⁵⁷ Translation is required only if the language is different. -Article 35 (2), UNCITRAL Model Law.

⁵⁸ Article 36, UNCITRAL Model Law. The grounds are similar to those enumerated in NYC, 1958.

⁵⁹ Article 36(1)(b)(ii), UNCITRAL Model Law.

⁶⁰ 76th Report of Law Commission of India on Arbitration Act, 1940.

⁶¹ He refers to law-suits being decided by village councils called as *kulani* & corporations called as *sreni* & assemblies called as *puga*, thereby allowing dispute settlement by the courts established by kings & these different arbitration institutions, resembling the modern panchayats. -Pandurang Vaman Kane, HISTORY OF DHARMASHASTRA, 280, 1946, vol.3.

⁶² These private tribunals were not constituted by the royal authority. -M.K.Sharan., COURTS PROCEDURE IN ANCIENT India, 27 (1978).

⁶³ *Puga* courts comprised persons dwelling in the same place, irrespective of their caste or employment & were competent to decide matters of local public interest.

⁶⁴ These were guilds or associations of persons engaged in similar pursuits deciding matters of special trades.

⁶⁵ Social matters were decided by the *kula*.

⁶⁶ Sircar, LAW OF ARBITRATION IN BRITISH INDIA, 6 (1942).

⁶⁷ This applied only in the Presidency town & was complemented by Section 89 & Second Schedule to Civil Procedure Code, 1908 in the areas where this law had no application.

⁶⁸ This law had 7 Chapters & 49 Sections.

⁶⁹ It consolidates the law relating to domestic arbitration, international commercial arbitration & enforcement of foreign arbitral awards.

⁷⁰ Preamble, ACA, 1996..

⁷¹ It aims at speedy disposal with least court intervention. It comprehensively covers international commercial arbitration & conciliation along with domestic arbitration & conciliation & seeks to enforce every final arbitral award in the same manner as if it were a decree of court.

Part II of ACA, 1996

The commercial⁷² and reciprocal reservations,⁷³ subject to which India signed NYC, 1958, find their way into Part II, Chapter I of ACA, 1996 *vide* Section 44 defining foreign award as the one arising out of legal relationships, whether contractual or not, considered as commercial under the Indian law and made in the territories notified⁷⁴ in the Official Gazette to be a territory governed by NYC, 1958, upon Central Government's satisfaction regarding reciprocity clause.⁷⁵ Arbitral awards made in the convention countries not notified⁷⁶ in the Official Gazette are refused to enforce. Provisions relating to enforcement of the foreign awards under Part II, ACA, 1996 are enumerated in the Table below:

Provisions	Chapter I - New York Convention Awards	Chapter II - Geneva Convention Awards
Foreign arbitral award defined	*Section 44	*An award on differences considered commercial under an Indian law made after 28/7/1924 in pursuance of an agreement covered under the Protocol in the II Schedule & between persons of whom one is subject to jurisdiction of the Powers notified in the Official Gazette by the Central Government, upon being satisfied about reciprocity clause, to be parties to the Convention set forth in III Schedule. ⁷⁷
Conditions of enforcement	*Section 48- Enforcement may be refused at the request of the party against whom it is invoked if he furnishes proof regarding incapacity or invalidity of agreement; ⁷⁸ that no proper notice of the appointment of the arbitrator or arbitral proceedings was given or	*Section 57- Can be enforced if it is made in pursuance of a submission to arbitration which is valid under the law of the country where it is made; ⁸⁶ subject matter of the award is capable of settlement by arbitration under Indian law; ⁸⁷ the concerned arbitral tribunal was constituted in pursuance of the arbitration agreement & the law governing arbitration procedure; ⁸⁸ award has become final in the country where it is made ⁸⁹ & its enforcement is not contrary to the public policy or the law of India. ⁹⁰

⁷² Though the term commercial is not defined in ACA, 1996, it is widely interpreted & guidance is also taken from the UNCITRAL Model Law which considers commercial representation or agency & consulting to be commercial relationships. The commercial reservation limits the enforcement of foreign awards to those which are considered to be commercial in nature.

⁷³ Reciprocity reservation provides that Indian Government will limit the enforcement of arbitral awards to those made in other New York Convention countries.

⁷⁴ India recognizes foreign arbitral awards of those Convention countries that the Indian government "notifies" in India's Official Gazette, a process sometimes called "gazetting."

⁷⁵ The reciprocity requirement expressed in the Act is more onerous & restrictive than what is contemplated by the NYC, 1958. Section 44 demands that the award is made in a Convention Country & also that the country is notified in India's Official Gazette as being a country to which the NYC, 1958 applies.

⁷⁶ Matters are worse since out of the 148 countries signatories to NYC, 1958 to date only about 47 countries have been notified in the Official Gazette. Australia has been recently notified but regular international arbitration seats such as China, Canada, UAE & New Zealand are not notified yet. On 19th March 2012, China, Hong Kong are notified. - www.mondaq.com accessed on 5 October 2012 at 3.46 p.m.

⁷⁷ Section 53, ACA, 1996.

⁷⁸ Section 48 (1)(a), ACA, 1996.

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	was unable to present his case; ⁷⁹ award pertains to matters not contemplated in the agreement; ⁸⁰ composition of the arbitral authority/arbitral procedure not in accordance with agreement/law of the country where arbitration took place; ⁸¹ award is not yet binding on parties/is set aside/suspended; ⁸² subject-matter of the difference incapable of settlement by arbitration under Indian law; ⁸³ enforcement would be contrary ⁸⁴ to public policy of India. ⁸⁵	*Enforcement can be refused if award is annulled in the country where it was made ⁹¹ or the party against whom it is enforced had no notice of the arbitration proceedings/was under a legal incapacity/was not properly represented ⁹² or award dealt with matters outside the scope of agreement. ⁹³
* Section 47, Chapter I & Section 56, Chapter II provide that for enforcement original award/duly authenticated copy & original agreement & necessary proof that the award is foreign needs to be produced.		

An appeal lies from an order refusing enforcement⁹⁴ while an enforceable foreign award is executed as a decree.⁹⁵

⁸⁶ Section 57 (1)(a), ACA, 1996.

⁸⁷ Section 57 (1)(b), ACA, 1996.

⁸⁸ Section 57 (1)(c), ACA, 1996.

⁸⁹ Section 57 (1)(d), ACA, 1996.

⁹⁰ Section 57 (1)(e), ACA, 1996. An award is deemed to be in conflict with the public policy if its making was induced or affected by fraud or corruption.- Explanation to Section 57 (1)(e) , ACA, 1996.

⁷⁹ Section 48 (1)(b), ACA, 1996.

⁸⁰ Section 48 (1)(c), ACA, 1996.

⁸¹ Section 48 (1)(d), ACA, 1996.

⁸² Such order was issued by the courts of the country arbitration was seated. -Section 48 (1)(e), ACA, 1996..

⁸³ Section 48 (2)(a), ACA, 1996.

⁸⁴ An award is deemed to be in conflict with the public policy of India if its making was induced or affected by fraud or corruption.- Explanation to Section 48 (2)(b), ACA, 1996.

⁸⁵ Section 48 (2)(b), ACA, 1996.

⁹¹ Section 57 (2)(a), ACA, 1996.

⁹² Section 57 (2)(b), ACA, 1996.

⁹³ Section 57 (2)(c), ACA, 1996.

⁹⁴ No second appeal lies. However a discretionary appeal would lie to the Supreme Court under Article 136 of the Constitution of India. Such appeals are entertained only if the Court feels that they raise a question of fundamental importance or public interest. -Section 50 & 59, ACA, 1996.

⁹⁵ Section 49 & 58, ACA, 1996.

VI. Enforcement of Foreign Arbitral Awards in India – Judicial Perspectives

Since less-interference by the judiciary in arbitral proceedings is a fundamental theme underlying ACA, 1996, Indian courts exercise supervisory jurisdiction only over domestic awards under Section 34, ACA, 1996⁹⁶ wherein it can set aside an award if it conflicts with public policy of India. Section 5 enumerates that save as provided in the provisions of Part I, no judicial authority can intervene in arbitration proceeding governed by the said part. Section 2(2) enumerates application of Part I if the seat of arbitration is in India but does not preclude application of the Act to arbitrations seated outside India. Lots of confusion surrounds the application of Part I. Till recently it was safely assumed that Part I applied only to domestic arbitrations and a foreign award is enforceable reliably in India under Part II. However, a panel of the Supreme Court Judges ruled in *Bhatia International* that Part I applied to a foreign award whenever a party attempted to enforce it in India under Part II, thereby creating a havoc. A party successfully obtaining a foreign award against an Indian respondent still faced the challenge of losing its merits in the Indian courts while getting it enforced. A brief discussion of the relevant judicial ratios is provided herewith.

*Bhatia International v. Bulk Trading S.A. & Another*⁹⁷ (*Bhatia International*) – The parties to an international contract had resorted to arbitration under the rules of ICC, Paris to be conducted in Paris. For ensuring recovery of claim from the Indian party in the event of a favourable award, foreign party applied to an Indian court for interim measures under Section 9⁹⁸ for securing property of the Indian party who objected on the ground that the arbitration was being held in Paris and NYC, 1958 has no provision for interim measure being granted by a court other than one in which the arbitration is being held.⁹⁹

⁹⁶ This falls in Part I, ACA, 1996; the grounds for setting aside under Section 34 are thus: (a) the party making the application proves that he was under some incapacity or the agreement is invalid under the law to which the parties have subjected it or under the law time being in force or he was not given proper notice of the appointment of an arbitrator/arbitral proceedings/was unable to present his case or arbitral award deals with a dispute not contemplated within the terms of the submission or contains decisions on matter beyond the scope of such submission or the composition of the arbitral tribunal/arbitral procedure was not in accordance to agreement or (b) the Court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Indian law or the arbitral award conflicts with the public policy of India.

⁹⁷ AIR 2002 SC 1432; S.A., (2002) 4 SCC 105. The judgment was delivered on 13/03/2002 by a three-judge bench.

⁹⁸ Section 9 provides that a party may, before or during arbitral proceedings or any time after making of arbitral award but before it is enforced in accordance with Section 36 apply to a court for the appointment of a guardian for a party who is minor or person of unsound mind or for an interim measure or protection for following matters, namely (a) the preservation, interim custody or sale of any goods, subject-matter of agreement; (b) securing the amount in dispute in the arbitration; (c) detention, preservation or inspection of any property or thing which is the subject-matter of the dispute or authorizing, for any of the aforesaid purposes, any person to enter upon any land or building in the possession of any party or authorizing any samples to be taken or observation to be made or experiment to be tried, deemed necessary for obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection appearing just & convenient to the Court & Court has same power for making orders as it has in any proceedings before it.

⁹⁹ The Appellant entered into a contract with the 1st Respondent on 9/5/1997 which contained an arbitration clause providing that arbitration has to be under the rules of International Chamber of Commerce (ICC). On 23/10/1997, 1st Respondent filed a request for arbitration with ICC. Parties agreed that arbitration be held in Paris, France. ICC appointed a sole arbitrator. 1st Respondent filed an application under Section 9, ACA, 1996 before the III Additional District Judge, Indore, M.P. against the Appellant & the 2nd Respondent, seeking an injunction restraining these parties from alienating, transferring or creating third party right, disposing of, dealing with & or selling their business assets & properties.

Ratio: Provisions of Part I apply to all arbitrations and proceedings relating thereto. It compulsorily governs the arbitrations held in India, parties free to deviate only to the extent permitted by the derogable provisions of Part I. To the international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions. In such case, the laws or rules chosen by the parties prevail and any provision of Part I, if contrary, will not apply.

Effect: An unprecedented judicial interpretation was given to Section 2(2), ACA, 1996¹⁰⁰ apprehending that if Part I does not apply to arbitrations held outside India or those held in a non-convention country, not a signatory to the NYC, 1958 or GC, 1927, result would be adverse and neither Part I or II would govern them and parties will fail to get any interim relief. Under this line of authority, the Indian courts set aside foreign awards and appointed arbitrators in foreign arbitrations.¹⁰¹ The ratio opened flood-gates of litigation defeating the very purpose of arbitration as an alternate dispute resolution. India's reputation regarding arbitration laws was tarnished and foreign investors considered it risky to deal with Indians. It proved a major set-back for foreign trade and investment in India.

*Venture Global Engineering v. Satyam Computer Services Limited*¹⁰² (Venture Global) - Supreme Court, in view of *Bhatia International*, authorized itself to set aside an LCIA award though rendered in London and a foreign challenge to the award had already failed.¹⁰³

Ratio:

- Foreign arbitral award inconsistent with Indian domestic law could be set aside for contravention of "public policy".
- Provisions of Part I apply even to foreign award, thus petition for setting aside of foreign award in Indian courts is permitted¹⁰⁴ and Indian courts can refuse to enforce foreign award on the grounds specified in Section 48¹⁰⁵ and Section 57.¹⁰⁶
- Applying Section 34 to foreign awards would not be inconsistent with Section 48 or any other provision of Part II.

*Oil & National Gas Commission Ltd v. Saw Pipes Ltd*¹⁰⁷ - Supreme Court ruled that the public policy¹⁰⁸ of India is affected if the award is against the fundamental policy of India or the interests of India or the award is unjust, immoral or patently illegal.

Appellant raised the plea of maintainability of the application contending that Part I does not apply to arbitrations seated outside India. The Court held that it had jurisdiction & the application was maintainable. Appellant filed a Writ Petition before the High Court of Madhya Pradesh, Indore Bench which was dismissed.

¹⁰⁰ It provides that Part I, ACA, 1996 applies if the place of arbitration is in India.

¹⁰¹ The decision was widely criticized since Indian courts tried to exercise long-arm jurisdiction.

¹⁰² (2008) 4 SCC 190; was delivered by a two-judge Bench.

¹⁰³ Court had to consider whether the Court of Additional Chief Judge, City Civil Court, Secunderabad had jurisdiction to entertain the suit for declaration filed by the appellant to set aside the award passed by the sole arbitrator appointed at the instance of respondent No.1 despite the fact that arbitration was seated outside India.

¹⁰⁴ Provisions regarding enforcement of foreign award in Part II speak nothing about setting aside.

¹⁰⁵ In respect of awards made as per NYC, 1958.

¹⁰⁶ In respect of awards made as per GC, 1927.

¹⁰⁷ (2003) 5 SCC 705; AIR 2003 SC 2629.

¹⁰⁸ Public policy requirement differs from one country to another.

*M/S Indtel Technical Services v. W.S. Atkins Plc*¹⁰⁹- Herein an application for appointment of an arbitrator was filed under Section 11(9), ACA, 1996. The parties had chosen the proper law of contract as the law of England and Wales but proper law of arbitration was not specified. The respondent argued that proper law of arbitration must be presumed from the proper law of contract. Rejecting the contention, Supreme Court ruled that it was empowered to appoint arbitrators in the event of a deadlock between the parties, though the seat of the arbitration was outside India.

To undo the damage following *Bhatia International*, Law Commission of India submitted its 176th Report¹¹⁰ proposing amendments to Section 2(2).¹¹¹ However, it was never carried into effect.

*Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc*¹¹² (*BALCO*) overrules the doctrine of *Bhatia International* and *Venture Global*. The main question before the court was whether the absence of the word ‘only’ from Section 2 (2) would make Part I applicable to foreign arbitrations seated outside India.¹¹³

Ratio:

- The seat of arbitration determines the jurisdiction of the courts.
- Part I, ACA, 1996 would not apply to international commercial arbitration held outside India. Such awards would be subject to the jurisdiction of Indian courts only when they are sought to be enforced in India in accordance with the provisions of Part II. Part I still applies to international commercial arbitrations if they are held within India.
- No suit for interim injunction under Section 9¹¹⁴ would be maintainable in India in relation to an international commercial arbitration seated outside India since Part I is applicable only to arbitrations seated in India.¹¹⁵
- Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India. Following the principle of literal interpretation, it was further held that omission of the word ‘only’ is of no relevance.
- Section 34 could only be invoked to challenge an award when arbitration is seated in India.¹¹⁶

¹⁰⁹ (2008) 10 SCC 308.

¹¹⁰ Arbitration & Conciliation (Amendment) Bill, 2001 available at <http://lawcommissionofindia.nic.in/arb.pdf>

¹¹¹ The proposed amendment envisaged that this part shall apply only when the place of arbitration is in India. Provided that provisions of Sections 9 & 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable & recognized under Part II.

¹¹² Civil Appeal No.7015 of 2005; 190 page judgement delivered on 6 September 2012 by Constitution Bench of Supreme Court comprising of Chief Justice S. H. Kapadia & Justices D. K. Jain, S. S. Nijjar, Ranjana Desai & J. S.Khehar-judgement available at <http://www.scribd.com/doc/105082204/Bharat-Aluminium-Co-v-Kaiser-Aluminium-Technical-Service>

¹¹³ It was contended that there was a conscious deviation from Article 1(2) of the UNCITRAL Model Law in omitting the word ‘only’ from Section 2(2) & giving restricted meaning to it would be contrary to the other provisions of the ACA, 1996.

¹¹⁴ Court opined that giving a ‘purposive’ interpretation to Section 9 would destroy the territorial principles upon which the UNCITRAL Model Law is based & no civil suit for any interim relief is allowed in such situations.

¹¹⁵ Court observed that Parliament by limiting the applicability of Part I has recognized principle of territoriality.

¹¹⁶ Thus, the courts of the country where arbitration is seated would regulate such arbitration & an award may be challenged before them; the lawsuits brought in India to enforce international arbitral awards under Part II no longer face

- If an arbitration agreement contemplates seat of proceedings in a foreign country and the procedural law to be that of the Indian Act, it would not make Part I applicable or enable the courts to exercise jurisdiction over the proceedings or the award.
- Provisions of Part I and Part II do not overlap and Part II is not merely supplementary. There is complete segregation between them as Part I deals with all four phases of arbitration-commencement, conduct, challenge and recognition and enforcement while Part II pertains only to recognition and enforcement of foreign awards.

Effect: The judgement prospectively insulates arbitrations seated outside India and foreign awards from the unwelcome interference by the Indian courts. Judicial intervention has been rendered minimal, this being the basic underlying objective of the ACA, 1996.

VII. Conclusions

After having trodden a very dynamic path, of late the Indian judiciary has finally developed a reasoned, cautious and a sophisticated approach in relation to the enforcement of foreign arbitral awards, thereby turning the country into a welcome place to invest and trade with and improving the tarnished image of the Indian arbitration scenario.

The scope of the ACA, 1996 can be widened by Parliament only and not by Judiciary. The sanctity of legal contracts entered into between Indian and foreign companies' needs to be upheld since the strength of the rule of law and predictability of its enforcement are important factors influencing investment decisions. No company would appreciate an arbitration decision being stayed or rejected later by a court. If a congenial environment is created, India can itself become an attractive venue for arbitration keeping in mind its economic strength and the large number of foreign companies doing business in the country.

To minimize the chances of non-enforcement, appropriate drafting adjustments in the arbitration agreement assume significance. A clause specifying seat of arbitration in a convention country officially gazetted by India as a New York Convention country would be appreciable. Even the agreement can expressly exclude application of Part I to prevent the award from being set aside on Indian public policy grounds.

BALCO judgment, one of the important judgments of the Supreme Court of India, is bound to attract attention of those interested in commercial and legal dealings with India. *BALCO* judgement rests the doubts operating in the minds of foreign investing partners and traders regarding the enforceability of the foreign arbitral awards in India. Since the *BALCO* overrules *Bhatia International* with surprisingly prospective effect,¹¹⁷ the fate of the matters pending in the concerned area is still at the mercy of Indian judiciary. The latter will continue to haunt many foreign traders and investors and control many pending disputes for years to come.

the public policy test of Section 34(2)(b)(ii); Indian courts cannot annul a foreign arbitral award but can only refuse enforcement of a foreign arbitral award under the grounds specified in Section 48.

¹¹⁷ This element of the judgment gives rise to serious concern. Thus all agreements executed after the date of the judgment & agreements executed, arbitration proceedings/applications pending in the Indian Courts will remain unaffected by this judgment.

WTO- TRIPS AGREEMENT AND RIGHT TO HEALTH IN INDIA: A CRITICAL ANALYSIS.

Dr. Arundhati Kulkarni*

Introduction

Worldwide patent movement, built around multinational corporations (MNCs) and some governments of the developed world, with the assistance of some International Treaties such as Trade Related Aspects of Intellectual Property Rights (TRIPs), the Patent Co-operation Treaty, the Substantive Patent Law Treaty and the like, seems to establish an inflexible patent system where patents of 20 years run time have to be given for any invention in any field of technology. This development being part of ongoing process of globalisation has produced some undesirable results at least in some states or regions of the world. It has created difficulties in promoting health and safety of products moving across borders such as food stuffs pharmaceuticals, machinery and appliances, and also increased the power of non-governmental organisations and their capacity to operate on a global economy while ignoring particularly of a national governmental regulatory protection.¹

The process of globalisation has adversely affected national government's monetary and fiscal decisions. It is claimed that economic globalisation is the number one threat to the survival of the natural world.² The Global transfer of economic and political power from national governments to multinational corporations is a disaster for human rights, the environment, social welfare, agriculture, food safety, workers' right, national sovereignty and democracy.³

Globalization may also affect health status through the impact of international trade agreements such as TRIPS (trade-related aspects of intellectual property rights). TRIPS is part of the 1994 World Trade Agreement, which, on the face of it, makes access to essential life-saving drugs impossible for low income countries, regardless of their level of public health expenditure. Indeed, trade expansion is dominated by international rules that provide protection for 20 years to new discoveries. This restricts the possibility of producing or importing essential drugs. In addition, even in the cases in which TRIPS allows parallel imports of cheap generic drugs, trade pressures by the large countries where the major pharmaceutical companies are based limits access to affordable drug imports. The case of HIV/AIDS drugs is an example of distortions in the international norms being partly responsible for delaying the fight against this lethal disease in many poor countries.

India being a social welfare state, the Indian Patent Act was framed in a manner that ensured the predominance of public interest over the interests of inventor. Patent law in India has always strived to strike a balance between the individual interests of patentee and the interest of the society at large. Therefore, Indian Patent Act 1970 did not grant patent protection for food and

*Assistant Professor, Karnataka State Law University's Law School Navanagar, Hubli

¹ John H. Jackson, *Jurisprudence of GATT and WTO*, Cambridge: Cambridge University Press, 2000, p.3.

² Marjorie Cohn, "World Trade Organisation: Elevating Property Interests above Human Rights", *Georgia Journal of International and Comparative Law* (2001) 29, p.427.

³ *Ibid.*

pharmaceutical products. It was an effort to keep the prices of necessary medicines at an affordable level by placing public health considerations above property right concerns. It was successful in its endeavour to a certain extent. The Indian pharmaceutical industry flourished in the absence of product patents for pharmaceuticals.

But the signing of WTO TRIPs Agreements has brought about major changes in the existing legal regime of patents. Amendments to the Indian Patent Act 1970 in the year 1999, 2002 and finally in 2005 generated heated debate on the issue of public health. The option available to the nations to have a process patent regime in the areas of national importance has been completely taken away by the TRIPs agreement. There was some resistance to the amendment both inside and outside the Parliament on the ground that TRIPs agreement is an attempt by the industrialised countries to strengthen their monopoly over technology regardless of the fact that such an approach is protectionist, anti-competitive and anti-liberalisation.⁴

History of TRIPs Agreement

Intellectual property has emerged as a key tool in value creation and innovative growth of communities and countries in the transition to twenty first century. Intellectual property in the knowledge industry such as pharmaceuticals has become more extensive. For many years, international trade was governed by GATT (General Agreement on Trade and Tariff). The primary purpose of the trade system developed under the GATT was to promote trade in goods through the reduction or elimination of protectionist policies.⁵ In mid80's the Uruguay Round of GATT proposed for the inclusion of intellectual property in the trade agenda. At the beginning of Uruguay Round, about 50 countries did not grant protection to pharmaceutical products at all, and some excluded pharmaceutical processes from protection as well. Many also excluded food and other products from patentability.⁶ The main international instrument dealing with patents before the entry into force of TRIPs Agreement was the Paris Convention, which neither contained any restrictions to exclude certain types of inventions from patentability, nor did it establish any patentability criteria.⁷ It was up to the Paris Union countries to determine these in their domestic laws.⁸

Before the Uruguay Round, Intellectual Property rights were hitherto not considered as trade issues and hence not covered by GATT. The policy behind introduction of intellectual property issues was clear, i.e. to use the threat of trade embargoes to force developing countries to follow the dictates of developed countries on whole range of economic and industrial policies on one hand, and on the other to use these new issues to create barriers against developing countries wishing to access the domestic markets of developed countries. The basis for negotiations was the famous Dunkel Draft. The most contentious portion of the Dunkel Draft was that which related to patents. India along with other countries like Brazil, Argentina, Thailand etc. opposed the

⁴Rajeev Dhavan, "GATT-The Final Solution Fraud Twice Confounded," *Lawyers Collective*, May 1994, pp 4 - 6.

⁵ Carlos M. Correa, "Implementing National Public Health Policies in the Framework of WTO Agreements", *Journal of World Trade* 34 (6) 2000, p.89.

⁶*TRIPs and Development: Resource Book*, UNCTAD/ICTSD capacity building project on IP rights and sustainable development, December 2000.

⁷ The requirement of novelty, inventive steps and industrial applicability as laid down in Art.27.1 of the TRIPs agreement.

⁸*Supra* note 2.

inclusion of TRIPs in the negotiating agenda. They argued that the issue of patents was a non-trade issue and that the history of patent laws across the globe shows that all countries have evolved their domestic laws in consonance with their stage of economic development and development of scientific and technological capabilities. The laws that provide strong protection limit the ability of developing countries to enhance their scientific and technical capabilities and retard dissemination of knowledge. But in the negotiations giant pharmaceutical MNCs railroaded all oppositions and forced the signing of TRIPs Agreement. The Draft which formed basis of the Agreement was prepared by industry representatives from the US, Europe and Japan. Curiously in 1988-89 India agreed to the inclusion of TRIPs in the GATT negotiations. The capitulation by India punctured the opposition of other developing countries and TRIPs entered the negotiation on world trade.⁹

With the creation of the World Trade Organisation in January 1995, a wide-ranging international agreement on Trade Related Aspects of Intellectual Property (TRIPs) entered into force. TRIPs Agreement is obligatory for all states that wish to join the WTO and is part of the common institutional framework established under the WTO. TRIPs adopts a patent law minimum well above the previous standards of Paris Convention, extending both subject matter covered and term of protection, patent rights are extended to virtually all subject matter, including pharmaceutical products, chemicals, pesticides, and plant varieties and are to be granted for twenty years from the date of application. The Agreement makes the WTO's dispute settlement mechanism available to address conflicts arising under TRIPs.¹⁰

This far-reaching agreement has important implications for innovation, research and development, economic development, the future location of industry, and the global decision of labour. Indeed, the dramatic expansion of the scope of Intellectual Property rights embodied in TRIPs reduces the options available to future industrializers, by effectively blocking the route that earlier industrializers followed. It raises the price of information and technology by extending the monopoly privileges of right holders and requires states to play a much greater role in defending them. The industrialised countries built much of their economic powers by appropriating other's intellectual property, with TRIPs this option is foreclosed for later industrializers. The agreement codifies the increasing commodification of what was once the public domain, "making it unavailable to future creators". States and firms whose comparative advantage lies in imitation, stands to loose under the new regime.¹¹

Worldwide patent movement, influenced by the current trends in globalisation, appears to have produced some undesired result in the developing countries including India.

Effect of TRIPS on Production of Generic Drugs

India has recently stopped producing affordable generic versions of new medicines. This means that vital medicines for treating AIDS and other diseases will be more expensive throughout the developing world. TRIPs agreement obliges India to grant 20 years patent protection of

⁹ Amitsen Gupta, *Patent Act-Jeopardising the lives of millions*, <http://lists.kabissa.org/Isits/archieves/public/pha.excahgne/masgo1806.html>.

¹⁰ Susan K.Sell, *Private Power and Public Law: The Globalisation of Intellectual Property Rights*, Cambridge: Cambridge University Press, 2003, pp 8-9.

¹¹ *Ibid.*

pharmaceutical products. So generic production of new medicines is illegal.¹² The threat of high priced new medicines matters for health care in India, which has more people living in absolute poverty. It also matters for rest of the developing world, since India has been major supplier of generics including low cost antiretroviral, and is the one of the very few developing countries with a sophisticated pharmaceutical industry capable of producing generic version of new drugs. The issue is not just the price and availability of treatments for HIV/AIDS or for TB and malaria. Hepatitis C, for example, affects 170 million people worldwide the great majority in developing countries, but the cost of treating one patient with patented drugs is US\$ 300000 per year. Governments of poor countries cannot afford such high prices for medicines when running a health system on very limited resources.¹³ When timely availability of generic version is a matter of life and death for millions of the poor and suffering, and more than 1000 people die untreated every day in India from pandemics like AIDS/HIV, TB Malaria etc. a delay in introduction of generic versions of effective new drugs would directly result in denial of treatment to lakhs of the poor dying and suffering from such pandemics. Such delay by the introduction of product patenting for medicines would be total abdication of duty and violation of fundamental right to life under Article 21 and state's constitutional obligations.¹⁴

Impact of TRIPS on Drug Prices

Much of the debate on the impact of product patents on the pharmaceutical industry in India has centred on the issue of price of the patented product and their accessibility. While it is true that a positive association is observed between stronger protection and prices of drugs, it is also true that prices decline with the expiry of patent. In the US, rapid reduction in the price of drugs after the expiration of the patent has been reported. Though more competition among generic drug producers result in substantial price reduction for those drugs, yet increased competition from generic does not result in aggressive response in price behaviour by established brand name products.¹⁵

In India when amoxicillin was first produced by a multinational the price of the drug was very high. However with the local manufacturers stepping into produce the indigenous version of the amoxicillin, the price of the same declined rapidly. It should be admitted that adoption of the process patents along with the domestic regulations that restricted the role of multinationals resulted in the growth of the domestic industry. In the late 90's the pharmaceutical industry of India reached position of near sufficiency in formulations. After a long time experience of having a negative balance of trade in pharmaceutical products, India started enjoying positive balance of trade from the late 80's. In production volume India accounts 8 percent of world's pharmaceutical production. The number of pharmaceutical manufacturers increased from a mere 200 in 1950-51 to more than 600 in 80's which reached a phenomenal figure of 23,790 in 1998-99, of this a sizeable percentage of firms belong to the small scale sector. It is estimated that out of 28.6 million workforces in the pharmaceutical industry, about 4.6 million is employed in the organised units

¹² McDonald, *India's new patent law and health crisis*, <http://www.thebody.com/atn/407/india-pattnshtm>.

¹³ *Ibid*.

¹⁴ A paper presented by Dr.Gopal Dabade in a Seminar Organised by Sidhartha Law College Gulbarga on 22nd October 2005.

¹⁵ N.Lalitha, *TRIPs and Pharmaceutical Industry: Issues and Prospects*, <http://www.iprsonline.org/fictsdl/docs/resorucesHealthArticleLalitha.doc>.

and the rest are engaged in distribution and ancillary industry. These units produce drugs that are not under patent protection and are analogous to products that are already there in the market. Hence competition is severe among the pharmaceutical units in India, which is one of the important reasons for the relatively lower prices of the medicines in India.¹⁶

But the TRIPs Agreement has imposed the wide-ranging changes that just been adopted in India. The changes imposed by TRIPs includes increasing the duration of all patents to 20 years, broadening the scope of patentability and the introduction of product patents for medicines. It has been feared that these legislative modifications will eventually lead to higher prices in India and the product patent regime mandated by TRIPs will make even lifesaving drugs, particularly for diseases of the developing world, unaffordable to its vast population.¹⁷

Critics have argued that patent should be granted only for pharmaceutical process and not products; process patents provide a weak protection, as there might be many ways of producing drugs that are bioequivalent, if product patent is granted for drugs it lead to monopoly and consequent increase in the prices of drugs.

TRIPs Agreement and Right to Health

Right to health is a fundamental human right. Human rights refer to universal rights of human beings regardless of jurisdiction or other factors, such as ethnicity, nationality, region or sex. Human rights and fundamental freedoms are birth right of all human beings; their protection and propagation is the first responsibility of all governments.¹⁸

One area where the threat to human rights was perceived is pharmaceutical sector. The worst impact of TRIPs that the pharmaceutical industry of developing countries foresees would be the end of generic drugs. It is feared that the product patent regime mandated by TRIPs might lead to the destruction of a strong indigenous industry that produces generic substitutes for drugs discovered elsewhere and supply these generics both domestically and to other developing countries at a fraction of the cost of branded originals. It is also feared that in the post TRIPs era large number of units in the industry may be compel to close down and only a few hundreds may survive.¹⁹

It would allow a few MNCs of technologically rich states to control access to food medicine and drugs. When Thai companies made AIDS drugs available at a cost well below that of United States drug companies, the United States on behalf of the drug companies threatened WTO and TRIPs challenge for patent infringement. Thailand, which depends on United States for 25% of its exports, was effectively blackmailed into stopping the manufacture of cheaper AIDS drugs.²⁰

It has been claimed that intellectual property rights are well protected by the WTO at the expense of human beings as WTO rules reflect an agenda that serves only to promote dominant

¹⁶*Ibid.*

¹⁷ M.D.Nair, *The Hindu*, January 31, 2002.

¹⁸ Vienna Declaration and programme of Action, 25 June 1993, United Nations (DOC A/CONE 157/24 Part 1).

¹⁹ Ashok Ram Kumar, *Impact of TRIPs on Indian Pharma*, <http://www.pharmabiz.com>.

²⁰*Id.*, at p.436.

corporate interest that already monopolised the arena of international trade.²¹ According to UNICEF, in Guatemala 1.5 million infants die every year primarily from fatal infant diarrhoea caused by the supplementing of breast-feeding with artificial formula. Gerber Food, a US based multinational claimed on its packages that its infant formula would ensure healthy babies and bolstered the claim with photographs of fat healthy babies. Guatemala enacted a law, modelled after the World Health Organisation Code of Marketing of Breast Milk substitutes, intended to protect infant health. The law required that formula producers clearly state the superiority of breast-feeding on their labels. All of Guatemala's domestic and foreign suppliers of formula changed their packaging to comply. The country's infant mortality rates dropped dramatically. Gerber, however, induced the United States State Department to threaten a WTO challenge based on company's intellectual property claim to its labelling. In response Guatemala amended its law to exempt imported baby food products.²²

Health is a fundamental human right. The constitution of India directs the state to regard the improvement of public health as among its primary duties. Abundant availability on a continuous basis, at reasonable prices of essential lifesaving and prophylactic medicines of good quality is cornerstone of new measures. In the case of *Vincent Panikur Langar v. Union of India*,²³ Hon'ble Supreme Court has also reaffirmed the principle 'public health to be a matter of top priority'. In the above mentioned case the Supreme Court has opined as follows: "Attending to public health, in our opinion therefore is of high priority perhaps one at the top". "It is the constitutional obligation of the state to provide adequate medical service to the people to preserve human life, whatsoever is necessary for this purpose has to be done".

In the case of *State of Punjab and others v. Ram Lubhaya Bagga and others*²⁴, the Supreme Court has declared that the obligation of the state to protect the citizen's right to life and health to be its 'sacrosanct' and 'sacred' duty.

Health is one of the fundamental basic needs of all human beings. International Convention on Economic Social and Cultural Rights recognises the right to the 'enjoyment of the highest attainable standard of physical and mental health'.²⁵ UN Charter expressly states that in the event of conflict between state's obligation under the UN Charter and their obligations under "any other international agreement", their obligations under the UN Charter shall prevail.²⁶ Of many new areas that captured global attention protection of intellectual property through WTO TRIPs regime for achieving the objectives of globalisation remained the most controversial. Protagonists of globalisation considered uniform norms for the international protection of intellectual property rights, particularly in the new areas of biotechnology, information technology etc., as a key factor to reap the benefits of globalisation, the promoters of human rights strongly feel that this has the

²¹ The Realisation of Economic, Social and Cultural Rights: Globalisation and its impact on the full enjoyment of Human Rights, sub commission on the promotion and protection of human rights, U.N. ESCOR, 52nd sess. U.N.doc.e/cnna/sub.2/2000/12/par.1566-67(2000).

²² *Supra* note 7, at pp 436 – 437.

²³ AIR 1987 SC 990.

²⁴ (1998) 4 SCC 117.

²⁵ Article 12 of International Covenant on Economic Social and Cultural Rights, New York, December 1966.

²⁶ Article 103 of UN Charter.

potential to deny the poor of their basic human rights. Even though the TRIPs has included many new areas of intellectual property the provisions concerning patent are going to have maximum impact on the protection of the human right of larger section of the population.²⁷

Critics are concerned that TRIPs will not only reduce competition and increase prices, but by doing so, will threaten both human rights and the development process. UN human rights bodies have alerted governments to the “apparent conflicts between the intellectual propriety rights regime embodied in the TRIPs agreement on the one hand and international human rights law on the other” and reminded all governments of the primacy of human rights obligations over economic policies and agreements.²⁸ They have called on member states to refrain from taking measures, which would limit equal access to medicines “used to treat HIV/AIDS or the most common opportunistic infections that accompany them”. It is now accepted that there is a right to access to treatment.²⁹ The independent UK Commission on Intellectual Property Rights, which comprised wide range of international experts, concludes that TRIPs may harm development and it is inappropriate to apply the same standards to all nations regardless of national wealth. Standards of Intellectual Property Protection that may be suitable for developed countries may produce more costs than benefits when applied in developing countries, which rely in large part on knowledge generated elsewhere to satisfy their basic needs and foster development.³⁰

And while the World Bank estimates that Intellectual Property Protection will lead to increased foreign investment in middle-income countries, it estimates that full implementation of TRIPs would mean a loss to developing countries of \$20 billion in patents for all sectors including health.³¹ Human rights treaties have not devoted significant attention to the impacts of intellectual property on the realisation of specific rights such as the right to health. However, the relationships have been considered in general terms. An analysis of relevant articles and of the intention of states negotiating them brings out several important elements. First human rights treaties recognise the importance of scientific and technological development, they also acknowledge the possible tension between the interests in inventors and the interest of society at large in benefiting from scientific advances. The balance between the two is tilted towards the society in general rather than the inventor. Further the interests of inventors must be understood within the contest of all the other human rights protected under international human rights convention.³²

²⁷ N.S.Gopalkrishnan, “Intellectual Property Protection and Human Rights Violation”, *Cochin University Law Review*, Vol.XXXIV 2000, p.92.

²⁸ UN Sub-Commission for the promotion and protection of Human Rights 52nd session, agenda Item 14, 17 August 2002.

²⁹ United Nations Commission on Human Rights Resolution 2001/33.

³⁰ Integrating Intellectual Property Rights and Development Policy, Commission on Intellectual Property Rights, London, 2002 (executive summary p.10.).

³¹ World bank, Global Economic Prospects and the Developing Countries 2002; Making trade worse for the worlds poor, October 2001.

³² Philippe Cullet, “Patents Bill, TRIPs and Right to Health”, *Economic and Political Weekly*, 27 October 2001, p.4049.

Conclusion

Patents as statutory rights granted by the state for a limited period in respect of new and useful inventions have played a dominant role in economic development of a state. Patent rights having originated as an exception to the rule that all monopolies are illegal, have been statutorily regulated by every state to promote general welfare of the citizens on the ground that patents are the tools of public policy that should be used to attain higher level of public interest than to promote only the individual interest of inventors or the owners.

There is some truth in the assertion that the patent system built on TRIPs would strengthen western monopoly over technology and 20 years term would discourage research and development in India even though there is an assumption that the patent system would assist technology transfer. The study has indicated that the patent system instead of encouraging domestic pharmaceutical sector would allow MNCs to market their products resulting in closure of large number of small and medium scale units and public sector units. By mergers and acquisitions MNCs will capture and take control of Indian companies to dominate the Indian market.

GEOGRAPHICAL INDICATIONS AS A DEVELOPMENT TOOL

Dr. Rekha S. Chavan*

I. Introduction

Over the past few decades, geographical indications have become major intellectual assets in relation to a variety of goods, acting not only as a tool for protecting consumer's interests and reinforcing confidence in high-quality and local products, but also as a legal and economic tool for the development of rural areas and the preservation of cultural heritage.

Geographical Indications, also referred to as appellations of origin, are "indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin".¹ Obtaining the status of protected Geographical Indication requires "a precise product specification which includes a definition and evidence of the link to the geographic area in which the product originates."² In essence, special status is conferred upon generic terms that describe qualities and characteristics of goods based on their geographical origins. For instance, wines emanating from a particular region are granted the rights to use the Geographical Indication defining that region while winemakers producing wines outside that region are prevented from doing so in the marketing of their goods. Thus Geographical Indications represent important intellectual property assets that convey important information concerning the (geographical) origins of a product; that is, a product originates in a certain place and therefore possesses a certain qualities.

II. Functions of Geographical Indications

Geographical indications perform a variety of economic and other functions, which may depend on how producers use geographical indications and consumers view them.³

- i) Origin function: Designations operate as indicators of origin from which the products come or are in some other way connected.
- ii) Quality Functions: Designations symbolise qualities which certain products have or which consumers associate them with and guarantee that they measure up to expectation.
- iii) Investment or advertising function; Designations are ciphers around which investment in the promotion of a product is built and that investment is a value which deserves protection as such, even when there is no abuse arising from misrepresentations either about origin or quality.

*Assistant Professor, Vijnaneshwar Government. Law College, Gulbarga, Karnataka.

¹World Trade Organisation www.wto.org.

²The Journal 2004, "Move over the River Is a Tide of Change for SS" May 20, ed 1 P.S. New Castle Chronicle and Journal Ltd., New Castle, UK.

³These functions are similar to those traditionally distinguished for trademarks. See e.g. Jeremy Philips, *Trademark Law: A Pravrical Anatomy* (2003); and Onno Brouwer, *community Protection of Geographical Indications and Specific Characters as a means to enhance Foodstuff Quality* (1991) 28 ML Rev. 615, 630.

- iv) Culture protecting function: Designations protect culture by preserving traditional productions methods, habits of consumption and cultural identity.⁴

III. Economic and Social Benefits of Geographical Indications

Geographical Indications are intellectual property rights. Their function is to identify products on the market, similar to trademarks and trade names. Well protected and pro-actively used, GIs are a very interesting marketing tool because they can convey a lot of information from the producer to the consumer. GI gives the producers of a region the exclusive right to use the indication for their products originating from that region. It also means that they have the right to prohibit any unauthorised use, usurpation or imitation of the sign on a product that is not from the designated area or which does not have the qualities guaranteed by the GI.

A tool to create value- products bearing a geographical indication have an added value for which consumers are ready to pay. Consumers are ready to pay a 10% premium price for origin – guaranteed products. Geographical indications therefore unlock value by capitalising on consumers' desire for authentic, quality product, and as a consequence, most products⁵ bearing a geographical indication enjoy a higher retail price than that of similar products. The premium then pays for the renown of the product. In addition to a higher retail price, primary producers benefit from their participation in the production of goods bearing a geographical indication production, by getting a higher price for their products.⁶

Geographical indications create value, which is expressed in a variety of ways. For example, the registration of a geographical indication has been shown to increase production output and land value. Also, the certainty afforded by legal production creates opportunities for investment in a product and region.

IV. A tool to Promote Rural Development and Sustainability

Geographical indication products have significant implications for producers of developing countries. One important aspect of such traditional products and activities is that they relate to community engagement. Millions of people in the developing world depend upon such traditional activities for their food security and health in many countries traditional medicines provide the only affordable treatment available to poor people.⁷

Geographical indications can provide rural areas with a new vitality. In the first instances, the grant of a geographical indication will provide the right owners with the opportunity to get economic benefits from their geographical indication and with the right to exclude non entitled

⁴TomerBroude, "Taking Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO Law (2005) 649 Express Opreprin Series, 16; MEMO/03/160 why do Geographical indications matter to us, 30 July 2003.

⁵StephanePasseri, Protection and Development of Geographical Indications (GIs) in Asia, conference on IP in Hong Kong and Mainland China, Best Practices and International Impact, 22 march 2007, 8.

⁶*Ibid.*

⁷ UNCTAD/ICTSD 2003 Resource Books on TRIPs and Development: Part Two- Substantive obligations, 2-3, Geographical Indications. Prepared for the UNCTAD/ICTSD capacity building project on Intellectual Property Rights and sustainable development. Geneva, at <http://www.iprsonline.org/unctadictsd/resorucesbookindex.htm>.

users by creating a barrier to entry into a niche market segment. These attributes will, in turn translate into an equitable distribution of value and before to make owners of geographical indications and their communities. Subsequently, the economic incentives will then produce other incentives to nurture and sustain traditional methods and know-how, which will contribute to inter-generational equity. Other indirect benefits, such as the creation of employment, the retention of the population in rural areas and the possibility to generate tourism will also benefit the owners of a geographical indications and the community as a whole. Some basic properties of a geographical indication are likely to benefit the local producers and the regional economy. First, geographical indication is held in perpetuity with no time limit as long as local knowledge is sustained and the indication is prevented from being generic. This means the marketing costs are needed only to reach out to consumer with the message of further innovations in the product second. The right is granted to a collective body of producers and to and not to an individual producer. Therefore the whole community is going to benefit, and this in turn may spur the regional economy. Third unlike patents and copyrights, geographical indications are not created but only recognised which means that investments are related only to building a reputation of a product already existing, whereas patents and copyrights relate to creating products in the first place.

V. Geographical Indications in Developing Countries

It is interesting to note that unlike other IPRs, the concept of GI has been received favourably in the developing countries. The potential socio-economic benefits that GIs could accrue to developing countries have led many to believe that GI is the 'sleeping beauty IPR'.⁸ The key socio-economic issues relating to geographical indications particularly relevant to developing countries are mis-appropriation, protecting traditional and indigenous knowledge and culture, improving market access, creating niche markets, protection of reputation, potential income effect and rural development. Geographical indication has the potential to improve rural livelihoods, based on local resources and thus, advance rural development.⁹

Worldwide, rural communities have developed typical products based on the interaction between traditional local know how (including selection, production and processing), cultural settings and particular environmental conditions such as the soil and climate (World Bank Report, 2004). The market mechanism, as it exists today, does not necessarily reward either these products or the producers. GI provides an effective framework to counter information asymmetry, leading to a process which can be viewed as 'Institutionalisation of Quality' that rewards such products and producers with premium prices. The premium captured by products displaying Geographical Indications suggests that some form of value is embedded in the use of GI which is a mixture of economic, cultural and social values reflected in product-place linkages. As such, GIs draw from both natural and human resources located within the territory, thereby stimulating the rural economy.¹⁰

⁸WIPO Magazine "Geographical Indications: from Darjeeling to Doha", July 2007.

⁹Pacciani, A., 6, Belletti, A. Marescotti and S.Scamuzzi, The Role of Typical Products in Fostering Rural Development and the Effects of Regulation (EFC) 2081/92, 73rd Seminar of the European Association of Agricultural Economists, Ancona, Italy, June, 28-30, 2001.

¹⁰Lourseiro, M.L. and J.J., McCluskey, 'Assessing Consumer Response to Protected Geographical Indication Labelling agribusiness, 16(3) 309-20, 2000.

VI. Conclusion

Geographical Indications are being recognized as the most effective intellectual property right for developing countries because of its potential to localize economic control, reward holders of traditional knowledge and encourage indigenous social development. GI helps a community of producers to differentiate their products from competing products in the market and build goodwill around their products, often fetching a premium price. From consumers' point of view, GIs act as a signaling device, which helps them identify genuine quality-products and also protect them against counterfeits. It is undisputed that successful geographical indications could bring a number of economic and social benefits to developing countries. However, the value and benefits of a geographical indication will depend on the way it is exploited, marketed and policed.

ALTERNATIVES TO LITIGATION IN INDIA

Dr. J. M. Mallikarjunaiah*

It is now widely acknowledged that our litigation system requires drastic spring cleaning. This is not to minimize the role our courts, especially the superior courts, play in the promotion of the rule of law. Generally speaking, except litigants who stand to gain by delaying the process of justice, others do not perhaps enjoy taking amounts by way of expenses. This is true of all types of cases. There is always a great rush for interim orders of courts. Not many in India can afford litigation. This state of affairs makes people cynical about the judicial process, often subjecting it to ridicule. Where do we go from here?

In recent years, several conferences have been held in India, including a conference of Chief Ministers of the various States and Chief Justices of the High Courts, to devise appropriate strategies for dealing with the exploding docket problem. These exercises have no doubt created a greater awareness of the problem today than before at all levels concerned with the justice dispensing system and some progress has been achieved, at least at the level of the Supreme Court. Be that as it may, it is unlikely that the problem will get resolved in the near future. The Supreme Court does not appear to view with favour tribunalisation of justice. What then are our choices?

We have no other choice but to vigorously and quickly devise effective alternative options to litigation to ease the present weight of judicial business. Of course, India is not the only country which is buffeted by arrears of courts cases. Even the developed countries such as United States of America and the United Kingdom suffer from this problem, albeit on a lesser scale. The USA and, following its inspiration, several countries, including Australia, Canada, Germany, Holland, Hong Kong, New Zealand, South Africa, Switzerland and the United Kingdom have been using over the last 20 years or so what is popularly known as 'Alternative Dispute Resolution' (ADR) that encouraged the disputants to arrive at a negotiated understanding with a minimum of outside help. The primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice" for all. In other words, the ADR system seeks to provide cheap, simple, quick and accessible justice. The desirability and necessity of encouraging ADR on a large scale is hardly in dispute.

The ADR procedures consist of negotiation, conciliation, mediation, arbitration and an array of hybrid procedures, including mediation and last-offer arbitration (MEDOLA), mini-trial, med-arb and neutral evaluation. In countries like the USA, several federal and state judges have incorporated ADR techniques in their court room practice and are calling upon litigants to utilize them; legislation was also enacted to promote the use of ADR by Legislature and the Judiciary – are thus committed to the encouragement of ADR movement.

ADR techniques are extra-judicial in character. They can be used in almost all contentious matters which are capable of being resolved, under law, by agreement between the

*Principal KLE Society's Law College, Bangalore

parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. In particular, these techniques have been shown to work across the full range of business disputes; banking; contract performance and interpretation; construction contracts; Intellectual Property Rights; insurance coverage; joint ventures; partnership differences; personal injury; product liability; professional liability; real estate; and securities. ADR offers the best solution in respect of commercial dispute of an international character.

Alternative dispute resolution is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It offers only a alternative options to litigation. There are still a large number of important areas, including constitutional law and criminal law, in respect of which there is no substitute for court decisions. ADR may not be appropriate for every dispute even in other areas; even if appropriate, it cannot be invoked unless both parties to a dispute are genuinely interested in a settlement.

The advantages of ADR are several. First, it can be used at any time, even when a case is pending before a court a law, though recourse to ADR as soon as the dispute arises may confer maximum advantages on the parties; it can be used to reduce the number of contentious issues between the parties; and, it (except in the case of binding arbitration) can be terminated at any stage by any one of the disputing parties. Second, it can provide a better solution to dispute more expeditiously and at less cost than litigation. It helps on keeping the dispute a private matter and promotes creative and realistic business solutions, since the parties are in control of the ADR proceedings. ADR procedures take only a day or a few days to arrive at a settlement. Third, ADR programmes are flexible and not afflicted with rigours of rules of proceedings. Even a failed ADR proceeding is never a waste either in terms of money or time spent on it, since it helps the parties to appreciate each other's case better. Fifth, ADR can be used with or without a lawyer. A lawyer, however, plays a very useful role in identification of the contentious issues, exposition of the strong and weak points in a case, rendering during negotiations and over-all presentation of his client's case. Sixth, ADR procedures help in the reduction of the work-load of the courts and thereby help them to focus attention on the cases which ought to be decided by courts. Seventh, ADR procedures permit parties to choose neutrals who are specialists in the subject-matter of the dispute. This does not mean that there will be a diminished role for lawyers. They will continue to play a central role in ADR processes; however, they will have to adapt their role to ADR requirements.

A number of ADR procedures are hybrids that combine two or more well established ADR procedures. ADR procedures can be broadly divided into two categories, namely, adjudicatory and non-adjudicatory. The adjudicatory procedures such as arbitration and binding expert determination lead to a binding ruling that decides the case. The non-adjudicatory procedures contribute to resolution of disputes by agreement of the parties without adjudication. Of the several ADR techniques, "mediation" seems to be the most widely-used one; it is the same dispute resolution process as conciliation, except that in the case of the former the neutral third party plays a more active role in putting forward his own suggestions for the settlement of the dispute. Sometimes, the terms "conciliation" and "mediation" are used interchangeably. Other ADR techniques can be used where appropriate and what form is appropriate depend upon the facts and circumstances of each case.

A brief description of ADR procedures widely used is as follows:

Negotiation: A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute.

Conciliation/Mediation: A non-binding procedure in which an impartial third party, the Conciliator/mediator assists the parties to a dispute in reaching a mutually satisfactory and agreed settlement of the dispute.

Med-Arb: A procedure which combines, sequential, conciliation/mediation and, where the dispute is not settled through conciliation/mediation within a period of time agreed in advance by the parties, arbitration.

MEDOLA: A procedure in which, if the parties fail to reach agreement through mediation, a neutral person, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties, such selection being binding on the parties.

Mini-trial: A non-binding procedure in which the disputing parties are presented with summaries of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser.

Arbitration: A procedure in which the dispute is submitted to an arbitral tribunal which makes a decision (an “award”) on the dispute that is binding on the parties.

Fast-track Arbitration: A form of arbitration in which the arbitration procedure is rendered in a particularly short time and at reduced cost.

ADR is by no means a recent phenomenon, through it has been organised on more scientific lines, expressed in more clear terms and employed more widely in dispute resolution in recent years than before. The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunals was well-known to ancient India. Long before the king came to adjudicate on disputes between persons such disputes were quite peacefully decided by the intervention of the *Kulas* (family or clan assemblies), *Srenis* (guilds of men following the same occupation), *Parishads* (assemblies of learned men who knew law) and such other autonomous bodies. There were *Nyaya Panchayat* at grass-roots level before the advent of the British system of justice.

Even in day-to-day affairs, in respect of some categories of disputes, ADR procedures are invoked sometimes without conscious thought, *e.g.*, disputes within the family, between friends, between neighbours, dispute involving employers and employees, etc.

The Constitution of India calls upon the State to provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. It was in discharge of this obligation that the Committee for Implementing Legal Aid Schemes (CILAS) was established in 1980. The CILAS had initiated non-formal fora known as *Lok Adalats*. A *Lok Adalat*, which means a ‘people’s court’, is not, however, a court in its accepted connotation; it is a forum where voluntary effort aimed at bringing about settlement of disputes

between the parties are made through conciliatory and persuasive efforts. *Lok Adalats* provides speedy and inexpensive justice in both rural and urban areas. They specially cater to the needs of weaker sections of the society.

The Members of a *Lok Adalat*, usually three, act as conciliators and are drawn generally from amongst serving or retired judicial officers, social workers and advocates. *Lok Adalats* are organised with the financial assistance rendered by both the Central and State Governments and are monitored by the judiciary. As on 31 March 1996, more than 13,000 *Lok Adalats* were organized and over five million cases were settled. These cases related primarily to motor accidents, land acquisition, family disputes, mutation of land, encroachments on forest land, bank loans, workmen's compensation and compoundable criminal offences. While the achievements of *Lok Adalats* are significant, they have not been able to attract cases involving heavy financial stakes or important civil litigation. Private litigation remained totally outside the ambit of *Lok Adalats*. Even Government departments or public sector undertaking do not seem to think of a *Lok Adalat* as a major forum for alternative dispute resolution. However, in the socio-economic conditions that prevail in India there is a clear and urgent need to make greater use of the conciliatory process, already set in motion through this medium of *Lok Adalats*, at least in respect of certain categories of disputes. The Legal Services Authorities Act, 1987 has been enacted by Parliament to confer statutory status on *Lok Adalat* and also to regulate their functions. It has brought into existence the National Legal Services Authority in place of CILAS. In the context of growing number of cases in the courts as also the need to provide for expeditious disposal of commercial disputes in the context of economic reforms undertaken in India in recent years, it was widely recognised that the law on arbitration need reform. Accordingly, the Arbitration and Conciliation Act, 1996, was promulgated which came into force on 25th January, 1996. It is modelled largely on the UNCITRAL Model Law on International Commercial Arbitration and the UNICTRAL Conciliation Rules. However, the Ordinance seeks to go beyond the aforesaid Model Law and Conciliation Rules inasmuch as it makes provisions for arbitration and conciliation of domestic disputes as well. Any domestic dispute, not merely a commercial one, which is capable of being resolved by agreement between the parties, may become the subject-matter of arbitration, conciliation or any other ADR programme.

The Act consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also defines the law relating to conciliation arbitration and enforcement of foreign arbitral awards as also defines the law relating to conciliations. There are also provisions regarding arbitration in other Central and State enactments in force in India.

Procedures also exist which combine, sequentially, direct negotiations and, where the differences are not settled through direct negotiations, compulsory arbitration. An example of this procedure is contained in the Government of India Scheme for Joint Consultation and Compulsory Arbitration for Central Government Employees. Under the Scheme, if the Government and the employee fails to reach agreement in direct negotiations on matters relating to conditions of service and work, etc., the disagreement is required to be referred to a Board of Arbitration, if so desired by either side. And, subject to the over-riding authority of Parliament, the recommendations of the said Board will be binding on both sides.

Alternatives to Litigation in India

Government contracts generally provide for compulsory arbitration in respect of disputes arising there under and usually the arbitrators appointed to decide such disputes are senior government officers. The large numbers of public sector undertaking also follow a similar procedure. There is also Government of India's Scheme, evolved on the Directors of the Supreme Court, with regard to settlement of disputes between one Government Department and another and one Government Department and a Public Enterprise and between Public Enterprises themselves. This Scheme provides for the constitution of a standing Committee of senior officers to ensure that no litigation involving such disputes is taken up in a court or a tribunal without the matter having been first examined by the said Committee and the Committee's clearance for litigation obtained.

The Ministries concerned in specific cases are also represented in the said Committee. The Committee assesses the reasonableness of the rival stands before it makes up its mind. This procedure has helped in an amicable settlement of a large number of disputes which would have otherwise ended in litigation.

There is also a permanent machinery of arbitrators constituted by the Government of India to settle all current and future commercial disputes between public sector undertaking inter-se as well as between a public sector undertakings inter-se as well as between a public sector undertaking and a Government Department. The award of the arbitration in such a dispute is binding on the parties to the dispute. Any party aggrieved by the award may make a reference for setting aside or revision of the award to the Union Law Secretary whose decision binds the parties finally and conclusively.

Courts in India also appoint arbitrators of their choice in certain eventualities. There are also a number of commercial organizations which provide a formal and institutional base to commercial arbitration and conciliation.

There are several merchant associations which provide for in-house arbitration facilities between the members of such associations and their customers. In all such cases, the purchase bills generally require the purchasers and sellers to refer their disputes in respect of the purchase or the mode of payment or the recovery thereof to the sole arbitration of the association concerned, whose decision is final and binding on the parties. Stock exchanges in India also provide for in-house arbitration for resolution of disputes between the members and others. The Board of Directors of each stock exchange constitutes the appellate authority for hearing appeals from the ward of the arbitral tribunal. It appears that these in-house facilities have proved quite effective.

India has recently entered into bilateral investment protection agreements with the United Kingdom, Germany, Russian Federation, The Netherlands, Malaysia and Denmark. Each agreement makes provision for settlement of disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former through the following ADR procedures: negotiation, conciliation and arbitration. India is also a party to the Convention Establishing the Multilateral Investment Guarantee Agency which provides for settlement of disputes between States parties to the Convention and the Multilateral Investment Guarantee Agency through negotiation, conciliation and arbitration. There are a number of agreements in other sectors to which India is a party containing provisions for dispute-resolution through ADR procedures.

Of the enactments having a bearing on the subjects of conciliation, special reference may also be made to the Code of Civil Procedure, 1908 which contains provisions enjoining a duty on courts to make efforts and to assist the parties in arriving at a settlement in certain categories of suits/proceedings such as litigation by or against the Government or public officers in their capacity, litigation relating to matters concerning the family such as suits/proceedings for matrimonial relief, guardian and custody, maintenance, adoption, succession, etc. Similar provisions are also contained in the Hindu Marriage Act, 1955 and the Family Courts Act, 1984. The Industrial Disputes Act, 1947, also makes provisions for settlement of disputes through conciliation.

Consistent with the legislative policy on conciliation and with a view to providing a solution to the problem of congestion of cases in courts, the Himachal Pradesh High Court had evolved Pre-trial, In-trial and Post-trial Conciliation Project in the subordinate courts in Himachal Pradesh with effect from 1st September 1984. This scheme has been widely welcomed by the litigants. The Conference of Chief Ministers and Chief Justices, in their Resolution of 1993, as also the Law Commission of India in its 77th and 131st Reports, had recommended the operation of the conciliation courts as existing in Himachal Pradesh. The Calcutta Resolution adopted in 1994 by Law Ministers had also recommended that such conciliation courts should be constituted in other States also.

Barring arbitration and conciliation, other ADR procedures are virtually unknown in India. For a successful pursuit of ADR movements in India, three things are absolutely necessary; good law; infrastructural facilities for holding ADR proceedings; and, professionally trained ADR practitioners. Of these three, the aforesaid Act is in accord with internationally shared thinking on the subject. There are, however, no trained ADR practitioners in India at present and those who are doing ADR work are largely self-taught. Nor are the infrastructural facilities for holding ADR proceedings very attractive. There are also no institutions which have teaching or research programmes on ADR.

The ADR movement received a major fillip in India in 1993. A resolution adopted by the Chief Ministers and the Chief Justices on 4th December 1993 declared that courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. It further emphasized the desirability of disputants taking advantage of ADR which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. The Prime Ministers of India has on a number of occasions emphasized the need to turn to ADR for resolving disputes.

It is in this context that certain eminent people in the legal, administrative and commercial fields have come together and established an institution known as "The International Center for Alternative Dispute Resolution" (ICADR). The International Center is registered as a society under the Societies Registration Act, 1860 on 31st May 1995. It is an independent non-profit making organization. The International Center is intended to spread ADR culture in this part of the world.

Through it is seated in Delhi at present; it has plans to function through offices set up in other parts of the country. The main objectives of the Center are:

Alternatives to Litigation in India

- (1) to propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR;
- (2) to provide facilities and administrative and other support services for holding conciliation, mediation, mini-trials and arbitration proceedings;
- (3) to promote reform in this system of settlement of disputes and its healthy development suitable to the social, economic and other needs of the community;
- (4) to appoint conciliators, mediators, arbitrators, etc. when so requested by the parties;
- (5) to undertake teaching in ADR and related matters and to award diploma, certificates and other academic or professional distinction;
- (6) to develop infrastructure for education, research and training in the field of ADR;
- (7) to impart training in ADR and related matters and to arrange for fellowships, scholarships, stipends and prizes.

On 6th October, 1995, the ICADR was inaugurated by Shri P.V. Narasimha Rao, the Prime Minister of India. A new chapter in the history of the administration of justice has thus commenced. It is now a time of hope and change and of rising expectations for the ICADR.

While inaugurating the ICADR, the Prime Minister of India, observed:

While reforms in the judicial sector should be undertaken with necessary steps, it does not appear that courts and tribunals will be in a position to bear the entire burden of the justice system. It is incumbent on government to provide at reasonable cost as many modes of settlement of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution so that the court system proper would be left with a smaller number of important disputes that demand judicial attention.

In addition to effort of private institutions such as the International Center for ADR, there is an urgent need for the judiciary to evolve court-annexed ADR schemes and make ADR a part of the judicial repertoire of dispute management. Experience gained so far does not lend support to the view expressed by some legal theorists that judicial sponsorship of ADR can compromise judicial authority in the context of adjudication. Government and public sector undertakings too should encourage recourse to ADR by incorporating mandatory ADR provisions in their contractual undertakings. Where appropriate, legislative changes should be introduced. ICADR has plans to seek corporate pledges and law firm pledges to use ADR.

ADR in India is in its infancy. Attitudes towards it of the professional, industrial and commercial groups are yet to be developed. The beginnings of a professional attitude and approach to the subject are, however, discernible. It is hoped that the coming years will be characterized by a search for alternative means of resolving disputes. The Indian experience in this regard may prove to be great relevance to other developing countries, for many of the problem faced in these countries are similar to those faced in India. The Indian initiative should not be seen, therefore as having only a local significance.

THE STATUS OF INTERNATIONAL TREATIES UNDER THE CONSTITUTION OF INDIA

Dr. Anita M. Jalisatgi *

International Law is the law which governs the relations of sovereign States *interse*. It consists of rules which are binding upon states in their intercourse with each other.¹ Municipal law or national law is the law of a State which regulates conduct of the individuals within a State. International law may be different from the domestic laws of a country. The two systems are usually understood as distinct legal system of rules and principles. Although international law requires States to carry out its international obligations, it does not lay down uniform pattern to incorporate the same in their municipal sphere. As a result domestic legal systems of different countries vary in respect of implementation of international law at national level. So the States follow different processes of incorporating international law into their domestic legal system, as per their constitutional provisions. The different State practices relating to incorporation of international law into municipal law have been explained by two schools of law – *monist* and *dualist*. Monist school regards international law and municipal law as parts of a single legal system.² International law automatically becomes a part of municipal law in these countries. Dualist school believe that international law and municipal law are two separate laws. Countries which follow dualist thought of school, international law does not automatically become part of national law of that State.

Implementation of International law in India

Few provisions of Indian Constitution specifically deal with international treaties and its implementation. Article 51(c) one of the Directive Principles of State Policy provides that the State shall endeavour to foster respect for international law and treaty obligations.³ Art. 51(c) mentions ‘International Law’ and ‘Treaty obligations’ separately. According to Prof. C. H. Alexandrowicz the expression ‘International Law’ connotes Customary International Law and ‘Treaty Obligations’ stands for obligations arising out of International Treaties. This interpretation seems to be logical in the context of the article as well as the attitudes of courts in India on questions of International Law.⁴ Thus the Indian Constitution attaches much importance to international legal obligations and imposes a positive obligation on the State to adhere to the same. Same view has been adopted by the judiciary. In *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey*⁵ the

* Associate Professor, K.L.E. Law College, Bangalore

¹Oppenheim, *International Law*, Ninth Edition (Longman Group U.K. Ltd and Mrs. Tomko Hudson, 1992) Vol I at 4.

²D.J. Latham Brown, *Public International Law*, London, Sweet & Maxwell (1970), at 265.

³The state shall endeavour to –

a) promote international peace and security

b) maintain just and honourable relations between nations

c) foster respect for International Law and Treaty obligations in the dealings of organized people with one another; and

d) Encourage settlement of International dispute by arbitration.

⁴ M. K. Nawaz, ‘International Law on the contemporary Practice of India Some Perspectives’, Proc, ASIL, April 25 – 27 (1963), p 275 at p.278; see also C.H. Alexandrowicz, ‘International Law in India’, ICLO (1952), p.292. Cited in Dr. S. K. Kapoor ‘Human Rights under International Law & Indian Law’, Central Law Agency, Allahabad 15th ed., 2004, p.109.

⁵ AIR (1984) SC 667

Supreme Court held that the Indian Courts shall apply customary International Law in India to the extent they are not inconsistent with the municipal laws. Similarly in *People's Union for Civil Liberties v. Union of India*⁶, the Supreme Court observed that "It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law." These decisions of Supreme Court makes it clear that customary International Law are implementable in India without enabling legislation provided those are not against municipal law.

Implementation of International Treaties in India

Treaties acquire a prominent place in international relationship. Entering into International treaties is one of the characteristic features of State sovereignty.

A treaty is an official written agreement that States use to legally bind themselves. International treaties are the result of the negotiations between the States and are governed by international law. Here again, the process of implementation of international treaties at national level varies in different countries. In other words, countries which follow monist school as soon as State ratifies or accedes to an international treaty that becomes part of municipal law. Under such systems, treaties are generally considered to be self-executing treaties. Countries which follow dualist school, treaties in are not self-executing, that is, it does not have the force of law without the passage of supplementary domestic national legislation.

India as a sovereign state has entered into several international treaties. It is well known basic principle of the International law that States need to carry out its obligations under international treaties.⁷

To fulfil this obligation, Article 253 of the Constitution of India provides that Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or any decision made at any international conference, association or other body.⁸ Ordinarily speaking, Constitution of India provides for division of legislative powers between Union and State Governments. The Parliament cannot make a law with respect to a matter in State List. Article 253 is one of those set of Articles, which provides certain exceptional situations in which the Parliament can legislate with respect to which matters falls under the State List. Thus although India is a federal nation with separation of legislative powers between the Centre and the States, the Union Parliament enjoys very wide powers when it comes to the implementation of a treaty. Parliament in India can even encroach upon areas within the legislative competence of States in giving effect to the provisions of an international treaty or convention. Further, under Article 246, Parliament has exclusive power to

⁶ AIR 1997 SC 568

⁷ The doctrine of "*Pacta sunt servanda*" provides that every treaty in force is binding upon the parties to it and must be performed in good faith. This principle is incorporated in Article 26 and Article 27 of the Vienna Convention, 1980 which lays down that every treaty in force is binding upon the parties to it and must be performed in good faith and a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.

⁸ Article 253 reads "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, associated or other body."

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enact a law on the matters enumerated under List I of Seventh Schedule of the Constitution (Union List). As Entry-14 of Union List deals with treaty-making power, Parliament is empowered to enact legislation for the same. Thus under the scheme of the Constitution, international treaties can be legally enforceable within the municipal sphere of India only when Parliament enacts an enabling legislation incorporating it under the domestic system. But Article 73 of the Constitution provides that the executive power of the Central Government shall extend to the matters with regard to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Executive powers of the Union of India are specifically vested in the President under Article 53 of the Indian Constitution. Apart from vesting the executive power, this provision also provide for the exercise of such executive power either by him directly or through the officers subordinate to him in accordance with the Constitution.

However, executive power of government of India to enter into international treaties does not mean that international treaties are enforceable upon ratification. This is because Indian Constitution follows the “dualistic” doctrine with respect to international law. Therefore, international treaties do not automatically form part of national law. They must, where appropriate, be incorporated into the legal system by a legislation made by the Parliament. The requirement of ratification by Parliament will ensure that international agreements and treaties with far reaching implications are subjected to a closer legislative scrutiny and a wider political and public discussion. But in the absence of a specific provision stipulating the procedure for the negotiation and ratification of treaties, the exercise of this power has by and large remained a preserve of the executive, which has tended to interpret Article 73 to mean that its authority extends over the subjects included in the Union List.

An examination of Constitutional provisions clearly show that even though executive has the power to enter into treaty, implementation of treaties has been made a subject of Parliament and therefore treaties do not automatically become part of municipal law. They have to be transformed into domestic law by a legislative Act. Thus, though signing and ratifying an international treaty is within the domain of the executive, implementation of such treaty falls under the domain of Parliament as is explicitly provided under Article 253.

Judicial Reflections

Thus how far these treaties entered by the executive bodies are enforceable in the municipal sphere of democratic country like India without an enabling legislation is a controversial issue.

In *Bangalore v. Union of India*⁹ Karnataka High Court held that “*if the Parliament does not enact any law for implementing the obligations under a treaty entered into by the Government of India with foreign countries, courts cannot compel Parliament to make such law and in the absence of such law, Court cannot also enforce obedience of the Government of India to its treaty obligations with foreign countries.*”

⁹ AIR (1983) Kar 85

The Division Bench of the Rajasthan High Court in *Birma v. State*,¹⁰ while considering the question as to whether a treaty between the British Government and the Princely State of Dholapur, which was not given effect to by means of legislative enactment, could be regarded as part of municipal law, held that “...*Treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority.*” In *Nanka v. Gov. of Rajasthan*¹¹ Court held that “**Treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislative authority.**”

Hence according to these decisions treaties entered into by the Union of India do not become enforceable at the hands of our courts and they do not become part of our domestic law.

Implementation of International Human Rights Treaties in India

Even in case of Implementation of International Human Rights Treaties in India courts are facing same dilemma. For example in *Xavier v. Canara Bank Ltd.*¹² the issue was whether provisions of International Covenants/Treaties to which India is a party become part of the municipal law of India. In dealing with this question, the Kerala High Court answered the question negatively.

“.....The remedy for breaches of International Law in general is not be found in the law courts of the State because *International Law per se or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken.* I agree that the Declaration of Human Right merely sets a common standard of achievement for all peoples and all nations but cannot create binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated, but individual citizens cannot complain about their breach in the municipal courts even if the country concerning has adopted the covenants and ratified the Optional Protocol. *The individual cannot come to court but may complain to the Human Rights Committee, which in turn, will set in motion other procedures. In short, the basic human rights, enshrined in the International Covenants above referred to may at best inform judicial institutions and inspire legislative action within member –States but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of Judiciary.*

Same view was expressed by the Supreme Court in *Jolly Verghese v. Bank of Cochin*¹³ “*India is now a signatory to international Covenant on Political and Civil Rights and Art. 51(c) of the Constitution obligates the States to “foster respect for international law and treaty obligations in the dealings of organized peoples with one another”. Even so, until the municipal law is changed to accommodate the Government what binds the court is the former, not the latter.*

But in *Visakha v. State of Rajasthan*¹⁴ while dealing with the question the Supreme Court through judicial activism went one step ahead and held that international Human rights treaties which are ratified by India and which are promoting fundamental rights are enforceable without

¹⁰ AIR 1951 Raj 127

¹¹ [1951] AIR (38) Raj. 163

¹² 1969 Ker L T 927

¹³ (1980 (2) SCC 360

¹⁴ (1997) 6 SCC 241

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any enabling legislation. The court was concerned in this case with the protection to be afforded to working women from sexual harassment at workplace so as to make their fundamental rights meaningful. Relying upon Articles 14, 15, 19(1)(g) of the Constitution, the court observed that “any international convention not inconsistent with the fundamental rights and in harmony with this spirit must be read into these provisions to enlarge the meaning and content thereof to promote the object of the Constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact law for implementing international conventions and norms by virtue of article 253 read with entry 14 of the Union List in the Seventh Schedule to the Constitution. Article 73 is also relevant. It provides that the executive power of the Union shall extend to matters with respect to which Parliament has power to make laws. The executive power of the Union is therefore, available till Parliament enacts legislation to explicitly provide the measures needed to curb the evil.” The Court relied upon the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) which has been ratified by the Government of India.

In *D.K. Basu v. State of West Bengal*¹⁵ the Government of India had acceded to and ratified the International Convention on Civil and Political Rights, 1966. Article 9(5) of the said Convention declares that “anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation”. The Government of India had, however, made a reservation to this clause while ratifying the said Convention saying that Indian law does not recognize any such right. The Supreme Court however opined that “That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right of a citizen. There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life; nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.” This decision indicates not only a recognition of an International Covenant ratified by India but also a readiness to ignore the reservations appended by our country while ratifying the Convention, in the light of the law developed by the Supreme Court.

In *Githa Hariharan v. Reserve Bank of India*,¹⁶ where the Supreme Court held that “the CEDAW and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June, 1993. The interpretation that we have placed on Section 6(a) of Hindu Maintenance and Guardianship Act, 1956 gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to international convention and norms for construing domestic laws when there is no inconsistency between them.”

Thus, in absence of specific domestic legislation enacted by the Parliament, implementations of treaties are not justifiable in Indian courts. However, a perusal of the jurisprudence shows that even though initially the domestic courts in India have been reluctant to incorporate international treaty provisions into our domestic courts unless an enabling provision

¹⁵ (1997 (1) SCC 416

¹⁶ AIR 1999 2. SCC 228

has been passed to that effect by the legislature, in the later years pro-active role is being played by Indian judiciary in implementing India's international obligations under international treaties particularly when the matter deals with protection of Human Rights.

RESETTLEMENT AND REHABILITATION OF THE DISPLACED AND THE PROJECT AFFECTED FAMILIES IN INDIA – AN ANALYSIS

Dr. Shweta Deshpande*

I. Introduction

After independence, when India launched the task of nation building, it chose the path of planned development. This was flagged off with the launching of five-year plans. Since economic development was conspicuously poor, planners focused more on economic development defined mainly as the growth of GNP, which was symbolized by new factories, dams, mega projects, mining etc.¹ Dams were even referred to as the '*temples of modern India*' and as the '*symbols of progress and prosperity*'. Though these mega projects have provided power to growing industries, irrigation to thirsty lands and above all, have brought economic prosperity to the nation, they have nevertheless, led to the forced displacement of thousands of people from their ancestral lands. The temples of modern India have become temples of doom for uprooted people. Such projects have changed the patterns of the use of land, water and other natural resources that prevailed in these areas.² Thousands of people have been compelled to leave their homes and disrupt the way of life built up by their forefathers. In such circumstances it is essential that there should be clearly defined law and policy with regard to the resettlement and rehabilitation of such persons. The present paper examines the legal attempts made in India to resettle and rehabilitate the displaced people and the R&R provisions of the newly passed Right to Fair Compensation and Transparency in Land acquisition, Rehabilitation and Resettlement Act, 2013.

II. Displacement, Resettlement and Rehabilitation Policy in India Post Independence

Displacement due to 'development' in India is not new, though resettlement and rehabilitation as a policy measure certainly is. The colonial period has produced a vast segment of displaced people. The forest resources, river systems and mineral base that attract the 'developmental projects', have already seen a 'displaced', segment of the Indian society. In the Indian context, it is of interest to note that most of the developmental projects are located in the most backward areas and populated by various small nationalities otherwise called tribals. These segments, with the enactment of land settlement laws, forest laws and commercialization of forest products and minerals, have undergone a metamorphosis, where legally the access to the various natural resources are denied and these segments are treated as hostages within their environment. Another productive segment was also a part of the displacement due to the process of de-industrialization and forced commercialization of agriculture. These comprise the differentiated

* Lecturer, KPES Law College, Dharwad.

¹ Mohanty Biswarajan, "Displacement and Rehabilitation of Tribals", *Economic and Political Weekly*, March 26, 2005, p.318.

² Goyal, Sangeeta, "Economic Perspectives on Resettlement and Rehabilitation", Vol.31, No.24, *Economic and Political Weekly*, June 1996.

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peasantry, the artisanal groups and the traditional service groups.³ Any resistance to the displacement was treated as a 'law and order' problem, so no question of R & R policy. Land was acquired by the draconian provisions of the Land Acquisition Act 1894, with some amendments in 1967 and 1984, to be a weapon in the hands of independent Indian state for acquiring land from its citizens.

Independent India's Nehruvian development model based on development of heavy industries found a nationalistic fervour with planners and its privileged citizens, that there would be large-scale displacement, and in fact Nehruji while speaking to displaced persons of Hirakud Dam in 1948, said 'if you are to suffer, you should suffer in the interest of the nation'. Barring a few exceptions, most pre 1980 projects did not have a clear-cut resettlement plan. Resettlement was undertaken on case- to - case basis.⁴ Only National Thermal Power Corporation (NTPC) and Coal India Limited (CIL), two government undertaking formulated R & R policy and constituted R & R departments to administer it.⁵ As a result of this adhoc approach many of the displaced were left out of the process and even though there is an absence of accurate national database studies on displacement, a study for 1951-1995 completed in six states and other research show that their real number from 1947- 2000 probably runs into millions.⁶

At the national level, the first policy draft was prepared in 1985 by a committee appointed by the department of tribal welfare when it found that over 40% of the displaced people and project affected families in 1951-1980 were tribals. The next draft came from the ministry of rural development eight long years later in 1993 and the third in 1994. There was silence till 1998 when another draft came out but the ministry that prepared it also prepared amendments to the Land Acquisition Act 1894. A meeting convened by the ministry of rural development in 1999 ended with an implicit understanding that a policy would be prepared first and any amendments to Act would be taken up later.⁷ At the state level, although as early as in 1985 Madhya Pradesh did enact a law for resettlement and rehabilitation, but that did not apply to central government projects but to irrigation and power projects. The State of Karnataka also enacted a rehabilitation law in 1987 with the same limitations as that of Madhya Pradesh. The Maharashtra Government enacted a Rehabilitation Act in 1986 that received assent of the President in 1989. Four other States of India viz., Andhra Pradesh, Tamil Nadu, Orissa and Gujarat issued government orders/resolutions on the rehabilitation of families affected by displacement.⁸

At this level, what was really needed was a legislation with clearly defined objectives on resettlement and rehabilitation, since rehabilitation of people affected by development projects

³ M Bharathi & R.S.Rao, 'Linking Development to Displacement', *Economic and Political Weekly*, July 10-16, 1999.

⁴ To mention a few, there were projects like Nagarjunasagar, Hirakud, Tungabhadra and Mayurkshi dams; the Rourkela, Bhilai and Bokaro Steel plants, several defence establishments, Coal mines, etc, which did offers resettlement in the form of house sites to the displaced.

⁵ Mohammad Asif, 'Why Displaced Persons Reject Project Resettlement Colonies', *Economic and Political Weekly*, June 10, 2000, pp 2005-08

⁶ Walter Fernandes, 'Rehabilitation Policy for the Displaced', Vol.39, Issue 12, *Economic and Political Weekly*, March, 2004, pp 1191-1193.

⁷ *Ibid.*

⁸ Saxena N.C., 'The draft National Policy on Resettlement and Rehabilitation', Keynote address at National Seminar on 'Urgent Issues in Displacement, Resettlement and Rehabilitation', IGNOU, Febraury6-7, New Delhi.

does not mean just monetary compensation and resettlement. Rehabilitation means restoration and improvement of the living conditions of the Project Affected Families (PAFs) and not just giving money, which in most cases is spent on towards loan repayment and sheer domestic consumption. However, instead of a law, a nicely worded policy document was promulgated. The department of land resources of the ministry of rural development published a National Policy on Resettlement and Rehabilitation on February 17, 2004 on the eve of Parliamentary elections held in May 2004. The NRPR 2004 did not take into account many pertinent issues relating to R&R and remained ineffective in its implementation. On October 2007, the Union Cabinet approved for the 'National Policy on Rehabilitation and Resettlement, 2007' to replace the National Policy on Resettlement and Rehabilitation for Project Affected Families, 2004. Although NRPR 2007 had many interesting statements,⁹ the trouble with all these statements was that, there was no mechanism to verify the compliance of these statements. Provisions relating to providing of land were qualified with the terms as far as possible,¹⁰ or if government land is available in resettlement area,¹¹ or to the extent possible,¹² etc. The employment provisions of NRPR 2007 were also qualified with subject to the availability of vacancies and suitability of the affected person for the employment.¹³ The policy also had grey areas in the matters relating to powers of the commissioner, who was responsible for supervising and implementing the formulation of resettlement and rehabilitation plans and schemes, grievances and redressal mechanisms including the ombudsmen.¹⁴ The policy did had certain potential features like the need for social impact assessment¹⁵ and the mandatory nature of SIA clearance,¹⁶ amongst others. After a gap of eight long years, finally a legislation is passed to address effectively the issues relating to R&R.

III. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013: An analysis

The newly passed legislation Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act sets out to reconcile two agendas that have so far clashed. It aims to secure the land requirement of the Governments development agenda while addressing the mounting resistance of people whose land is acquired. Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013, is a legislation that was passed on 29 August 2013 in the Lok Sabha and on 4th September 2013 in Rajya Sabha. The Bill received the assent of the President of India, Pranab Mukherjee on 27th September 2013.

⁹ Prior to initiating the acquisition of land for a project, the appropriate government should, *inter alia*, take into consideration the alternatives that will (i) minimize the displacement of people due to the acquisition of land for the project ;(ii) minimize the total area of land to be acquired for the project; and (iii) minimize the acquisition of agricultural land for non-agricultural use in the project suitable institutional mechanism should be developed and adapted by the appropriate government for carrying out the task in transparent manner clause 1.4 NRPR 2007.

¹⁰ Cl.5.5 (vi) of NRPR 2007.

¹¹ Cl 7.4 of NRPR 2007.

¹² Cl 7.24.2 of the NRPR 2007.

¹³ Cl 7.13.1 (a) of the NRPR 2007.

¹⁴ Clause 8 of the NRPR 2007.

¹⁵ Cl 4.1 of the NRPR 2007, when a project involves involuntary displacement of 400 or more families *enmasse* in plain areas, or 200 or more families *enmasse* in tribal or hilly areas, DDP block areas mentioned in sch.v or sch.vi to the Constitution. DDP block means a block identified under the Desert development Programme of the Government of India.

¹⁶ Cl 4.6 of NRPR 2007.

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The Act shall be notified in the year 2014. The new Act is a major step forward because it links land acquisition with resettlement and rehabilitation. By doing so, it brings to the forefront questions that have long since been at the heart of conflict around land acquisition:

- When can the government legitimately exercise its powers of ‘eminent domain’?¹⁷ and
- How Compensation and Rehabilitation and Resettlement procedure should be designed to counter the negative impacts on displaced people.¹⁸

The notion of eminent domain (restriction on the definition of public purpose) provides detailed listing of public purposes. All “infrastructure” activities notified by the government with the exception of “private hospitals, private educational institutions and private hotels” constitute a legitimate public purpose for which the government may forcibly acquire land. Land may also be acquired for industrial corridors, mining, urban and rural development, sports, healthcare, transport and space programmes. The government may acquire land for these purposes for public private partnerships as well as for private companies.¹⁹ Further the government retains the power to add to the definition “infrastructure” by notification.²⁰ The urgency clause is limited to cases involving India’s defence, national security or for emergencies due to natural calamities. Under the 1894 Act this clause was notoriously misused for ordinary acquisitions, in order to bypass the procedures prescribed under the Act. But now, under the new Act, its limited application should curb such misuse.

As far as compensation payable to the affected families, is concerned, the new legislation increases the compensation payable upon acquisition to four times the value of the average of the registered sale deeds in the rural areas, and two times in the urban areas.²¹

Over five chapters and two entire schedules have been dedicated to outlining the elaborate process (and entitlements) for resettlement and rehabilitation. To address historical injustice, the current law applies retrospectively to cases where no land acquisition award has been made. Various rehabilitation and resettlement benefits are given for farmers, landless and livelihood losers. All the affected families are entitled to a house, provided they have been residing in an area for five years or more and have been displaced. If they choose not to accept the house, they are offered a one-time financial grant in lieu of the same. All the affected families are given a choice of annuity or employment. Provisions for time limits are found for various R&R entitlements.²² The third schedule lists the infrastructural amenities that have to be provided to those who are displaced.

¹⁷ Eminent domain means forcibly when the government can acquire land in exchange for compensation of previous owners and users.

¹⁸ Oxfam India Policy Brief, No.2, Oct 2012 <http://www.oxfamindia.org/sites/default/files/land-acquisition-bill-proofed%20>.

¹⁹ Section 2(1) of Act.

²⁰ This is a more restricted residuary powers than that under 1894 Act, which enabled the government to acquire land for any aim the government deemed a ‘public purpose’.

²¹ Section 21 to 30 of the Act.

²² Section 31, Chapter V on R&R Award.

However, providing generous monetary compensation will prove meaningful only when Resettlement and Rehabilitation measures are strengthened. Land should be compensated by land of similar value wherever possible; in other cases, Resettlement and Rehabilitation measures should restore the livelihoods of affected people. The guarantee of employment²³ provided in the current legislation is of little help in that regard, because it holds only person in the household and is not associated with clear conditions of termination. The attribution of single job and money to an entire household will concentrate economic power around the male head of the family.

The social Impact Assessment study and its review by an independent group is the main social safeguard provided by the Act. The study draws on consultations with Gram Sabha members to assess; the nature of public interest involved in the project and its potential benefits compared to social and environmental costs, the number of affected families and the socio-economic impact on adjoining areas, whether the extent of land proposed for acquisitions is bare minimum required, and whether acquisition at an alternate place is not feasible. The assessment is then reviewed by a group of experts, who may, make a recommendation that the project shall be abandoned, if its impacts are deemed unacceptable.²⁴ However, ambiguities in these sentences undermine the reliability of the social safeguard. The binding nature of the recommendation needs to be spelt out in ways that have no room for future interpretations. Monitoring committees at the national and state limits are established to ensure that R&R obligations are met.

A separate chapter has been carved out to protect the interests of the tribals and those belonging to the scheduled castes.²⁵ As far as possible no acquisition shall take place in the scheduled areas.²⁶ And where such acquisitions does take place; it has to be done with the approval/consent of the local institutions of self-governance.²⁷ A Development Plan has to be prepared laying down the details of procedure for settling land rights due but not settled and restoring the titles of tribals on alienated land by undertaking a special drive together with land acquisition.²⁸ The plan must also contain a programme for development of alternative fuel, fodder timber and forest produce within a period of five years sufficient to meet the requirements of tribal communities as well as scheduled castes.²⁹ The scheduled tribes affected families shall be resettled preferably in the scheduled area in a compact block so that they can retain their ethnic, linguistic and cultural identity.³⁰ The resettlement areas predominantly inhabited by the SCs/STs shall get land, to such extent as may be decided by the appropriate government free of cost for community and social gatherings³¹. Fishing Rights for forest dwellers and SCs are protected in case of irrigation/hydel projects.³² If the affected families belonging to SCs/STs are relocated outside of the district, then they shall be paid an additional 25% R&R benefits to which they are entitled in monetary terms along with one-time entitlement of Rs.25,000.³³ All benefits, including the reservation benefits available to the SCs/STs in the affected areas shall continue in the resettlement

²³ Section 31(1) of the Act.

²⁴ Chapter II, Sections 4 to 7 of the Act.

²⁵ Chapter V on R&R award.

²⁶ Section 41 (1) of the Act.

²⁷ Section 41 (2) & (3) of the Act.

²⁸ Section 41 (4) of the Act.

²⁹ Section 41 (5) of the Act.

³⁰ Section 41 (7) of the Act.

³¹ Section 41 (8) of the Act.

³² Section 41 (10) of the Act.

³³ Section 41(11) of the Act.

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area.³⁴ These detailed provisions on R & R of displaced people in the new Act is a welcome measure and hopefully it will benefit the displaced and the project affected families along with ensuring development.

IV. Conclusion

It follows from the above discussion that, the Act has provisions to provide fair compensation to those whose land is taken away, brings transparency to the process of land acquisition, and most importantly assures Rehabilitation and Resettlement of the project affected and displaced people. This legislation is eagerly sought both by industry and whose livelihood is dependent upon land.

³⁴ Section 42(1) of the Act.

CRITICAL ISSUES CONCERNING THE JURISDICTION OF INTERNATIONAL CRIMINAL COURT

Dr. Jagadish S. Halashetti*

1. INTRODUCTION

On 17th July, 1998 in Rome, 120 nations decided to establish a permanent International Criminal Court (herein after referred as ICC) to try individuals for the most serious offences of global concern, such as genocide, war crimes, and crimes against humanity. On 1st July, 2002 the Statute establishing the ICC came into force after receiving sixty ratifications.¹

One of the most delicate issues in the creation of the ICC was the determination of its jurisdiction. Articles 5 to 21 of Part 2 of the Statute of ICC govern the jurisdiction, admissibility and applicable law.

United States America, China and India and many other countries have not ratified the Rome Statute establishing the ICC raising several objections including the bases and scope of the jurisdiction of the ICC. In this article an attempt is made to analyze the issues concerning the jurisdiction of the ICC based on the objections raised by the countries during the process of creation of the ICC.

2. THE JURISDICTION OF THE ICC - NATURE, BASES AND SCOPE:

2.1 Nature

Jurisdiction refers to the legal parameters of the Courts operations, in terms of subject matter [jurisdiction *ratione materiae*], time [jurisdiction *ratione temporis*], space/territory [jurisdiction *ratione loci*] as well as over individuals [jurisdiction *ratione personae*].²

The ICC has two types of jurisdiction; (1) automatic, and (2) optional. Once a State ratifies the treaty, the ICC gets automatic jurisdiction,³ on the other hand non-party States may also accept the jurisdiction by lodging a declaration of accepting the jurisdiction of the Court **over a crime in question**. This is optional jurisdiction.⁴

*LL.M., Ph.D. Advocate, High Court of Karnataka, Bangalore.

¹ As on 08-10-2013, 122 States are Parties to the Rome Statute of the ICC. Out of 122 States, 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States. See the official website of ICC at http://www.icccpi.int/en_menus/icc/Pages/default.aspx

² William A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed., Cambridge, London, 2004, p.68.

³ Article 12 (1) of Statute of ICC.

⁴ Article 12 (3) of Statute of ICC.

Critical Issues Concerning The Jurisdiction of International Criminal Court

The jurisdiction of the court is complementary to national criminal jurisdiction of State parties.⁵ In other words, the ICC does not replace national courts but complements, in that the national courts will have first right to prosecute and punish crimes covered under the Statute unless they are unwilling or unable genuinely to carry out the investigation or prosecution.

2.2 Bases:

The bases of the jurisdiction of ICC are (1) territorial principle and (2) active personality principle. For the ICC to exercise jurisdiction, the State within whose territory an offence is committed [territorial principle] or the State of nationality [active personality principle] of accused, must be a party to it or accept its jurisdiction on ad-hoc basis (over a crime in question). The ICC may exercise universal jurisdiction only when Security Council refers a matter to the Court under Chapter VII of the Charter of U.N. which binds non-party States.⁶

2.3 Scope:

The scope of the jurisdiction of the ICC is limited to the most serious crimes of concern to the international community as a whole. Thus the crimes within the jurisdiction of the court are;

- [1] the crime of genocide
- [2] crimes against humanity
- [3] war crimes and
- [4] the crime of aggression⁷

It has jurisdiction only with respect to crimes committed after the entry into force of this Statute.⁸ Further, it may exercise jurisdiction with respect to crimes within its jurisdiction only when if it is referred by;

- [a] State parties
- [b] Security Council acting under Chapter VII of the Charter of U.N.
- [c] Prosecutor of the Court.⁹

⁵ Article 1 of Statute of ICC.

⁶ Article 12 and 13 of Statute of ICC. See also V.D. Sharma, *International Crimes and Universal Jurisdiction* I.J.I.L., vol.42 2002, p.153.

⁷ Article 5 (1) of Statute of ICC. The Review Conference (in terms of Article 123 for Review of Statute) held in Kampala, Uganda from 31 May to 11 June 2010 adopted (first amendment) a definition of the crime of aggression, thereby allowing the ICC to exercise jurisdiction over the crime for the first time. The second amendment adds to Article 8(2) (e) three clauses which make it a war crime to employ chemical weapons or expanding bullets in an armed conflict *not of an international character*. The Statute already makes the use of chemical weapons and expanding bullets a war crime in armed conflicts between countries.

⁸ Article 11 (1) of Statute of ICC.

⁹ Article 13 of Statute of ICC.

It may also exercise jurisdiction when a non-party State accepts the jurisdiction of the court by lodging a declaration to that effect with the Registrar of the Court over a crime in question.¹⁰

3. CRITICAL ISSUES CONCERNING THE JURISDICTION OF THE ICC

A. ISSUE OF COMPLEMENTARITY JURISDICTION

The Preamble and Article 1 of the Statute of ICC emphasize that the jurisdiction of the ICC would be complementary to national criminal jurisdiction.¹¹ It means that domestic courts will have the first right to initiate proceedings and punish unless that State is unwilling or unable genuinely to carry out the investigation or prosecution. This has been called the complementarity jurisdiction.

Several aspects of complementarity are addressed in specific provisions. Article 17[1] states that a case is inadmissible when it is being investigated or prosecuted by a State that has jurisdiction over it, or when the case has already been investigated and the State has decided not to prosecute. In such circumstances the Court may only proceed where the State is unwilling or unable genuinely to investigate or prosecute the case.¹²

Against this backdrop, the critical issues that arise for consideration as to the complementarity jurisdiction of the ICC are as follows;

[1] It has reduced the “supremacy” of the ICC over domestic courts;

¹⁰ Article 12 (3) of Statute of ICC.

¹¹ Preamble of the Statute of ICC reads as that “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions...”, and Article 1 reads as “An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”.

¹² Article 17 reads as (1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

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[2] It will block the competence of the ICC's jurisdiction over crimes of international importance, as States exercise their first right of prosecution and thereby reducing the number of cases on which the ICC has competence to decide.

[3] A subsequent trial by ICC after holding the national trial proceedings illegitimate, may be blocked by the application of the rule against double jeopardy [ne bis in idem] set out in Article 20 of the Statute of ICC and codified in important human rights treaties such as International Covenant on Civil and Political Rights, 1966 (ICCPR).¹³

[4] It provides an opportunity to States to shield an offender from criminal responsibility, or conduct proceedings in a manner inconsistent with intent to bring the person concerned to justice.

[5] There is a danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries by holding their trials, illegitimate or sham.

[6] What happens in a case where an individual properly tried, but then is subsequently pardoned under the domestic law? The ICC would seem to be permanently barred from intervening.

For example: In the early 1970's William Calley was convicted of war crimes for an atrocious massacre in My Lai village in Vietnam. Justice had done its job and then he was duly sentenced to a term of life imprisonment. Then the U.S. President, Richard Nixon, intervened and granted him a pardon after only a brief term of detention had been served.¹⁴

B. ISSUE OF "ROLE OF SECURITY COUNCIL"

Role of the Security Council in the jurisdiction of the ICC has been the subject matter of controversy. The provisions in question are Articles 13 and 16 which authorize the Security Council to **refer**¹⁵ or **defer**¹⁶ a matter to the ICC respectively.

The following are the objections to the Security Council's power under Article 13 to refer a matter to the ICC under Chapter VII of the Charter of the United Nations;

[1] It would amount to granting special power to the five permanent members having veto power to decide upon a particular situation on purely political condition, for example, Security Council did not create ad-hoc Tribunals in cases of Pinochet, Military Junta in Myanmar, Pol Pot regime in Cambodia, Israeli Prime Minister Sharon, U.S.A, Action in Vietnam but created only in the cases of Yugoslavia and Rwanda.

[2] It would amount to selective criminal justice administered according to the sweet will of the powerful States, exclusively.

[3] Three of the five permanent members of Security Council [USA, China and Russia] are not party to the Rome Statute of ICC, however are in a position to impose obligations on non-State

¹³ Article 14 (7) of ICCPR says that "No one shall be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with law and penal procedure of each country"

¹⁴ William A. Schabas, *Op.cit.*, p.88.

¹⁵ Article 13 (b) reads as "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;...."

¹⁶ Article 16 reads as "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

parties. Since there is no precondition for the exercise of jurisdiction when a situation is referred by the Security Council to the ICC this provision will enable these non-parties to bind through the Court the other non-parties.

[4] The Security Council will not be in a position to refer a matter to the Court against one of the permanent members, since guilty State may block such an attempt by exercising its veto power.

[5] It would violate sovereign equality of States as well as equality before law, because it contains an assumption that the five veto-wielding States do not by definition commit the crime covered by the ICC Statute, or in case they so commit, that they are above the law and thus possess *de jure* impunity from prosecution while individuals in all other States are presumed to be prone to committing such international crimes.

[6] It violates the basic principle of treaty law that treaties do not bind third States without their consent.

The Principal objections to Article 16 which authorizes the Security Council to make a request to the ICC to “defer” a matter for a period of 12 months [renewable] by adopting a resolution under Chapter VII of U.N. Charter are as follows:

[7] It violates the fundamental principle of International Law by conferring on the Security Council a power which it does not have under the Charter and which it cannot and should not be given by any other instrument.

[8] The time period of 12 months ensures the continuance of serious crimes without any hindrance and allows destroying crucial evidence that may serve the purposes of justice at a future stage.

[9] It would block the ICC’s jurisdiction over such matters for a indefinite period as the Security Council is authorized to renew the period for another 12 months and so on.

[10] It would authorize the permanent members of the Security Council to protect their nationals from ICC jurisdiction.

[11] It would undermine the ICC’s impartiality and independence and would represent unwarranted political interference in a judicial body.

[12] It is difficult to understand as to, on the one hand the ICC is being set up to try crimes of the gravest magnitude, on the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. This fear is evident from the adoption of Resolution 1422 by the Security Council which blocked the ICC’s jurisdiction over acts or omissions, relating to a U.N. established or authorized operation for twelve months.¹⁷

[13] It amounts to rewriting the Rome Statute in as much as it nullifies the legal effect of national laws of several States that have incorporated Rome Statutes’ “prosecute or surrender obligations”.

¹⁷ UN Security Council Resolution 1422 was adopted unanimously on 12 July 2002. The Resolution granted immunity to the members of United Nations Peace Keeping Forces who are from countries that were not party to the ICC from prosecution by the ICC. The resolution was passed at the insistence of the United States, which threatened to *veto* the renewal of all UN Peace Keeping Missions unless its citizens were shielded from prosecution by the ICC. Resolution 1422 came into effect on 1 July 2002 for a period of one year. It was renewed for twelve months by Resolution 1487, passed on 12 June 2003. However, the Security Council refused to renew the exemption again in 2004.

C. ISSUE OF “ROLE OF PROSECUTOR”

Article 15 provides *proprio motu* powers to the Prosecutor. The Prosecutor under his independent investigative powers may bring a case before the ICC. He can for this purpose, receive information on potential crimes from a number of sources including States, organs of U.N., inter-governmental and non-governmental organizations and other reliable sources. This power of the Prosecutor was strongly opposed by all the permanent members of the Security Council [except U.K.] and other participating countries including India.¹⁸

The following are the principal objections raised against the powers of the Prosecutor.

[1] Given the nature of appointment of Prosecutor, he may act under political consideration than judicially and make him the most powerful man in the world.

[2] It would be inappropriate to vest such a competence, which pertains to States, in the hands of an individual Prosecutor to initiate investigations *suo motto* and thus trigger the jurisdiction of the Court. The distinction between the States, on the one hand, and the professional role of the Prosecutor on the other hand as far as invoking the jurisdiction of ICC should be maintained. These two should be clearly distinguished.

D. ISSUE OF “NEGATION OF JURISDICTION”

According to Article 124 on becoming a party to the Statute, a State may declare that for a period of **seven years** after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of war crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.

If a State party chooses this option, it will have the effect of negating the concept of inherent or automatic jurisdiction of the ICC over all crimes listed in Article 8. Another consequence of Article 124 read with Article 12 is that a State party can protect its own soldiers from being tried for war crimes before the ICC, whereas a non-State party may find its own soldiers tried by the ICC.

Thus, in view of this provision the State which becomes party to the Statute will be at an advantage, compared to a State which decides not to accede to the Statute.

Another aspect of negation of jurisdiction is provided under Article 98[1] which states that the Court may not proceed with a case which requires a State to act inconsistent with international law with respect to the State or diplomatic immunity of a person or property of a third State. Article 98[2] provides that the court may not proceed with a case which requires a State party to act inconsistently with its obligations under international agreements.

¹⁸Y.S.R. Murthy, *A Giant Step Forward or Delusion – An Evaluation of the Rome Statute of the International Criminal Court*, I.J.I.L., Vol.40, 2000, p.521.

Even though the Statute does not recognize any immunity to a head of State or diplomat, it allows States to respect for such immunities provided under International Law. This indeed hampers the exercise of the jurisdiction of the ICC over such persons in case they commit crimes within the scope of ICC's jurisdiction.

Article 98[2] is a dangerous provision, which sows the seed of destruction of the ICC.¹⁹ There are about 105 such agreements in force mainly amongst the NATO countries, which ensures that ICC has no jurisdiction over crimes committed on the territory of or by nationals of NATO countries.

What happens in case States parties have entered into such agreements with non-State parties or non-State with non-State parties? The result is that ICC will be precluded from exercising its jurisdiction over such crimes. For example U.S.A. has concluded such agreements with Romania, Israel, East Timor, Tazakistan and India.

E. ISSUE OF 'LIMITED SCOPE OF JURISDICTION'

According to Article 5 of the Statute, the jurisdiction of the court is limited to the most serious crimes of concern to the international community as a whole, namely;

- [1] the crime of genocide;
- [2] crimes against humanity;
- [3] war crimes;
- [4] crime of aggression

Many countries including India have objected to the limited scope of jurisdiction of the ICC.²⁰ According to them, crime of terrorism, plane hijacking, drug trafficking, listing nuclear weapon, weapon of mass destruction, whose use is banned as war crimes, should be within the reach of Court's jurisdiction. The Review Conference-2010 held at Uganda did discuss this aspect but failed to adopt necessary amendment in this regard.

F. ISSUE OF 'LIMITED BASE OF JURISDICTION'

The jurisdictional scheme reflected in Article 12 of the Statute is based on two fundamental principles of jurisdiction, namely;

- [1] Principle of Territoriality - this enables a State to exercise jurisdiction over an offender if the offence is committed within the territory of the State.
- [2] Principle of active personality - this enables a State to exercise jurisdiction over an offender on the ground that he is a national of the State concerned.

¹⁹ Article 98(2) reads as "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender".

²⁰ B.C. Nirmal, *Jurisdiction of the ICC*, I.J.I.L., vol.3, 2003, p.126.

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It is submitted that the exclusion of two important bases of ICC's jurisdiction has significantly curbed its reach. Firstly, had the 'custodial State' been included, many such perpetrators could have been captured while traveling outside their own countries. Even countries that want to turn over a suspect visiting its territory are helpless due to lack of legal base to do so.

Secondly, had the State of nationality of victim [passive personality jurisdiction] been included, a country could have submitted a case to the ICC if its citizens were victims of these serious crimes in another country.

4. Conclusion

Given the differing political security interests as well as different legal systems of nations, the creation of a permanent judicial body like ICC is a step forward signaling a growing political and legal consensus on the need to rein in impunity. However, having examined the above issues of jurisdiction of the ICC, the question arises as to whether ICC will be able to exercise its jurisdiction fairly and independently making it an effective judicial institution to deal with serious crimes concerning the international community as a whole?

At present 20 cases in 8 situations related to the situations in Uganda, Congo, Sudan and Central Africa, Kenya, Libya, Mali and Cambodia have been brought before the ICC. What is to be noted is that the situations in Iraq, Afghanistan, Sri Lanka and Syria have not been brought to ICC because of political interests and lack of ICC's power to exercise jurisdiction over the situations in these countries. The international community must address the critical issues concerning the jurisdiction of ICC as noted above to make it more powerful. Further, no law, institution is perfect, so also ICC. What ICC has done is, it has created a platform to evolve international criminal jurisprudence and it is in its infant stage. There is a need to strengthen ICC with more jurisdictional capacity in order to ensure international peace, security and above all justice.

AN OVERVIEW OF REGULATION OF IP RELATED TRADE PRACTICES UNDER THE COMPETITION ACT, 2002.

Madivalappa Matolli*

1. Introduction

It is widely believed that the presence of strong intellectual property rights spurs innovation, which in turn leads to higher economic growth and increasing benefits for all. Intellectual property rights (IPRs) attempt to balance long-run incentives for innovation and short-run access to innovation.¹ The argument seems natural as securing property rights is basic for a well-functioning market economy. No economic agent exercises productive effort without the certainty of controlling its fruits.² What is true for physical effort must be true for the intellectual efforts also. Economic propositions justify that ideas should be protected and available for sale, just like any other commodity. There is a general rule that monopoly acquired by IPRs is not bad. There are certain exceptions to this rule. The power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his business. But “intellectual property” has come to mean not only the right to own and sell ideas, but also the right to regulate their use. Consequently, the IP owners tend to indulge in anticompetitive activities. This creates a socially inefficient monopoly, and what is commonly called intellectual property might be better called “intellectual monopoly.” Intellectual property rights grant a degree of exclusivity to the owners, necessarily restricting access of others to the same.³ Competition law on the other hand, seeks to maintain effective access to the market.⁴ The relationship between these two areas of law poses unique challenges to policymakers, particularly in developing countries, the majority of which have little or no tradition in the application of competition law and policies.⁵ There is a seemingly inherent conflict between the two. Yet, there is increasing opinion that the two realms can, not only co-exist but also complement each other. This paper is an attempt to show that the competition regime can also contribute in regulating the anticompetitive trade practices associated with Intellectual Property.

The law of industrial and intellectual property, now universally known as IP law is born out of political and economic revolution all over the world and it reflects a legal framework governing the policies of commercial and industrial development and innovation based on the right of free economic initiative and free market competition. Working out how to balance our

* Principal, Government Law College, Hassan, Karnataka

¹ Margaret Kyle and Yi Qian, “Intellectual Property Rights and Access to Innovation: Evidence from TRIPS”. Available

@http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_econ_ge_3_13/wipo_ip_econ_ge_3_13_ref_kyle.pdf

² The Case Against Intellectual Property Michele Boldrin and David K. Levine University of Minnesota and UCLA January 14, 2012, available <http://www.globalcitizen.net/data/topic/knowledge/uploads/20090503182538579.pdf>

³ W.R. Cornish, Intellectual Property 3 (2003).

⁴ Richard Whish, Competition Law 2 (2005).

⁵ Carlos M. Correa, Intellectual Property and Competition Law, Exploring Some Issues of Relevance to Developing Countries, available at http://ictsd.net/downloads/2008/06/corea_oct07.pdf

commitments to equality and the need to provide sufficient incentives to the creators to ensure an adequate supply of intellectual property goods is a complex task.⁶

2. Relationship between IP and Competition Laws

Both intellectual property and competition regimes pursue the aim of enhancing economic welfare and innovation. But their direct objectives seem to be in conflict. Whereas intellectual property focuses on the reward of inventive effort and the inventor's incentives to innovate by conferring an exclusive right on the use of the invention, competition law emphasises the dissemination of innovation by ensuring diffusion and access. IP regime aims at achieving economic efficiency in the short run by conferring limited monopoly rights on the IP owners. The competition regime aims at ensuring efficiency in the long run by combating anticompetitive practice and by regulating the dominant position.

The economics of competition and antitrust law have a long-lasting tradition of fruitful interaction. Since the very beginning of antitrust legislation, microeconomics has influenced the context as well as the implementation of the law. And as one of the great economists of this century, Lord Keynes, pointed out, practitioners always adhere to the theories of a defunct economist, leading contemporary economists to write papers on the inadequate or outdated application of economics on antitrust legislation.

The interaction between IPRs and competition law is predominantly created by the non-rivalrous and non-excludable nature of intellectual property, which causes the problem of "appropriability".⁷ The creation of this *prima facie* "inherent tension" is due to IPR holders being granted statutory rights to essentially control access to the intellectual property and charging monopoly rents for the use of the IPRs—something apparently in conflict with competition law, which attempts to curtail such market power.⁸ This interface between IPRs and competition law has evolved several types of restraints on competition. While no one has sought to contend that licensing agreements are *per se* anticompetitive, the focus of these restraints is typically a licensing agreement which could adversely affect competition by artificially dividing markets among enterprises and possibly impeding the development of new goods and services.⁹

3. Anticompetitive Nature of other IPRs

While much of the literature on IPRs and competition law focuses on patents, anticompetitive behavior is possible in respect of exercise of other intellectual property rights also. Copyrights, for example, have been involved in important competition law disputes. Copyrights are also capable of creating monopoly power, and that progressive concentration is occurring in

⁶James Wilson, "Ontology and the Regulation of Intellectual Property" Available at <http://www.ucl.ac.uk/~rehbjgs/docs/ontology-ip.pdf> visited on 01-09-2011

⁷ K. Maskus, COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES: INTERESTS IN UNILATERAL INITIATIVES AND A WTO AGREEMENT, <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf>

⁸ A. Ng, D. Liang and P. Waters, INTERSECT BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW, <http://www.chinalawinsight.com/2008/10/articles/corporate/antitrust-competition/intersectbetween-intellectual-property-law-and-competition-law/>

⁹ The Institute of Chartered Accountants of India, COMPETITION LAWS AND POLICIES (2004), at 134.

the majority of information goods markets at both national and international levels. The anti-competitive effects of copyright protection of software, and interfaces in particular, have been central in several cases, notably involving Microsoft. Competition law concerns have also frequently arisen in relation to copyright-collecting societies. Fundamental tension between the goals of trademark and competition law has been observed in some cases as well. Moreover, undue enforcement of IPRs can amount to anti-competitive conduct. In particular, preliminary injunctions may be effectively used to prevent legitimate competition.

Until 2002, India did not have a competition law regime in its true sense as understood now. The earlier regime consisted of the Monopolies and Restrictive Trade Practices Act 1969. However this enactment, sought to be replaced by the Competition Act, enacted in 2002 and amended in 2007.¹⁰ After the enactment of this Act, the nexus between IP and competition has been a subject of constant debate among experts. In light of global developments, including the obligations under the TRIPS and the resultant amendments to the IP regime in India, the ability of the competition regime in India to be able to deal with market power created by IP became very relevant. The Competition Act deals with the same in more than one provision.

The Statement of Objects and Reasons states clearly that the Competition Act is being enacted *inter alia*, to prevent practices which have an adverse effect on competition and to promote and sustain competition in the markets.¹¹ This Act provides that no enterprise or association of enterprises or person or association of persons shall enter into any agreement which causes appreciable adverse effect on competition in India and any such agreement would be declared void.¹² The Act preserves the rights of the IPR holder to prevent infringement and protect these rights, as long as the restrictions imposed by the agreement are reasonable, ensuring that competition policy does not interfere with the reasonable use of IPRs. Section 4 of the Competition Act deals with abuse of dominant position¹³. It is clear that it is the *abuse* and not the existence of a dominant position, which is prohibited by law. Thus, it can be safely deduced that even before the enactment of Competition Act 2002 the unfair trade practices emanating from misuse of IPRs were coming under the ambit of MRTP Act.¹⁴ The exception under section 3 allows for reasonable conditions to be imposed by the IPR holder to protect the rights granted by the relevant IP law. This is to see that the IP protection is not vitiated. At the same time, the exception is only allowed for the purpose of protection of the rights to the extent granted by the IP law; hence the requirement of reasonableness. On the other hand, such an exception has not been carved in section 4 for a number of reasons. First, IPRs may not confer a dominant position in the market; as explained earlier, the legal monopoly conferred by IPRs may not necessarily lead to an economic monopoly and it is the latter that the competition law is concerned with. Secondly, even if IPRs do grant a dominant position, mere existence of market power is not prohibited under section 4. Therefore section 4 makes no exception for IPR-sourced market power.¹⁵ Section 3(5) of the Act

¹⁰ See Statement of Objects and Reasons, Competition Act, 2002.

¹¹ The Indian competition regime is young; this similarity in law to the EC law would allow the Competition Commission of India to draw on the EC competition jurisprudence, which is considered one of the most developed in the world. See Shannad Basheer, *supra* note 57

¹² Section 3(1) and 3(2) Competition Act, 2002

¹³ Wording of section 4 is similar to Art.82 of the EC Treaty.

¹⁴ M. Dugar, Commentary On The MRTP Law, Competition Law & Consumer Protection Law—Law, Practices And Procedures, Volume 1 (2006), p.757

¹⁵ See Rahul Dutta, *Critical Analysis: Reflection of IP in Competition Law of India*, available at <http://www.indlaw.com/display.aspx?4674>

declares that “reasonable conditions as may be necessary for protecting” any IPR will not attract section 3. The expression “reasonable conditions” has not been defined or explained in the Act. By implication, unreasonable conditions that attach to an IPR will attract section 3. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs. For example, a licensing arrangement may include restraints that adversely affect competition in goods markets by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merges the Research and Development activities of two or only a few entities that could plausibly engage in Research and Development in the relevant field might harm competition for development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to anti-competition concerns include cross licensing by parties collectively possessing market power, grant backs and acquisitions of IPRs

5. Trade Practices which attract the Competition law regulation:

A few such practices as enumerated by the CCI¹⁶ are as follows:-

- 1) Patent pooling:- Patent pool is a pool or combination in which the agreements are enforced by centralized control of essential patent rights. It is an arrangement of cross-licensing in which several patent owners join together to make individually held patents available to all members of the group. This occurs when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices. They may earn supra-normal profits and keep new entrants out of the market. The disadvantage of such a pooling is that, if all the technology is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete.
- 2) Tie-in arrangement: - a tying arrangement is a transaction in which the title or use of one item, the tying product, passes to the customer on condition that the customer takes a second item, the tied product, from the seller or lessor.¹⁷ Such condition may be express or implied. A licensee may be required to acquire particular goods solely from the patentee, thus foreclosing the opportunities of other producers. There could be an arrangement forbidding a licensee to compete, or to handle goods which compete with those of the patentee.
- 3) Royalty: - The owner of an IP is entitled to the fruits of it as long as the period of protection subsists. If he reaps reward even after its protection period the same is unreasonable. An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent. Such trade practice is anticompetitive.
- 4) R & D: - There could be a clause, which restricts Competition In R & D or prohibits a licensee to use rival technology.

¹⁶ Advocacy Booklet by Competition Commission of India on INTELLECTUAL PROPERTY RIGHTS UNDER THE COMPETITION ACT, 2002. Available at http://competitioncommission.gov.in/advocacy/PP-CCI_IPR_7_12.pdf

¹⁷ Marcus Mattson, Tying Arrangements-An Update. Available at <http://lawreview.byu.edu/archives/1982/4/mat.pdf>

- 5) A licensee may be subjected to a Condition Not to Challenge the Validity of IPR in question.
- 6) Know-how:- A licensee may require to grant back to the licensor any *Know-how* or IPR acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti-competitive manner.
- 7) A licensor may *Fix the Prices* at which the licensee should sell.
- 8) The licensee may be *Restricted Territorially* or according to categories of customers.
- 9) Package licensing: - A licensee may be coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them. This is known as Package Licensing which may be regarded as anti-competitive.
- 10) A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent may be an anticompetitive practice.
- 11) Restricting the right of the licensee to sell the product of the licensed know-how to persons other than those designated by the licensor may be violative of competition.
- 12) Imposing a Trade Mark Use Requirement on the licensee may be prejudicial to competition, as it could restrict a licensee's freedom to select a trade mark.
- 13) Indemnification of the licensor to meet expenses and action in infringement proceedings is likely to be regarded as anticompetitive.
- 14) Undue Restriction on Licensee's Business could be anticompetitive. For instance, the field of use of a drug could be a restriction on the licensee, if it is stipulated that it should be used as medicine only for humans and not animals, even though it could be used for both.
- 15) Limiting the Maximum Amount of Use the licensee may make of the patented invention may affect competition.
- 16) A Condition to employ or Use Staff imposed on the licensee designated by the licensor is likely to be regarded as anticompetitive.

5. Conclusion

The goal of competition law is not to prohibit the limited monopoly associated with IP but to prohibit anti-competitive conduct of the IP holders. Competition law does accept the fact that the IPRs are legitimate and serve the national economic interest. The trade practices that are regulated by competition law are those which are not considered to be legitimate, i.e. unjustifiable behavior. Intellectual property law and antitrust law share the common goal of “encouraging innovation, industry and competition.” Thus, when properly applied, the two bodies of law complement and reinforce each other. With suitable amendments some ambiguous provisions the Competition Act can really compliment with the IP regime in India.

JUDICIAL INCORPORATION OF HUMAN RIGHTS INTO THE INDIAN LEGAL SYSTEM

Vishnu Prasad R.*

Human rights since the time of World Wars have become an important area of concern and a more permanent issue in the area of world politics. Human rights are the basic rights, which are indiscriminately available to all members of the human family, and they have become the principle of liberation from oppression and domination. Efforts are being made by all the nations to protect and promote those rights among all its subjects.¹ India, by not being an exception, has given recognition to some of the universally recognised human rights in its constitution. This implies that not all the universally recognised human rights get the protection under it. As human rights are interdependent, indivisible and they do empower the growth of individuals, the Judiciary in India has been incorporating some of the 'un-enumerated human rights' into the scope of 'enumerated human rights'.² By this, it discharges its duty as the protector of fundamental rights of the individuals.

Nature and Significance of Human Rights

Human rights are both creations and creators of modernity, the greatest political and legal invention of modern political philosophy and jurisprudence. Human rights construct humans.³ By their nature, the human rights are intertwined, inalienable and indivisible. Rights of men like right to life, freedom of speech and expression, right to dignity, right to food, right to water, right to shelter, right to equality, right to movement, right to privacy, right to equal pay for equal work, *inter alia*, are recognised as essential rights, all along, in all civilised Nations. Western countries have proclaimed and popularised these basic rights as human rights. "So the idea of conferring basic rights to men has had been a feature of all civilised states, but the idea of universalization of such basic rights indeed is the contribution of the western countries."⁴

The need for protecting such basic rights on universal plane gained importance from the time of World Wars. Since then, based on co-operation and co-ordination, all nations are endeavouring to protect and promote the basic rights among its subjects based on equality and

*Assistant Professor, NLSIU Bangalore

¹ The protection of human rights is attempted at universal, regional, and national level. The following are the important three-tier instruments by which the protection is attempted.

Universal level: U.N. Charter, Universal Declaration of Human Rights 1948, International Bills on Human Rights, U.N. Bodies primarily concerned with Human Rights, and Other key international conventions. Regional Level: American Convention on Human rights, European Convention on Human rights, European Social Charter, African Charter, Helsinki Final Act and Arab Commission.

National Level: Constitution of India and Protection of Human Rights Act, 1993.

² If the rights declared under UDHR/ICCPR / ICESCR are also expressly specified in the Constitution of India, then they may be termed as 'specified Fundamental Rights' or 'Enumerated Rights.' If the rights declared under UDHR/ICCPR/ICESCR are not expressly mentioned in the Constitution of India then they may be regarded as 'Un-enumerated Rights.'

³ Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca, Cornell University Press, (1989), p. 88

⁴ See Wiktor Osiatynski: *The Universality of human rights* In Individual and Human Rights, Central European University Reader 2008

non-discrimination.⁵ Human rights very often are expressed and guaranteed by law in the forms of treaties or customary International Law.⁶ The universality of human rights involves the insurance of individual human dignity through states. This idea was perceived in the different International Covenants and conventions that the states and International organizations themselves dictated obligations for ensuring and protecting human rights there into. These International documents clearly recognize the states as first violators of human rights and they indicate that the primary responsibility for protecting human rights will also belong to states. With respect to ensure this obligation of states operating as a protector and violator in the same way, the system has been internationalized.⁷ Universality of human rights is the cornerstone of the International Human Rights Law (IHRL).⁸ IHRL lay down obligations on Governments to act in certain ways or to refrain from certain acts.⁹

“Human rights are universal, not in the sense of being a vernacular of cultural prescriptions, but rather as a language for the bestowal of moral power. Their role is not that of endowing culture with a substantive content but of seeking to condition all actors in such a way that they can liberally fashion that content.”¹⁰ Universal nature of human rights have been criticised by few Islamic States as it interferes with their culture. That is on one hand, the Islamic States distinguish their civilisation from others and the cognisance of this is not taken by the IHRL, and on the other hand, the IHRL fails to recognise the cultural rights of such State as part of international human rights standards but imposes international standards of human rights to be adopted by all States.¹¹

Though universality of human rights is debated, the significance of it is well accepted by all States and attempts are made by States to protect and promote human rights through norms. “Normative explanations of the democratic peace emphasize that democratic societies internalize non-violent and non-coercive approaches to the resolution of the great majority of domestic political conflicts. The normative approach argues that the values of nonviolent and non-coercive conflict resolution serve as the basis for negotiations when disagreements occur at the international level.”¹² Human rights standards are to be construed as inclusive and non-exhaustive as the dimensions of human rights and the moral standards of the people are subjected to change.

⁵ The protection of human rights is attempted at universal, regional, and national level. The following are the important three-tier instruments by which the protection is attempted.

Universal level: U.N. Charter, Universal Declaration of Human Rights 1948, International Bills on Human Rights, U.N. Bodies primarily concerned with Human Rights, and Other key international conventions. Regional Level: American Convention on Human rights, European Convention on Human rights, European Social Charter, African Charter, Helsinki Final Act and Arab Commission.

National Level: Constitution of India and Protection of Human Rights Act, 1993.

⁶ Excerpt from <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>

⁷ See Raha. Lucienne Zohadi, The Generations of Human Rights, 1 *Int'l Stud. J.* 95 2004.

⁸ *Ibid.*

⁹ IHRL lays down obligations, which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to promote human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

See <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>.

¹⁰ Excerpt from <http://www.iue.it/http://cadmus.iue.it/dspace/index.jsp>,

¹¹ See C.G. Weeramantry, Islamic Jurisprudence: An International Perspective, (1988) p. 113

¹² Dixon, W.J. "Democracy and the Peaceful Settlement of International Conflict." *American Political Science Review* 1994, p.88

Building a Case for Human Rights

“For the idea of human rights to take hold as a general social need and reality, it was necessary that basic changes in the beliefs and practices of society take place, changes of the sort that evolved from about the thirteenth century to the Peace of Westphalia (1648), during the Renaissance and the decline of feudalism.”¹³ “When resistance to religious intolerance and political-economic bondage began the long transition to liberal notions of freedom and equality, particularly in relation to the use and ownership of property, then were the foundations of what today are called human rights truly laid. During this period, reflecting the failure of rulers to meet their natural law obligations as well as the unprecedented commitment to individual expression and worldly experience that was characteristic of the Renaissance, the shift from natural law as duties to natural law as rights was made.”¹⁴ All were testimony to the increasingly popular view that human beings are endowed with certain eternal and inalienable rights.

The idea of human rights, perhaps known by different name, played a radical role in the late eighteenth and early nineteenth century struggles against political absolutism. The failure of rulers to respect the principles of freedom and equality that had been central to natural law philosophy almost from the beginning is considered as responsible for this development. “In the words of Maurice Cranston, absolutism prompted man to claim human or natural rights precisely because it denied them.”¹⁵ “The historical account of the human rights transition through establishment of positive law demonstrates that human rights are not absolute and immutable, because by their very nature are limited by the rights of others. Human Rights is not immutable, because what is necessary for the realization of its concept can vary with the passage of time.”¹⁶

Classification of Human Rights

The First Generation Rights or Civil and Political Rights originate primarily from the seventeenth and eighteenth century reformist theories, which are associated with the English, American, and French revolutions. Civil and Political Rights are negative in terms, that is, it favours the abstention rather than the intervention of government in the enjoyment of rights of the people. The Second Generation Rights or Economic, Social, and Cultural Rights derive from the early nineteenth century. In large part, it is a response to the abuses and misuses of capitalist development and its underlying.

“The Third Generation Rights or Solidarity Rights, while drawing upon, interlinking, and re-conceptualizing value demands associated with the two earlier generations of rights, are best understood as a product, albeit one still in formation, of both the rise and the decline of the nation-state in the last half of the twentieth century.”¹⁷

¹³The teachings of Aquinas (1224/25-1274) and Hugo Grotius (1583-1645) on the European continent, and the Magna Carta (1215), the Petition of Right of 1628, and the English Bill of Rights (1689) in England were proof of this change. See Burns H. Weston, Human Rights, 6 (3) *Human Rights Quarterly*, (Aug., 1984), pp. 259-260

¹⁴*Ibid.*, p.259

¹⁵*Ibid.*

¹⁶*Supra* note 7.

¹⁷*Ibid.*

“Thus, at various stages of modern history following the revolutions of the seventeenth and eighteenth centuries, the socialist and Marxist revolutions of the early twentieth century, and the anti-colonialist revolutions that began immediately following World War II- the content of human rights has been broadly defined, not with any expectation that the rights associated with one generation would or should become outdated upon the ascendancy of another, but expansively or supplementally. Reflecting evolving perceptions of which values, at different times, stand most in need of encouragement and protection, the history of the content of human rights also reflects humankind's recurring demands for continuity and stability.”¹⁸ The view that Economic, Social, Cultural, Civil and Political Rights are indivisible, interrelated and interdependent goes as far back as human rights themselves.¹⁹ Civil and Political Rights (CPR) and Economic, Social, and Cultural Rights (ESCR) were first declared under the Universal Declaration of Human rights, 1948²⁰ (UDHR) and subsequently in many international conventions and covenants.²¹ The UDHR has had its impact on the Conventions, Charters and Covenants dealing with human rights, including that of the Constitutions of several States. Inspired by UDHR, India has also constitutional provisions that almost resemble the substance of UDHR.

Protection of Human Rights in India

The framework of freedom is law. The constitution of India is designed to deal with the organization of government, the distribution of powers and the protection of certain individual rights. It serves as part of the framework of freedoms by limiting powers of organs of the government, which denies to all government the arbitrary destruction of individual liberties.²² The foundation for human rights protection in India is its Constitution. With an intention to provide better protection to human rights, the Government enacted a special legislation called the Protection of Human Rights Act, 1993.²³ Both of these are considered as national level protection-mechanisms for human rights in India. As human rights are protected and promoted in the form of fundamental rights, they can be considered as constitutional guarantees in a legal system.

Human rights as part of the constitution

“Ultimately, humanity has a commitment to history to make human rights a viable reality.”²⁴ The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical stages have different human rights requirements. Countries at different development stages or with different historical traditions and cultural backgrounds also have [a] different understanding and practice of human rights. Thus, one should not and cannot think [of] the human rights standard and model of certain countries as the

¹⁸*Supra*, note 7, p.267.

¹⁹Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights*, Martinus Nijhoff Publishers, Leiden Boston, 2009, p. 1

²⁰ UDHR, 1948, Articles 3-21 (CPR) and 22-27(ESCR). Subsequently under ICCPR, 1966 and ICESCR, 1966.

²¹See International Covenant on Civil and Political Rights, 1966, The American Convention on Human rights, 1978, European Convention on Human rights, 1950, The African Charter, 1986 and International Covenant on Economic Social and Cultural Rights 1966, etc.

²²Charles B. Nutting, “The Framework of Freedom”, 26 Temp. L.Q. 139 1952-1953

²³ This Act seeks to provide better protection and promotion of the human rights by establishing human rights commissions at the central and state level and the human rights courts.

²⁴V.R. Krishna Iyer, *Human Rights and Inhuman Wrongs* B.R Publishing Co., New Delhi (1990), p.36.

Judicial Incorporation of Human Rights into the Indian Legal System

only proper ones and demand all other countries to comply with them. It is neither realistic nor workable to make international assistance or even international economic co-operation conditional on them.”²⁵

There may be many perceptions about selecting few human rights to be part of the Constitution of India at the time of framing the constitution. One such perception is, considering the then nature and growth of the Indian economy, available resources, capacity of the state as provider, tradition, existing socio-economic problems, immediate needs of the individuals, etc., the framers of the Constitution have inserted some of the universal human rights standards. Some of which were incorporated in the form of fundamental rights under Part III and few others under the Directive Principles of State Policy (Part IV of the constitution).

Subsequently, with an intention to enlarge scope for the protection of human rights and to meet the international human rights standards the State of India has ratified covenants on CPR and ESCR. However, it has ratified the covenants on with certain reservations.²⁶ This process again speaks of non-recognition of certain international human rights standards as part of Indian legal framework.

Fundamental Rights and the Human Rights

Rights have two-fold objectives. The first one is to protect individuals and the second one is to regulate the abuse of power by the power-holders. Fundamental and human rights are felt needs of individuals against political absolutism. Even though, the fundamental rights and human

²⁵ Pieter van Dijk, A Common Standard of Achievement: About Universal Validity and Uniform Interpretation of International Human Rights Norms, 13 NETH.Q. HUM. RTS., 105, 105 (1995) (quoting speech of Liu Huaqui, head of the Chinese delegation at the World Conference on Human Rights, Vienna, Jun. 15, 1993).

²⁶ The Indian government has ratified the International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966 on March 27, 1979 with certain reservations. By ratification, it has established on the international arena its willingness to cohere to the Covenants. Reservations :a) With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the people under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.

b) With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State. c) With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners. d) With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, and articles 12, 19 (3), 21 and 22 of the International Covenant on Civil and Political Rights the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.

e) With reference to article 7 (c) of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said article shall be so applied as to be in conformity with the provisions of article 16(4) of the Constitution of India."

Visit http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-3&src=TREATY#EndDec.

rights are similar with reference to the nature and purpose,²⁷ there are distinctions between the two with reference to their application, scope, prominence,²⁸ and method of implementation.

Distinctions between human rights and fundamental rights

On a careful observation of the substance of fundamental rights, one can generalise that the CPR are protected under Part-III, whereas, the ESCR have been incorporated under Part-IV of the Constitution of India. This generalisation may have some exceptions. However, the fact that Part III is made enforceable and Part IV as non-enforceable highlights the deviation from international standards where such distinction in enforceability of CPR and ESCR is not found in the case of covenants on human rights. Non-enforceability of Part-IV does not stand for *malafide* intention of the government. Second distinction between human rights and fundamental rights lies with reference to whom the rights are available. “Fundamental rights” relates to a system and implies affiliation; on the other hand, the human rights are universal in nature. Human rights are more to do with natural rights and natural duties, whereas, the fundamental rights are what prescribed by the Constitution of India.²⁹ Human rights are for all human beings with no requirement as to citizenship or nationality. In the case of fundamental rights, certain fundamental rights are exclusively available to citizens, whereas some other rights are extended to aliens as well.³⁰ Third, human rights can be suspended during the times of emergency and same is the case with fundamental rights. However, the rights that are classified as derogable and non-derogable under IHRL and under the constitution are not the same.³¹ Fourth, under IHRL, Preventive detention can be resorted to by the States in the case of emergency alone, whereas, the preventive detention in India can be resorted to during both in the times of emergency and in peace time. This establishes the distinction in circumstances in which deprivation of certain essential rights like liberty can be affected.

It is pertinent to note that human rights like, right to legal aid, right to work, equal pay for equal work, etc. are recognised under Part IV and not under Part III of the Indian Constitution. Few other human rights like- right to privacy, right to clean environment, right to shelter, right to found a family, and speedy trial, *inter alia* are enumerated neither under Part-III nor under Part-IV of the Constitution of India. Therefore, it is observed, “all fundamental rights are human rights but not all human rights are fundamental rights.”

Prevalence of violation of Human Rights

Despite the existence of IHRL, it has been insurmountable to enjoy human rights as envisioned under it. Why? This is a propitious question to be raised.

²⁷ Human rights are the basic inalienable rights. Fundamental rights are also the basic inalienable rights. Both these type of rights are interdependent, indivisible in nature. These rights enable individuals’ welfare and growth.

²⁸ Human rights will have primacy over fundamental rights in case of any existence of conflict between them.

²⁹ <http://www.preservearticles.com/2011100314384/free-sample-essay-on-fundamental-rights-as-given-in-our-constitutions-india.html>

³⁰ Fundamental rights guaranteed by Arts. 15, 16, 19 and its different dimensions, Art. 29 and different dimensions of Article 21 (discussed under rights incorporated *infra*) are available only to citizens. Whereas, Citizens and aliens can enjoy the fundamental rights guaranteed by Arts. 14, 20, 21, 22, 23, 24, 25-28, and 30.

³¹ See ICCPR, 1966, Art.4 and the Constitution of India, Arts. 358 and 359.

Judicial Incorporation of Human Rights into the Indian Legal System

There are many causes for violations of human rights such as, wars, terrorist activities, natural calamities, organised crimes, abuse of powers by the States, State-inactions, insufficiency of laws protecting human rights at the national level, inefficient enforcement of the existing human rights law, ignorance of law and lack of awareness as to the human rights coupled with self-centric actions of individuals resulting in flouting other's rights. Also, capacity of the Individuals to enjoy their freedoms is observed to be variable as it depends upon the capacity to enjoy human rights is dependent on the health, age, free time available, nature of post held and level of education, etc., of the individuals.³² Humanitarian intervention by external agents to prevent violation of human rights is often a realistic practice. "Humanitarian intervention is often defined as infringement of a state's sovereignty by an external agent or agents for the sake of preventing human rights violations. The term "infringement" in this definition is carefully chosen: the implied contrast is between infringements and violations; not all infringements are unjust, so the definition remains neutral as to whether, or under what conditions, intervention is justified."³³ The institutions for securing and enforcing liberty rights require an allocation of certain obligations to specified others rather than to all others. First-order obligations to respect liberty rights must be universal, but second-order obligations to ensure that everyone respects liberty rights must be allocated.³⁴ There is no effective rule of law without law enforcement, and law enforcement needs law enforcers who are assigned specific tasks; there is no effective accountability of public administration without institutions that allocate the tasks and responsibilities and hold specified office-holders to account.

Judicial incorporation of Human Rights- Causative Factors

In addition to the above mentioned factors responsible for violations of human rights, there are certain other reasons which let down human rights protection mechanism, which have compelled the judiciary to incorporate human rights. They are as follows. a) Not all international standards of human rights are recognised under the Constitution of India. Important human rights standards such as right to privacy, right to dignity, right to health, right to food, right to livelihood, right to family, right against torture, etc., have been un-enumerated rights. Since the enumerated rights like right to life, right to liberty, etc., cannot be enjoyed without the above-mentioned rights, with an objective to enable the individuals and to cure insufficiency of legislative incorporation of rights, the judiciary has liberally construed right to life and liberty to include certain other un-enumerated facets into those rights. b) India has expressed its reservations while ratifying the two Covenants and this has led to non-recognition of certain human rights standards.³⁵ c) There is inefficient enforcement of human rights, justified by the realities of violations of human rights on daily basis. These realities have forced the people to approach the courts to interfere and to protect their rights. A broad, liberal, generous and benevolent construction is to be given, not a narrow, pedantic, literal or technical interpretation.³⁶ Accordingly, the Judiciary has been incorporating

³² This expression must not be understood as discriminatory grounds created under IHRL. Indeed, according to IHRL, all are equally entitled to enjoy all human rights. However, practically, the enjoyment of human rights depends upon the factors and reasons cited above.

³³ Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality, and Politics," *Journal of International Affairs* 1984, p. 311.

³⁴ Onora O'Neill, *The Dark Side of Human Rights*, *International Affairs* (Royal Institute of International Affairs (1944), Vol. 81, No. 2, Sub-Saharan Africa (Mar., 2005), pp. 427-439.

³⁵ *Supra*, note 19.

³⁶ *Sakal Papers Ltd v. U.O.I.*, [1962] 3 SCR 842

some of the ‘un-enumerated human rights’ into the scope of ‘enumerated human rights.’ Consequently, the Indian Judiciary has construed many human rights as integral part of the Constitution of India.

Apposite Development - Judicial Incorporation of Human Rights and its Effects

Liberal interpretation has all along been the judicial technique in the case of construction of the rights of the individuals unless the contrary intention appears in law. Courts have been giving liberal, progressive and expansive interpretation to the fundamental rights as well. This is on many occasions is supplemented with or has included the task of judicial incorporation. Incorporation of rights by the Judiciary is an instance of judicial activism and a judicial technique, by which the Judiciary tries to protect un-enumerated human rights for advancing welfare of the people. ‘Judicial incorporation of human rights’ may refer to a judicial interpretation and declaration by which certain un-enumerated human rights are held to be within the ambit of the enumerated fundamental rights.³⁷ In India, only the higher Judiciary can interpret the questions involving the constitutional provisions and fundamental rights. Declaration by the Supreme Court will have the force of law and it would be binding on the subordinate courts.³⁸

The Parliament of India has the power to make legislations to give effect to international treaties, covenants, etc.³⁹ Ratification process requires prior policy decisions to be taken, considering available and required finances, resources, strategies or measures and allied technicalities by which the State can fulfil the proposed international obligations. Incorporation of rights by the Judiciary may recognise an international human right to be part of Indian legal system, but ratification of an international Covenant confers better protection to a right than incorporation by the Judiciary. For instance, let there be an assumption that the Parliament in its wisdom and discretion decided not to ratify some international Covenant, which means India is not going to be bound by that Covenant. However, if the Judiciary while deciding a case tries to read a provision/s of that same Covenant which India did not ratify, then by the existing judicial practice, it may do so if those provisions are not inconsistent with fundamental rights and the Constitution of India. Consequently, whether those incorporated rights can be implemented or enforced without preparations as to deontic? It is a question to be considered.

Second concern is that, on one side, the judicial incorporation of rights is appreciated, *inter alia*, by the pro-human rights’ activists and organisations. On the other side, one can question the validity of this practice from the point of view of separation of powers, considering it an act of making of laws or interfering in the domain of the Legislature. If this question is to be a topic of debate, then no strict adherence to separation of powers in India may be the ground of rebuttal by the pro-rights team. Still, it would be insufficient to be a conclusive ground of argument to end this debate.

However, the Judiciary has been construing many international standards of human rights as part of the Indian legal framework. In the words of the Supreme Court, the “Constitution of

³⁷ For example- right to privacy an un-enumerated right if it is read into the ambit of right to life which is an enumerated right under the constitution, then it is incorporation of right by the Judiciary.

³⁸ Constitution of India, Article 141 states that the law declared by the Supreme Court is binding on all the courts in India.

³⁹ Constitution of India, Article 253.

India has not recognised any natural or common law rights other than that expressly conferred in the Constitution. However, this trend of the Supreme Court has changed especially after 1978. The Courts on many occasions, by accepting the rule of judicial construction, has held that, regards must be paid to international conventions and norms for constructing domestic law and the rights which are not specifically mentioned in the Constitution may be regarded as fundamental rights if it is integral part of the fundamental right.⁴⁰

Features of Judicial Incorporation

1. The choice ultimately made by the court will be based heavily upon historical and contemporary experience.
2. The court will not consider all the consequences of its decision, and will neglect the long-term consequences in favour of the short-term results.
3. The court will implicitly or explicitly balance several conflicting interests in reaching its conclusion.
4. Its choice of goal will be significantly affected by the consideration of whether the means exist to pursue it.
5. Its decision will be remedial in nature: it will emphasize the avoidance of an evil rather than the pursuit of a given goal.⁴¹

Right to life: Expanding horizons

A constitutional provision is treated as *sui generis*, calling for principles of interpretation of its own suitable to its character. Constitution is an organic instrument, must be interpreted broadly, liberally and purposively so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation,⁴² Accordingly, the Judiciary has read into Art. 21 the different facets of civilised meaningful human life.

Right to live with human dignity

The expression "life or personal liberty" under Art. 21 is interpreted by the Court to mean and include life with human dignity.⁴³ In *Smt. Gian Kaur v. The State of Punjab*,⁴⁴ the Supreme Court of India has not only reiterated that right to life includes right to dignity but also it has held that this expression means the existence of such a right up to the end of natural life.

Dignity of human beings is construed as respect of human beings as human beings, not dependent on any particular additional status. This envisages that dignity is now divorced from office and hierarchy that one holds in profession or in society. Right to dignity by incorporation, has become inseparable part of right to life. Incorporation of dignity within the meaning and ambit

⁴⁰ *A.D.M. Jabalpur v. Shukla*, AIR 1976 SC 1207

⁴¹ Daniel C. Kramer, The Courts as Guardians of Fundamental Freedoms in Times of Crisis, *Universal Human Rights*, Vol. 2, No. 4 (Oct. - Dec., 1980), pp. 1-23

⁴² See Nihal Jayawickrama, *The Judicial Application of Human Rights Law National, Regional and International Jurisprudence*, Cambridge University, New York, 2002, p.162-163.

⁴³ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608, See *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

⁴⁴ 1996 SCC (2) 648

of right to life assures self-respect and recognition of individuals in all transactions, in all relationships, at all levels and everywhere. Dignity is one of the civil rights but it is now to be construed as dependant on the enjoyment of several economic, social and cultural rights. For instance, dignity protects self-respect of the individual. This in turn is dependent on food, water, shelter, health and clothing that are again dependent on right to work, just conditions of work, equal pay for equal work, etc. Therefore, right to dignity and its realisation is to be considered from different perspectives and an attempt is made to address them in the following paragraph

Dignity may mean many things to many people. In common usage, dignity and dignified life is used to mean respect by others, self-respect, having access to food, health, clothing and shelter, ability to earn, being independent, honour, prestige, and status of the individual, etc.

Added to this ambiguity, dignity is not defined in UDHR or by the Judiciary. Even if it has, it faces complaints, such as, the definition is limited or not comprehensive or that it is only a working definition, etc., which are common for any definition. At the international level, the right to dignity is extended from human beings to institutions and states itself to mean state's recognition/sovereignty. Therefore, right to dignity is to be contextually understood. Further emphasis on the contextual understanding of right to dignity is given due to the ever-evolving nature of its dimensions or facets. For illustrations, first, in the context of prisoners' rights the dignity may mean and include prohibition of inflict of third grade treatment or torture to prisoners and detenues, prisoners right to be treated humanely during their period of detention with just and humane conditions of stay, cleanly environment, hygienic food, water, clothing, separate and adequate sanitation facilities, etc.

Secondly, in a case of prisoner of war, treating him humanely in accordance with appropriate Geneva Conventions and in case of his death repatriation of the dead body or where it not possible, cremating or burying every dead person's body with human dignity and as far as possible in accordance with the religion to which the dead person belong may mean dignity. Third, dignity of labour- just and proper conditions of work with good facilities, leisure, involvement of workers in management decisions, allowing the workers to form their associations or unions, equal pay for equal work, consulting workmen or employees about their priorities, views, plans, and concerns, and adherence to social security laws, etc. may mean right to dignity in the context of work. Fourth, individuals may form a group or a community to respect their cultural and spiritual rituals. Respecting the views, objectives, functions, autonomy and promotional activities carried by such group/s or community/communities may mean dignity to them.

Recent developments have shown that in certain parts of India young men and women are killed for marrying outside their caste considering it as an act of dishonour to their caste or community. This act cannot be considered as an act carried in pursuance of right to dignity but it can be considered as a crime and an invasion of rights of the couple. Therefore, the context becomes inevitably important in understanding the meaning and facet of right to dignity, though 'respect' may be the common element in all contexts. Whether incorporated right to dignity is capable of being used in all contexts is a question to be considered.

Right to Livelihood

In *Olga Tellis v Bombay Municipality Corporation*, the Supreme Court of India has stated, “An important facet of right to life is the right to livelihood, because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. Yet, such deprivation would not have to be in accordance with the procedure established by law if the right to livelihood is not regarded as a part of the right to life. That which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.”⁴⁵ By this interpretation and incorporation, the Indian Judiciary has not only held the right to livelihood as a facet of right to life but it has also paved the way for empowering the individuals to earn their livelihood. Earning livelihood is essential for individuals’ survival and it enables one to take care of one’s own family members and dependents. Livelihood helps all the individuals to enjoy or to have access to certain other basic rights such as education, entertainment, food, clothing, shelter and privacy, freedom of trade, business, or occupation, and right to property, etc. Next impact is that States have obligation to strategise and thereby provide for equal protection to this right among the citizens of urban and rural areas so that it meets the standards of Arts. 39 (b) and (c) of the Constitution of India.

Right against Sexual Harassment

In *Apparel Export Promotion Council v. Chopra*, the Supreme Court of India has held that “right to livelihood may be adversely affected by sexual harassment at one’s place of work.”⁴⁶ Particularly female employee will be affected as there is interfere with her work and employment. The judiciary has recognised the right against sexual harassment as a part of right to livelihood under Art. 21 of the Constitution of India, which is the need of the hour given the raise in offences against women. Further, to ensure this ruling efficiently, the Parliament of India has recently enacted an Act on the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal), 2013.

Jurisprudence of compensation

The Human rights Committee has stated that the deprivation of life by the authorities of the state is a matter of utmost gravity.⁴⁷ Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities. The defence of state immunity is inconsistent with the protection of the right to life, and it is not open to an official of the state to plead that he had caused the death of an individual in discharge of the sovereign functions of the state.

⁴⁵[1985] 2Supp SCR 51. See also UDHR. 1948 Art.25 (1) guarantees right to livelihood.

⁴⁶AIR 1999 SC 63. See also *Vishaka v. State of Rajasthan* (1997) 6 SCC 241. See ICESCR, 1966, Art. 7 (a) (i) & (b) and Art. 10 (3) guarantees right to just and fair conditions of work.

⁴⁷Human rights Committee, General Comment 6 (1982).

At the international level, right to compensation is a human right under Articles 9(5) and 14 (6) of the ICCPR, 1966. Art. 9 (5) provides that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

Accordingly, the Supreme Court of India in *PUCL v. Union of India*⁴⁸ has held that the Government must pay compensation to the families of two persons who had been arrested on suspicion of involvement in terrorist activity and had then been shot dead by the police while in custody. The court rejected police evidence that the deaths had occurred in crossfire between police and terrorists.

It is to be noted that the Government of India at the time of ratification of ICCPR in 1979 had made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention. That reservation, however, has now lost its relevance in view of law laid down by the Supreme Court in a number of cases awarding compensation for the infringement of the Fundamental Rights.⁴⁹ Right to compensation for fundamental rights is recognised but the quantum of compensation depends on facts, circumstances and judges’ discretion.

Right to Health: Medical Care and Treatment

Right to medical care is guaranteed under Art. 25 (1) of UDHR, 1948 and the same was read into Art.21 of the Constitution of India in *PBK Mazdoor Samity v. State of West Bengal*.⁵⁰ The apex Court has held that the obligation of the state to safeguard the right to life of every person means that the preservation of human life is of paramount importance. Accordingly, government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in a violation of his right to life guaranteed under Article 21 of the Constitution.

State has duty under Art.47 of the constitution to protect public health and nutrition. By virtue of *PBK Mazdoor Samity* decision, the individuals have been conferred with right to health including access to timely, acceptable and affordable health care and the same is now made enforceable. Secondly, the understanding of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, as envisioned by World Health Organisation is brought within the ambit of Art.21. Thirdly, it implies that governments must generate conditions in which everyone can be as healthy as possible. Such conditions range

⁴⁸*People’s Union for Civil Liberties v. Union of India* [1999] 2 LRC 1.

⁴⁹See cases: *Joginder Kumar v. State*, 1994 (4) SCC 260; *Neelabati Bahera v. State of Orissa*, 1993 (2) SCC 746; *State of Madhya Pradesh v. Shyamsunder Trivedi & Ors*, 1995 (3) SCALE 343; *Re Death of Sawinder Singh Grover*, 1995 Supp (4) SCC 450; *Miranda v. Arizona*, 384 US 436; *Rudal Shah v. State of Bihar*, 1983 (4) SCC 141; *Sebastian M. Hongrey v. Union of India*, 1984. (3) SCC 339 and 1984 (3) SCC 82; *Bhim Singh v. State of J&K*, 1984 (Supp) SCC 504 and 1985(4) SCC 677; *Sahell v. Commissioner of Police, Delhi*, 1990(1) SCC 422; *Kasturi Lal Ralia Ram Jain v. State of U.P.*, 1965.

⁵⁰*Paschim Banga Khet Mazdoor Samityv. State of West Bengal* (1996) AIR SC 2426. In this case, the claimant had suffered serious head injuries and brain hemorrhage as a result of having fallen off a train. He was taken to various hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private hospital. The court found that the claimant could in fact have been accommodated in more than one of the hospitals which turned him away and that the persons responsible for that decision had been guilty of misconduct.

from ensuring availability of health services, healthy and safe working conditions, adequate housing and nutritious food. The right to health does not mean the right to be healthy.⁵¹ Lastly, the right to health, like all human rights, imposes on States Parties three types of obligations. Respect: This means simply not to interfere with the enjoyment of the right to health ("do no harm"). Protect: This means ensuring that third parties (non-state actors) do not infringe upon the enjoyment of the right to health (e.g. by regulating non-state actors). Fulfil: This means taking positive steps to realize the right to health (e.g. by adopting appropriate legislation, policies or budgetary measures).⁵²

Concern: According to IHRL, public health is primarily responsibility of governments. However, in the era of globalization, governmental functions have shifted to non-state actors for the management and delivery of health systems. In this context, what is the extent and scope of one's right to health is to be ascertained.

Right against Delayed Execution

Art. 6 (2) of ICCPR, 1966 states that in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. Art. 6 (4) states that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

Keeping the above international obligation in mind, the Supreme Court of India observed with the caveat that the cause of the delay is immaterial when the sentence is death. 'Be the cause for the delay the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanizing character of the delay'.⁵³ In *Vatheeswaram v. State of Tamil Nadu* case,⁵⁴ the court held that a delay exceeding two years would be sufficient to entitle a person under sentence of death to demand the quashing of his sentence on the ground that it offended Article 21 of the Constitution of India. In later cases, the court thought that 'no hard and fast rule' could be laid down that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle a person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death,⁵⁵ although 'If there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed'.⁵⁶

These decisions are to be understood in the light of reality. Death penalty is not awarded by the courts in India in all the high-degree offences. It is used by the courts only in rarest of the

⁵¹See <http://www.who.int/mediacentre/factsheets/fs323/en/>.

⁵²*Ibid.*

⁵³*Vatheeswaram v. State of Tamil Nadu* [1983] 2 SCR 348 at 353, per Reddy J.

⁵⁴*Ibid.*

⁵⁵*Sher Singh v. State of Punjab* [1983] 2 SCR 582.

⁵⁶*Triveniben v. State of Gujarat* [1989] 1 SCJ 383.

rare cases and is greatly subjected to the discretion of the court, which is exercised on case basis. These standards practiced accompanied by the above decisions not only indicate the compliance to the international obligations but also it demonstrates judicial activism in stopping the delayed and arbitrary executions.

Power to grant pardon, reprieve, respite, suspend or commute sentences is granted to the President and the Governor by the constitution notwithstanding the power and jurisdiction of the courts. However, power to grant pardon in cases involving death sentence is the domain of the President. Recent news items relating this power have revealed that the Executive in considering mercy petitions causes a lot of delay. Until the Executive decides it, there cannot be any execution of sentences. Therefore, these decisions have tried to create a right against delay in execution by which it has ensured that judiciary and the executive have the obligation to act in a just manner in a reasonable period.

Right against Imprisonment in cases of breach of Contractual Liability

The honourable Supreme Court in *Vergese v. The Bank of Cochin*⁵⁷ considered it ‘appalling’ to cast a person in prison because of his poverty and consequent inability to meet his contractual liability.⁵⁸ The Court further opined that ‘To be poor in this country is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 of the Constitution, unless there is proof of the minimal fairness of his willful failure to pay in spite of his sufficient means.’ This declaration in effect has recognised Art. 11 of the ICCPR⁵⁹ as part of Art. 21 of the Constitution of India.

Significance of Adherence to Principles of Natural Justice

The Supreme Court of India in *Maneka Gandhi's case*⁶⁰ has held that the *audi alteram partem* rule must be regarded as incorporated in law by necessary implication, since any procedure which dealt with the modalities of regulating, restricting, or even rejecting a fundamental right has to be fair, not ‘arbitrary, freakish or bizarre’. Bhagwati, J., held that the passport authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, an opportunity of hearing, remedial in aim, should be given. ‘If such a provision were held to be incorporated in the Passports Act 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness.’⁶¹

⁵⁷See *Vergese v. The Bank of Cochin* [1980] 2 SCR 913.

⁵⁸ICCPR, 1966, Art.11 states that No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

⁵⁹No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

⁶⁰*Maneka Gandhi v. The Union of India* [1978] SCR 312. See UDHR 1948, Art. 10 and ICCPR, 1966, Art. 14 (1) guarantees right of hearing.

⁶¹*Ibid.*

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In addition, judiciary has invented many doctrines that aid the courts in checking whether principles of natural justice are complied or not. For instance the doctrine of Legitimate Expectation.⁶²

Right to privacy

Expression right to privacy may mean the right to be left alone to live one's own life with minimum degree of interference. Right to privacy is not guaranteed by the constitution of India. However, in *Kharak Singh v. State of U.P.*, it was held by the Supreme Court that the domiciliary visits is an infringement of the right to privacy and is violative of the citizen's fundamental right guaranteed under Art.21 of the Indian Constitution.⁶³ This right is recognised under Art. 12 of the UDHR, 1948 and Art. 17 of the ICCPR, 1966. Realising the preciousness of the right to privacy the Supreme Court of India has incorporated it under Art. 21 of the Constitution of India.

However, it is to be noted that the meaning of Privacy like dignity is evolving. Absence of interference from individuals and state, freedom to decide and take decision without interference from others, right to be alone, freedom to express oneself, right to be with family, etc. are all the different facets of privacy, including privacy during conversations. Right against unnecessary or arbitrary phone tapping is recognised by the Supreme Court as violation of freedom of privacy and speech and expression. There is a need for recognising privacy on cyber space- whether this incorporation can protect privacy of individual on cyber space? If yes, to what extent? are some of the important questions that one has to consider.

Right to information

The right to freedom of speech and expression⁶⁴ includes the right to 'seek', 'receive' and 'impart' information and ideas.⁶⁵ This freedom ensures that the individuals have liberty to express their own ideas and that of the views and ideas of the others. Right to seek information is brought within the ambit of freedom of speech and expression as it is important in a democratic set-up and especially in maintaining transparency.

⁶² This Doctrine envisages the idea that the government before it changes its long-standing course of action or scheme must inform those who are likely to be affected by such a sudden change in the arrangements.

⁶³ 1964) 1 SCR 33. In *Govind v State of Madhya Pradesh* [1996 (0) MPLJ 649] the right to privacy was assumed to be a part of the personal liberty guaranteed under Art. 21 of the Constitution, by stating that although the right to privacy is not explicitly provided in the Constitution, it is ingrained in the fundamental right of life and personal liberty. In *People's Union for Civil Liberties v Union of India* AIR 1997 SC 568, commonly known as telephone tapping case, the Supreme Court held that right to life and personal liberty includes telephone conversation in the office or home and thus telephone tapping is violative of Art. 21.

⁶⁴ The Constitution of India, Art.19 (1) (a) and ICCPR, 1966, Art.19 and American Convention on Human Rights, 1969 Art. 13.

⁶⁵ *Bennett Coleman & Co v. The Union of India*, [1973] 2 SCR 757, at 811, per Mathew J. See also, *Romesh Thappary. The State of Madras*, [1950] SCR 594, per Patanjali Sastri J at 602; *Sakal Newspapers (P) Ltd v. The Union of India*, [1962] 3 SCR 842, per Mudholkar J at 866; *Rangarajan v. Jagjivan Ram et al*, [1990] LRC (Const) 412, per Jagannatha Shetty J at 427. An individual has the right to receive information that would help him make an informed decision, whether it be in regard to the political party or candidate he should vote for, or the state of the art personal computer he should invest his money in. Held in *Sakal Papers (P) Ltd v. The Union of India*, [1962] 3 SCR 842.

Right to travel abroad

The Supreme Court in *Satwant Singh v. Asst. Passport Officer, New Delhi*, has held that the right to go abroad is a part of the person's personal liberty within the meaning of the Art. 21 of the Constitution of India.⁶⁶ This declaration in effect has recognised the right to movement and travel abroad as part of Art.21 of the Constitution, which is a guaranteed right under Art.12 (2) of the ICCPR, 1966. By judicial incorporation, the right to travel abroad is within the expression of personal liberty, which can be deprived only by a just, fair and reasonable procedure established by law. This declaration aid the mobility of resources between nations that in turn facilitates the growth of the individual and of the nation. This is an important right in the context of the globalization.

Humane treatment of Prisoners

The Constitution of India has no provision in Part III that can safeguard the interest of the prisoners. However, the Supreme Court in *Charles Shobraj v. Superintendent, Central Jail, Tihar, New Delhi*⁶⁷ has recognised that 'right to life' is more than mere animal existence. Even in prison, person is required to be treated with dignity and must be allowed to enjoy all freedoms in Art.19 and 21.

In *Prabha Dutt v. Union of India*,⁶⁸ the Supreme Court held that it would be a part of fundamental freedom of the press to interview prisoners sentenced to death. In *Francis Coralie Mullin v. Union Territory of Delhi*,⁶⁹ the Supreme Court held that a detainee has a fundamental right to have interview with his legal advisor and family members and that it is a part of his fundamental right under article 21. Also in *R. Raja Gopal v. State of Tamil Nadu*,⁷⁰ the Supreme Court held that even a prisoner condemned to death also has a fundamental right to privacy under Article 21.

In *D.K. Basu v. State of West Bengal*,⁷¹ it has been held "Torture of a human being by another human being is essentially an instrument to impose the will of the strong over the weak by suffering. The word torture today has become synonymous with the darker side of human civilization. Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it." In *Arvinder Singh Bagga v. State of U.P. and Ors*⁷² the court opined that torture need not mean merely physical but may even consist of mental and psychological torture calculated to create fright to submit to the demands of the police.

In *Smt. Selvi and Others v. State of Karnataka*⁷³ while dealing with the involuntary administration of certain scientific techniques, namely, narco analysis, polygraph examination and the Brain Electrical Activation Profile test for the purpose of improving investigation efforts in

⁶⁶AIR 1967 SC 1836. See also *Maneka Gandhi v Union of India* AIR 1978 SC 597.

⁶⁷ See also *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 2 SCR 516 and *Sunil Batra v Delhi Administration* (no 1) 1979 SCR (1) 392.

⁶⁸AIR 1982 SC 6

⁶⁹AIR 1981 SC 746

⁷⁰AIR 1995 SC 264

⁷¹AIR 1997 SC 610

⁷²1994 SCC Supl. (1) 500

⁷³ AIR 2010 SC 1974

criminal cases, the court opined that the compulsory administration of the impugned techniques constitute cruel, inhuman or degrading treatment in the context of Article 21 and hence it is violative of the constitution. These decisions have ensured that the prisoners are to be treated humanely.

Protection from custodial torture

In *Dr. Mahmood Nayyar Azam v. State of Chhattisgarh* the Supreme Court of India has observed that the “majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the Welfare State is governed by rule of law. It is imperative to state and it is the sacrosanct duty of the police authorities to remember that a citizen while in custody is not denuded of his fundamental right under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner.”

Further, it was held “On the contrary, Police are under obligation to protect his human rights and prevent all forms of atrocities. If the basic dignity or right is infringed by the state, a claim in public law can be maintained for compensation for contravention of human rights and fundamental freedoms as its protection is guaranteed in the Constitution. Such remedy or claim is based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right and it is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right.”⁷⁴

Article 10 (1) of the ICCPR, 1966 states “all person deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” This provision gets protection under Art.21 of the Indian constitution. Ruling in *Dr. Mehamood Nayyar Azam’s case* has made the defence of sovereign immunity inapplicable and alien to the concept of fundamental rights. The Court has further established a principle that justifies award of monetary compensation for contravention of fundamental rights when it is the only practicable mode of redress available for the contravention made by the State or by its servants in the purported exercise of their powers. Compensation for violation of the fundamental rights has become a remedy in public law that can be claimed *vide* Articles 32 or 226 of the Constitution.

Prisoner’s right to be treated humanely is entrenched and this in turn guarantees a right against torture, inhuman treatment, mental cruelty, right against compulsion to undergo narco analysis, lie detector, polygraph and other techniques that are declared to be unconstitutional in *Selvi’s case*.

Right to Speedy Trial

The right to speedy trial has been incorporated into the laws of various countries. A variety of international conventions has endorsed the significance of the right to speedy trial, including Article 14 and Art. 9 (3) of the ICCPR, 1966. In India, neither the Constitution nor any existing laws expressly confer the right to speedy trial on the accused. The origin of this right lies in the Supreme Court judgement in *Hussainara Khatoon v. Home Secretary, State of Bihar*

⁷⁴AIR 2012 SC 2573

(no.1),⁷⁵ where, the apex court held that though the right to speedy trial is not directly mentioned in the fundamental right but is implicit in the broad sweep of Art.21 which deals with right of life and personal liberty. Accordingly, the Patna High Court, in *Madheswardhari Singh v. State of Bihar*,⁷⁶ laid down the following guidelines:-(1) right to a speedy trial extends to all criminal prosecutions for all offences generally; (2) it applies to both trial and investigation as per the Code of Criminal Procedure, 1973; (3) it extends to all criminal proceedings inclusive of the stage of trial and appellate stage; (4) Delay of 7 years or more in trial and investigation other than capital punishment violates article 21 of the Constitution of India.

Delay in pronouncing the judgment has been reprimanded by the Supreme Court in *Anil Rai v. State of Bihar*, where the Court observed, “Unexplained long interval between conclusion of arguments and delivery of judgment shakes the confidence of the people in the judicial system and affects rights of the parties under Article 21 of the Constitution of India.”⁷⁷

The apex Court in *Akhtari Bi v. State of Madhya Pradesh*,⁷⁸ held that “to have speedy justice is a fundamental right which flows from article 21 of the Constitution. Prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail.” The rulings that held speedy trial as fundamental right under Art 21, serves the best interests of both the accused and the prosecution. Given the ascendancy of criminal elements in our public life, these imperatives are made all the more urgent as a result of the risk of witnesses being threatened, intimidated or bribed to rescind from a truthful version of events.⁷⁹

Right to Shelter and Right to Decent Environment

The Covenant on the ESCR, 1966, under Art. 7 Para (a) (ii) declares that “the State parties to recognise the right of everyone for decent living for themselves and their families” and under Art.11 States to recognise “the right of everyone to an adequate standard of living for himself and his family including housing.” It shows that right to shelter finds a place in the Covenant but it has not been enumerated right in the Indian Constitution. However, the Supreme Court in *Chameli Sing v. State of U.P.*⁸⁰ has held that by the right to live includes the right to food, water, decent environment, education, medical care and shelter. As of right to shelter is concerned the court held that it includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity and other civil amenities like roads, etc. Whether this expansive view can be a reality in India, which is highly populated remains as a concern.

Enforceability of Directive Principles of State Policy

Fundamental rights are justiciable and can be enforced by prerogative writs. On the other hand, the Directive Principles of State Policy in Part-IV of the Constitution are non-justiciable and

⁷⁵ (1980) 1 SCC 98. See also *Raj Deo Sharma v. State of Bihar* (1998) 7 SCC 507.

⁷⁶ AIR 1986 Pat., 324

⁷⁷ AIR 2001 SC 3173

⁷⁸ AIR 2001 SC 1528

⁷⁹ See <http://jurisonline.in/2008/03/speedy-justice/>

⁸⁰ [AIR 1996 SC 1051]

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cannot be enforced by the courts. The aim of most of these principles, which are borrowed from the Irish Constitution, is social and economic progress.

In 1952, the Supreme Court, in the case of *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga*⁸¹, has illustrated as to how a directive principle may guide the Court in determining crucial questions on which the validity of an important enactment may be hinged. Thus, when the courts are required to decide whether the impugned law infringes a fundamental right, the courts need to ask the question whether the impugned law infringes a fundamental right within the limits justified by the directive principles or whether it goes beyond them.⁸²

Directive Principles of State Policy are not *per se* enforceable by virtue of Art. 37 of the Constitution of India. But on many occasions, the Judiciary considering the need to enforce social welfare, social order, and social security for their proximate nexus with the individual's welfare protected under Part-III of the Constitution, has read the provisions of Part-IV with or in the light of Part-III that is enforceable. For instance, Art 7 (a) of ICESCR, 1966, lays down that fair wages and equal remuneration for work of equal value without distinction of any kind in particular women being guaranteed conditions of work not inferior to those enjoyed by men. Under the Indian constitution clause (d) of Art.39 of the Directive Principles of State Policy states about the equal pay for equal work for both men and women. In *Randhir Singh v. Union of India*⁸³ the Supreme Court held that the principle of equal pay for equal work though not a fundamental right is certainly a constitutional goal and is capable of enforcement through Constitutional remedies available under Art. 32 of the Constitution of India.

The other instance is 'Safe and healthy working conditions and the creation of conditions which would assure to all medical service and medical attention in the event of sickness' are the rights which are stated in Art.7 (b) and Article 12 (2) (d) of the ICESCR, 1966. Right to workmen to medical benefits under the Constitution finds place under Art.38 and Art.39 which is not enforceable. But the Supreme Court in the *Regional Director, ESI, Corporation and another v. Francis De Costa and another*⁸⁴ held that Arts. 38 and 39 read with Art. 21, the right to medical and disability benefit to workmen is his Fundamental Right as it is inseparable from right to life.

Similarly, in *M.H. Hoskot v. State of Maharashtra*⁸⁵ the right to free legal service dealt under Art.39-A of the Constitution was regarded as an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and is implicit in Art.21 of the Constitution. In *Khatri v State of Bihar*⁸⁶ the Supreme Court went a step ahead and directed the state of Bihar that

⁸¹(1952) SCR 889

⁸² For example, the scope of the right of equality of opportunity in matters relating to employment (Article 16) to any office in the State appears more fully defined when read with the obligation of the State to promote with special care the economic and other interests of the weaker sections (Article 46). Similarly, our understanding of the right "to practice any profession or occupation" [Article 19(1)(g)] is clarified when we read along with that right the obligation of the State to see that the health of the workers and the tender age of the children are not abused (Article 39). Thus, we need to interpret the fundamental rights in the light of the directive principles.

⁸³ AIR 1982 879

⁸⁴ 1996(6) SCC 1

⁸⁵ (1978) 3 SCC 544. See ICCPR, 1966, Art. 14 (3) (d).

⁸⁶ AIR 1981 SC 928

it cannot avoid the constitutional obligations to provide free legal services to a poor by pleading feeding financial and administrative inability.

Conclusion and Suggestions

It follows from the above discussion that not all the human rights as contemplated in IHRL have found a place in the Constitution of India. Ineffective implementation of laws coupled with instances of corruption in administration has inspired the Indian Judiciary to interfere to extend its service to at least some of the suffering classes. Thus, the credit goes to the Judiciary for being active in delivery of justice. In this course, the Judiciary has been liberally construing the rights and in some cases, it has even incorporated some of the un-enumerated rights, to the extent possible, into the provisions of the Constitution. In Public Interest Litigations, there has been a continuous effort of the Judiciary to protect the human rights and to provide justice for the deprived sections of the Indian community.

The Constitution of India empowers the state to regulate individuals' rights, for instance, reasonable restrictions and suspension of Fundamental rights during emergency and the same may result in legitimised human rights violations as mentioned earlier, if used unnecessarily and unreasonably. Nevertheless, the judicial review has ensured that it can prevent disproportional or excessive interference of the State in the enjoyment of fundamental rights by the individuals.

It is suggested that the Parliament ought to take necessary steps by which the judicial incorporations are better protected and enforced. The role of specialised bodies like Human Rights Commission at the Centre and State level is going to be significant in recommending suitable and appropriate steps in this behalf to the Government. It is suggested that the Legislature in particular must expressly incorporate the judicial decisions that paved the way for un-enumerated rights into the Constitution of India.

Further, it is suggested that there must be increase in quantity and quality of initiatives taken by the Government for the protection, promotion of human rights including dissemination of information on human rights. Rights cannot be asserted if individuals do not know rights exist united efforts by the Government and human rights literates, media, educational institutions and NGOs in this regard can give a new dimension to the single-handed efforts of the judiciary.

INTERNATIONAL REGIME ON DOMESTIC VIOLENCE AGAINST WOMEN – CATALYSTS FOR CHANGE

Anuja S.*

The evolutionary motive force for human rights is the mankind's demand for decent civilized life in which the inherent dignity of each human being is well respected and protected. The concept of human rights evolved largely from ideas of western political theory about rights of individuals to autonomy and freedom. In most societies, domestic violence against women has typically not been perceived as a crime. Through much of the international legal history, women have been invisible in the development and growth of international law. It took a long journey to adopt the policy that women's rights are human rights. Recognising the importance of the social costs of gender directed violence, the international agencies working on women's development have taken the lead in attempting to fill critical gaps in efforts to promote and protect women's human rights. Historically, stark distinctions were apparent as between the 'public sphere'-the political, legal and social institutions and the 'private sphere'-the home and the family. Doctrine of privacy and protection of the family reinforced this artificial divide.¹ As a result the international human rights treaties offered protection to women against violence that occurred only in the public realm.

Women's subordinate position in the home makes their experience different from men's. The image of the family as a protective retreat has been created largely through male eyes, disregarding women's oppression and the extensive discrimination against them which is inherent to the patriarchal structure and functioning of the family.² The significance of family for women is also more vital than that of men, because while a man is allowed an independent existence, woman's identity and survival is not socially conceivable without family and related roles. In behavioural terms, violence against women ranges from simple oppression to abuse, aggression, exploitation and severe oppression. Human Rights violations from female foeticide, infanticide, marital cruelty, dowry murders, child abuse, incest to women, battering and murder are committed within the safe confines of the home making women highly vulnerable in families. They remain largely invisible, being considered family matter.

The Indigenous Subjectivities and Impact

Domestic violence against women is a violation of the right to live with human dignity and identity, as it reinforces and reproduces the subordination of women and thus obstructs the developmental process. Amartya Sen defines "capabilities" as the freedom to choose what you

*Assistant Professor, National Law School of India University, Bangalore.

¹The domain of International law was held to be governing only the relationship between nation states or the treatment of individuals by the government or public officials. The traditional view was that international law is applicable only to governments and their representatives, but not to private actors as in the case of family violence. Domestic violence against women occurring within the four walls of the family was defined as a private issue and was thus kept outside the ambit of International law.

²Iyer Saroj, *The Struggle to be Human; Women's Human Rights* Books for Change, Bangalore, (1999), p.3.

have reason to value. “Development” as he opines is a process of expanding the real freedoms that people enjoy³. The expansion of human capabilities if it leads to development the freedom from domestic violence is to be viewed as integral to any exercise for evaluating developmental progress. The conventional standards for assessing well-being and development has been indicators such as income, education and health(longevity).The broader attempts of including the criteria of gender empowerment in a country necessarily includes the effective property rights and freedom from physical and mental abuse. Domestic violence manifests itself in the denial of the right to equal protection before law to which every human being is entitled. Denial of the state to recognize such offence committed against women also denies her right to simple and prompt recourse to a competent court for protection against acts that violates her rights.⁴

Domestic violence can undermine both a woman’s capabilities and her functioning’s in a range of ways. Familial violence manifests in the form of deprival of economic freedoms, social opportunities and political freedoms. The economic freedom indicates her capability to earn a living or acquire property. The international mandates declare the inherent “right to life, liberty, and security of person.”⁵ The victims of domestic violence are in constant fear for their lives, and are perpetually under the control of their abusers. The right to personal liberty and security is endangered where victims are deprived of their liberty of free existence and their right to security. Her mobility is restricted, her self- expression is monitored and her thoughts influenced by others in her milieu. A women suffering actual physical and mental injury can affect her functioning in the job market by disrupting the regularity of her work life, her productivity, efficiency and her chances of upward mobility or promotion. The country thereby loses a potential economic contribution of a substantial section of the population of the country.

Simultaneously domestic violence can erode women’s social opportunities by undermining her ability to build social relationships and social capital. Withdrawal from the society due to the shame attached to the continuous violence going on in the family atmosphere is another outcome of it. It suppresses her right to associate freely and the most fundamental attribute of the human beings i.e. the right to freedom of expression. Thereby, the right to have a woman’s physical, mental and moral integrity respected is denied. Thereby the sense of self of the women is disrupted that justifies the learned helplessness theory related to the domestic violence concept. The notions of self-respect can be double edged in relation to domestic violence. Notions of self-respect can prevent women from revealing such violence in order to maintain their own and their family’s social status. The threat of dis-possession from family aggravates the situation making her vulnerable to incompatible adjustments within the household. Domestic violence is a denial of right to social and political participation, by subjecting the victim to home confinement.

³Bina Agarwal and Pradeep Panda-“Toward Freedom from Domestic Violence: The Neglected Obvious,18(3) *Journal of human Development and Capabilities*; Routledge Publishing Ltd,(2007),p.360

⁴ Universal Declaration of Human Rights (UDHR),Article 1 adopted by the United Nations General Assembly in December 1948 and which all UN members, including India, are expected to honor, specifically states: “All humans are born free and equal in dignity and rights.” Article 2 states that all are entitled to these rights and freedoms “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.” In addition, Article 7 states that “all are equal before the law and are entitled without any discrimination to equal protection of the law.

⁵UDHR Article 3 and ICCPR Art. 6 and 9

Woman who is a victim of domestic violence within the family loses her ability to be an active citizen or seek her entitlements as a citizen the undermining of her sense of self gets reflected in the assumption that violence she face within the family is something personal and not political. And more over the issue of domestic violence has not been targeted a good political option. Thus the right to equal access to the public service of the country and to take part in the conduct of public affairs, including decision- making is restricted. The relative silence on domestic abuse in society and in the media underlines the failure of transparency guarantees on this front. The dynamics of domestic violence if ignored leads to non- effective functioning of a range of public policy interventions in the field.

An important corollary to what is above discussed as to the developmental obstacles there is the threat that it can be carried over to future generations. Violence during pregnancy can cause miscarriages, low-birth-weight infants and even foetal and maternal deaths. The studies reveal that children who witness domestic violence tend to suffer from higher emotional and behavioural problems than other children. The seeds of it are carried on to their adult lives. For example a high proportion of street children report marital violence in their family life. Such long term consequences on the children reduce the productivity of future generations as well. The adolescent in violent family situation undergo a period of identity crisis where he or she is unable to arrive at a defined self-understanding and left unable to choose and invest energy into the right careers.⁶

The prevalence of domestic violence violates any guarantee of protective security. It undermines the whole notion of the home as a protective space. It adversely affects individuals, their families and the wider society. The problem of domestic violence is symbolic to the law of jungle, where might is right. The reconciliation with the subjugation and hopelessness harms the woman more than the violence itself, as it erodes her personality and also that of the children. This brings us to the crux of the whole problem of familial violence. It is the sense of inadequacy, of vulnerability, of helplessness, of weakness and fear of violence that often destroys the women's sense of self.

Marital violence accounts for serious health implications in the victim. According to the World Report on Violence and Health by the World Health Organisation, Geneva, 2002, domestic violence accounts for a substantial but largely unrecognized proportion of maternal mortality. Another disintegrative effect of the domestic violence need to be understood on the basis of greater demand on health care systems, temporary or chronic economic and psychological dependence of victims on the welfare system. There is the denial of the right to optimum standard of physical and mental health as the victim undergoes prolonged physical and mental trauma. The right to affection and enriching personal relations required for the basic human existence suffers a setback. The denial of personal development restricts a woman's right to participate in various activities, curtails her prosperity in career or working field, academic field etc. Viewed from a human rights perspective it is the general denial of women's human right to be human. It leads to adverse economic burden on the society's welfare system.

⁶Bhargavi V. Davar; *Mental Health From A Gender Perspective*. Sage Publications, New Delhi, (2001), p.236.

The Accountability of the State

The gross human rights violations against women within the family remained invisible and ignored. To break the barriers between the violence against women in the public life and private life were one of the greatest challenges undertaken by the United Nations Organization and its affiliated agencies. The necessary theory of accountability of states⁷ for their inaction in cases of violence against women within the home led to the gradual acceptance of the notion that the state making little or no effort to stop violence is tacitly condoning it.⁸ This inter-relationship between the accountability of international law and its inactiveness in private matters turned it into a constructive act of the state.⁹ A state also has an obligation under human rights law to apply its laws without discriminating against women and to provide an adequate remedy for acts done by private individuals. A state's institutionalized inaction in the face of a pervasive domestic violence problem violates international obligations. This analytical shift in the international community, allowing domestic violence to be identified and addressed as a human rights violation led to the development of specific international legal obligations directly addressing domestic violence. The underlying premise is that every person has an interest in the maintenance of her or his physical autonomy and an essential right to be free from fear. This is reflected in International treaties, declarations, other international instruments and many states' constitutional and legal systems¹⁰. The continual nature of systemic intimate violence has been recognized to varying degrees in the domestic violence legislation of foreign jurisdictions¹¹.

The aggravating factors that contribute to the vulnerability of women are traditional roles of hegemony between men and women, private nature of systemic violence within the four corners of the family, the concomitant escalation of extreme violence upon separation, economic difficulties restraining women's freedom and the acquiescence of women's community to the violence. The right to be treated equally by the state also requires equality of protection against violence where it occurs most frequently i.e., the private space. This failure gets manifested in deficient police services, inaccessible or inefficient court processes, poor health services and lack of economic assistance in the form of welfare systems or laws. The systemic failure of the state to protect victims of severe intimate violence and punish its perpetrators constitutes an endorsement of the harm, implicit or otherwise. The conduct of the state, therefore by virtue of its failure to act,

⁷ The theory of due diligence, equal protection of laws, freedom from torture that upholds the right of the individual to live with human dignity and security emphasized the theory of accountability of states to ensure the human rights of its members.

⁸ The Inter American Court of Human Rights has issued a judgment in the case of *Velásquez Rodríguez*, which articulates one of the most significant assertions of State responsibility for acts by private individuals; this represents an authoritative interpretation of an international standard on State duty. The opinion of the Court could also be applied, by extension, to article 2 of the International Covenant on Civil and Political Rights (ICCPR), which requires States parties to ensure to all individuals the rights recognized in that Covenant. In the same case, the Inter American Court further reaffirmed that States are "obliged to investigate every situation involving a violation of the rights protected by [international law]". It discussed the scope of the duty of States, under article 1 of the American Convention on Human Rights, "to ensure" the rights within the treaty to all persons within their jurisdiction.

⁹ Kelly .D. Askin, Dorean M. Koenig (Eds.), *Women and International Human Rights Law*, Transnational Publishers, Inc, Ardsley, New York, Vol-1, (1999), p.243.

¹⁰ See eg: UDHR, ICCPR, ICESCR, CEDAW, DEVAW, the African Charter, the Rome Statute etc.

¹¹ Eg: Mexico and Nicaragua. In Mexico, the Law of Assistance and Prevention of Domestic Violence defines the violence as 'an act of power or omission that is recurring, intentional and cyclical, and is aimed at dominating, subordinating, controlling or harming any member of the family through physical, verbal, psycho-emotional or sexual violence'.

perpetuates the violence, creating an atmosphere of impunity¹². It is in this manner that the State's role is triggered in International Law.

The International mandates

The journey of the acknowledgement internationally from the concept of 'violence against women' to 'domestic violence against women' within the private space is reflected through the International Instruments on Human rights. The family is exalted as the very foundation of human existence, a haven for love, care and loyalty. It is asserted throughout the national and international Human Rights documents as the 'basic and fundamental unit of the society.'¹³ The significance of 'family' in a society as a provider of natural environment for the growth and well being of all its members,¹⁴ the need for giving social, legal and economic protection to the basic unit of the society,¹⁵ the inter relationship between the family, the child and the woman¹⁶ have all been affirmed throughout the standards set by the United Nations Organisation. Family is upheld as the dominant ideology, through which a particular set of household and gender relationships are universalized and naturalized.

The International Bill of Human Rights¹⁷ and the other Core UN Human Rights Treaties¹⁸ forms the basic guideline to the fundamental rights and freedoms of human beings in the international arena. These documents do not explicitly address the issue of domestic violence. Yet its principles articulate the concepts of fundamental rights and freedoms that are commonly violated in domestic violence cases. Those rights include the right to equality, right to equal protection of the laws, right to life, liberty and security of the person, right to physical and mental integrity, and right to be free from discrimination, torture, degrading and inhuman treatment. The mandates set up under the International Bill of Rights and the efforts of the United Nation Organisation, through international conventions, declarations, and conferences has brought to light the issue of domestic violence and the need to evolve laws to combat it both in the international and regional forums.

The preamble of the United Nations Charter, 1945 begins by referring to faith in fundamental human rights, in the dignity and worth of the human persons, and in the equal rights of men and women. Universal Declaration of Human Rights, The Magna Carta of the mankind

¹²Bonita Meyersfeld, *Domestic Violence and International Law*, Hart Publishing Ltd.UK, (2010), p.142

¹³UDHR Art 16 and 3 UDHR; The International Covenant on Civil and Political Rights,1966,Art 23;International Covenant on Economic, Social and Cultural Rights,1966Art10;American Convention on Human Rights,1969 Art 17 ;African Charter on Human and Peoples' Rights,1981Art 18 ;Arab Charter on Human Rights,2004,Art 33 .

¹⁴See Preamble of International Covenant on Economic, Social and Cultural Rights,1966;Declaration on Social Progress And Development,1969, Art 4 adopted by General Assembly Resolution 2542 (xxiv) on 11th december.1969.

¹⁵European Union Charter of Fundamental Rights,2000,Art.33

¹⁶Chapter ii –Global Framework of Beijing Declaration And Platform For Action, adopted at the Fourth World Conference on Women: Action for Equality, Development and Peace, 1995 held at Beijing, on 15th September 1995.

¹⁷It consists of The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, and its implementing covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights(ICESCR),which entered in force in 1976

¹⁸ It consists of the International Covenant on the Elimination of All Forms of Racial Discrimination,1965;the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),1979;the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment t or Punishment,1984;and the Convention on the Rights of the Child, 1989.

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exhorts that “All human beings are born free and equal in dignity and rights”. Human right to dignity, worth of human person and freedom from discrimination and recognition of violence as a form of discrimination are the pre requisites to protect and preserve the human rights of women placed under special circumstances. The beauty of the Declaration of Human Rights is that it is neither addressed to nations nor to member States of the United Nations but to every individual, and is not a legal instrument having binding force on its ratifiers, yet it has a great impact on the international respect and observance of human rights and on the constitutions of several States, including India, which have incorporated most of these rights.¹⁹ Equality is the foundation on which all other rights are built. Since domestic violence primarily targets women, it violates the concept of equality and non-discrimination on the grounds of sex. Violence that is directed against a woman because she is a woman leads to discrimination against women.²⁰

The International Covenant on Civil and Political Rights, 1976 and Committee on the International Covenant on Economic Social and Cultural Rights considered the issues of violence against women by the state, in the community or in the family, as an infringement of gender equality, civil liberties and socio economic rights. The main provisions of the ICCPR that can be applied to cases of domestic violence are as follows: Articles 1, 2, 3, 6, 7, 16, 23 and 26. The first Optional Protocol to the ICCPR allows individuals, whose countries are party to the ICCPR and the protocol, who claim their rights under the ICCPR have been violated, and who have exhausted all domestic remedies, to submit written communications to the UN Human Rights Committee.

International mandate requires the state “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”²¹. The standard international definition of torture comes from the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.²² The right not to be subjected to torture is also denied in cases involving domestic violence against women. Domestic violence manifests all the dynamics of terrorism i.e. seemingly random but actually well planned, psychological and physical warfare and creation of an atmosphere of intimidation. The Convention defines torture as “an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a purpose such as obtaining or a confession, punishment, intimidation, or coercion “or for any reason based on discrimination of any kind”. Domestic violence is a violation of a woman’s rights to bodily integrity, to liberty, and often right to life itself. This approach equates domestic violence to a form of torture.

The most outstanding and extensive instrument dealing exclusively with the rights of women is the Convention on Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly in 1979. It is described as an International Bill of Rights for women

¹⁹ParasDiwan and PeeyushiDiwan: *Human Rights and The Law, Universal and Indian* ,Deep &Deep Publications, New Delhi,(1998), p.32

²⁰This has been clarified by General Recommendation 19 of the UN Committee on Elimination of Discrimination Against Women 1992.

²¹UDHR,Article 5 and ICCPR,Article 7.

²² It requires three main elements: (1) severe physical or mental pain or suffering; (2) intentional infliction for certain purposes including punishment, coercion, intimidation, and discrimination; and (3) involvement of a public official. even though India has yet to ratify the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), provisions regarding torture in the UDHR and ICCPR which generally adopt CAT’s definition of torture, and both under which India has obligations, can be used to support Indian domestic violence claims.

as it sets out detailed information that aids in the recognition of discrimination against women²³. CEDAW extrapolates a prohibition on violence by stating that “Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination. These rights and freedoms include: a)the right to life; b)the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; c)the right to equal protection according to humanitarian norms in time of international or internal armed conflict; d)the right to liberty and security of person; e)the right to equal protection of the law; f)the right to equality in the family; g)the right to the highest standard attainable of physical and mental health; h)the right to just and favourable conditions of work”²⁴

The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. CEDAW calls on states to change the way public and private entities and individuals treat women. This is important in relation to domestic violence because it brings the state into the private realm. It compels the State to equalize private relationships (i.e., the way individuals treat women and not only the way the State treats women) and to intervene when discrimination marks both public and private affairs.

General Recommendation No.12 explains the content of state periodic reports to CEDAW, legislation to protect women from all kinds of violence (sexual violence, domestic violence, sexual harassment etc.), other measures to eradicate violence against women, existence of support services for women victims and provides for the statistical data on the incidence of violence against women. Article 6 of the General Recommendation Number 19 issued by the United Nations during the 11th session of the CEDAW in 1992, pertains specifically to the issue of violence against women. Gender-based violence is defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’ ‘Family violence’ forms a separate heading within the Recommendation.

The General Recommendation 19 (n.20) Article 6 para 23 recognized the violence in the family as:

“One of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women’s health at risk and impair their ability to participate in family life and public life on a basis of equality²⁵”

Specific recommendations on domestic violence includes imposing criminal penalties where necessary and civil remedies; legislation to remove the defence of honour in regard to the

²³Hussein, Ameena, *Some Times There Is No Blood: Domestic Violence and Rape in Rural Srilanka*; International Centre for Ethnic Studies Report; Srilanka, (2000), p.10.

²⁴It’s in Our Hands-Stop Violence Against Women, Amnesty International Publications U.K,2004, p.69

²⁵*Supra* n.12, p.34

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assault or murder of a female family member; services to ensure the safety and security of victims, including refuges, counselling and rehabilitation programmes; rehabilitation programmes for perpetrators; support services for families where incest or sexual abuse has occurred. The Recommendation also highlighted how violence against women as a group inhibits that group's ability to enjoy rights and freedoms. This is a logical extrapolation of CEDAW to violence against women. To an extent, General recommendation 19 closes the textual gap in the CEDAW text and makes it clear that the obligation to end discrimination against women includes the duty to prevent violence against women. It also formed the basis for the Declaration on the Elimination of Violence against Women 1993, and can therefore be seen as one of the triggers which brought violence against women into the mainstream of International law²⁶.

The Second World Conference on Women, held in Copenhagen sponsored by UN in 1980 explicitly referred the issue of domestic violence in an official document of the UN (Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, 1980.) The Third World Conference on Women Held in 1985 in Nairobi adopted by consensus the 'Nairobi Forward looking Strategies' which mainly focused on violence against women in the home and recognized it as a serious impediment to the objectives of the Decade of Women. It called for guidance to be given to the law enforcement authorities to deal with the victims, sensitively.

United Nation's General assembly adopted two resolutions directly addressing the issue of domestic violence. The first resolution on domestic violence, i.e. Resolution 40/36 of November 29, 1985, called for criminological research on the problem of domestic violence and requested the member states to implement specific measures to address it; The second resolution i.e. Resolution 45/114 of 1990 urged member states to develop and implement policies, measures and strategies both within and outside the criminal justice system to respond to the problem of domestic violence.

The Fourth World Conference on Human Rights held at Vienna provided a global platform in acknowledging and affirming that the human rights of women as 'inalienable, integral and indivisible part of human rights' and exhorted that 'women's rights are human rights' and led to the articulation of the concept of domestic violence as a human rights violation for the first time.

In 1993, the issuance of the Declaration on the Elimination of Violence Against Women based largely on the provisions of General Recommendation 19 by the U.N. General Assembly and the appointment of a Special Rapporteur on Violence Against Women furthered the application of the due diligence standard within the domestic violence context. Referring to the gender based roots of domestic violence the Declaration broadened the definition of violence by including both the physical and psychological harm done towards women, and it includes acts in both private and public life.

The Beijing Platform for Action was a turning point in International Women's Law as it underscored the long standing failure of governments to promote and protect a woman's human right to be free of violence in their homes. The Platform for Action admitted that a lack of gender-

²⁶*Id.*, pp.34, 36

disaggregated data made it difficult to ascertain the extent to which women are the victims of violence. By requesting states to develop improved data and statistics, the Platform for Action in effect gave a voice to the abused women whose suffering was going unnoticed. The collection of more comprehensive data on violence against women, including domestic violence, is central to revealing the actual situation of women in society. Thus, the Beijing Declaration and Platform for Action contributed extensively to the effort to unearth inequalities and improve the condition of women across the globe.

The Optional Protocol to CEDAW 2000 is considered the first gender specific international complaints procedure. Communications procedure conditions require complaint :by or on behalf of individuals or groups of individuals, in writing; claiming to be a violation of the rights in the Convention; all available domestic remedies have been exhausted, unless the application is unreasonably prolonged or unlikely to bring effective relief; Possibility of interim measures to avoid possible irreparable damage to the victims. Inquiry procedure is applicable in cases of grave and systematic violation of the Convention. The Optional Protocol to CEDAW²⁷ allows individuals or groups of individuals who are victims of any breaches of CEDAW to submit complaints to the Committee²⁸. Under a communications procedure, the Committee will be able to focus on individual cases when considering CEDAW. It would be able to say what is required from States in individual circumstances. This would help States to understand better the meaning of the obligations they have undertaken by acceding to CEDAW. Crucially, communications may also be submitted on behalf of individuals with their consent, unless acting on their behalf without their consent may be justified. This is a much wider test of standing than that which is contained in the European Convention on Human Rights. As one of the categories of sources of International law identified in the International Court of Justice Statute, the decisions of international and national judicial bodies and tribunals are an important source to consider in determining whether domestic violence is a violation of International Human Rights Law.

To date, three important communications on the issue of domestic violence have been considered by the Committee :*A.T v Hungary*;²⁹ *Fatima Yildirim v Austria*³⁰, *Goekce (deceased) v*

²⁷ The Optional Protocol to CEDAW is the first gender specific international complaints procedure. As well as putting CEDAW on a par with human rights treaties which have complaints procedures, it enhances existing mechanisms by specifically incorporating practices and procedures that have been developed under other complaints procedures. The Committee's views on communications would amount to what is called jurisprudence. Jurisprudence is the term used for a body of case law about any particular subject. It is used for guidance in interpreting laws. Jurisprudence from communications would provide clarification and guidance for States and for individuals about States' obligations under CEDAW. This has occurred with the ICCPR in regard to the publication of the Human Rights Committee's views on the cases that have been brought to it under the Optional Protocol to the ICCPR.

²⁸ Article 2-Provides a Communications Procedure which allows either individuals or groups of individuals to submit individual complaints to the Committee. Communications may also be submitted on behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received.

²⁹ Communication No: 2/2003. Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. (Views adopted on 26 January 2005, thirty-second session)

³⁰ The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gulen Khan and Melissa Ozdemir (descendants of the deceased), alleged victim Fatima: *Fatima Yildirim V Austria* Communication No.6/2005 UN Doc CEDAW/C/39/D/6/2005; (Decision) CEDAW Committee (views adopted 1 October 2007)

*Austria*³¹. Violations of CEDAW were found by the Committee in all three instances and the Committee set out the duties which states should fulfill in relation to victims of domestic violence, such as the provision of a safe home, child support and legal assistance. All allegations of domestic violence should be investigated in a thorough manner and victims provided with sufficient access to justice. The Committee's opinions gave the states guidance as to how to fulfill its obligations in respect of domestic violence. It also shows quite systematically the ways in which a legal framework can break down and fail to protect victims of domestic violence. Where communications and recommendations are made public, a powerful tool develops. It is through condemnation and public damnation that change potentially takes root. As well as putting CEDAW on a par with human rights treaties which have complaints procedures, it enhanced existing mechanisms by specifically incorporating practices and procedures that have been developed under other complaints procedures.

General Comment No.28, 2000 adopted by the UN's human Rights Committee was the committee responsible for the implementation of the ICCPR. The major thrust areas of the Comment was to ensure that the rights of women and men are equally protected both in the public and private sector. The connection made between formal arrest and the isolation engendered by domestic violence was a major leap in recognizing the fact that intimate violence is no less cruel than violence committed by state authorities. General Comment in Referring to equal access to justice and legal aid insisted that women should be able to overcome the barriers in giving evidence as witnesses on the same terms as men and that their testimony should not be pitted against that of men. It emphasized the importance of this in 'family matters', thereby acknowledging that this is the realm in which women need particular legal assistance³². This represents a significant step in the direction that reflect the emergence of a concrete, definitive and authoritative norm in the International law prohibiting domestic violence.

The General Assembly Resolution on the Elimination of Domestic Violence against Women 58/147 in the year 2004 invoked the connection between domestic violence and discrimination against women. The Preamble identified domestic violence against women and girls as a human rights issue and approaches the domestic violence as violence that occurs in the private sphere between 'individuals who are related through blood or intimacy'³³. This widens the scope of the Resolution as the domestic violence is identified as a 'public concern' and attempts to embrace violence that occurs in all manner of intimate contexts, and not solely restricted within marital relationships. Within the concept of domestic violence, the Resolution includes physical, psychological, sexual and economic harm and importantly reference is made to the isolation of the victim, all of which results in imminent harm to the safety, health or well-being of women³⁴. The Resolution makes recommendations regarding legislative steps to strengthen legislation or enact legislation, spanning criminal and civil measures, such as social assistance, restraining orders³⁵ and the establishment of 'one-stop centers and safe havens for domestic violence victims'³⁶. This

³¹ The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce and Guelue Goekce (descendants of the deceased) V. Austria Communication No5/2005 UN Doc CEDAW/C/39/D/5/2005; (Decision) CEDAW Committee (views adopted 6 August 2007)

³² *Supra* note.12, p.59,60

³³ UNGA Res 58/147 UN Doc A/RES/58/147, para7(m)

³⁴ *Id.*, para1(c) and (e)

³⁵ *Id.*, para7(a)-(e)

³⁶ *Id.*, para7(f)-(g)

recommendation is extremely important due to its pragmatic nature, confirming that all levels of state may have a role to lay in addressing one incident of domestic violence while also dismantling the systemic obstacles that prevent domestic violence victims from obtaining public assistance, such as re-victimisation and gender insensitive laws and practices³⁷. In September 1994, the International Conference on Population and Development was held at Cairo. The major focus of the conference was the right to health including reproductive choices for women.

Thematic Rapporteurs are held as one of the most effective tools within the United Nations to monitor human rights violations. In 1994, Radhika Coomaraswamy was appointed by the U.N. Commission on Human Rights as the first Special Rapporteur on Violence against Women, Its Causes and Consequences. In her preliminary report, she emphasized that states have a duty under international human rights law to protect women from violence in their homes.³⁸ It held that all states were not only responsible for their own conduct or of its agents alone but also were responsible for their failure to take necessary steps to prosecute private citizens for their behaviour when found incompatible with the international mandates.

The United Nations framework for a model law on domestic violence³⁹ was forwarded on the basis of the report on the causes and consequences of violence against women. The definition on domestic violence was widened to encompass all forms of gender inequality and gender discrimination existing within the family. "All acts of gender based violence i.e. Physical psychological and sexual abuse by a family member against women in the family ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating, verbal abuse forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts shall be termed as domestic violence.

Regional legal and policy instruments and jurisprudence relating to Domestic violence

The international legal and policy framework outlined above has been accompanied by the adoption of various legal and policy frameworks at the regional level. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994 otherwise known as the Convention of *Belém do Pará*, is the first legally binding only international Convention directed solely at eliminating violence against women. It recognizes that every woman has the right to be free from violence in both public and private spheres. It refers to physical, sexual and psychological violence that 'occurs within the family or the domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse'⁴⁰.

³⁷*Id.*, para7 (h)-(l)

³⁸*Preliminary Report of the Special Rapporteur on Violence against Women to the Commission on Human Rights E/CN.4/1995/42 (1994)*, paras. 99-107.

³⁹ A Framework for Model Legislation on domestic violence, report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, E/CN.4/1996/53/Add.2, February 2nd, 1996.

⁴⁰ Convention of Belem Do Para Art.2(a)

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It is the first regional human rights treaty to focus exclusively on gender based violence and to prohibit violence within the home. It requires that States parties apply due diligence to prevent, investigate and impose penalties for violence against women and contains detailed provisions regarding the obligations of States to enact legislation. States parties are obligated to adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman; take all appropriate measures, including legislative measures, to amend existing laws or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; establish fair and effective legal procedures for victims; and establish the necessary legal and administrative mechanisms to ensure that victims have effective access to just and effective remedies⁴¹.

The European Parliament and Council in 2007 established the ‘Daphne III Programme’, as specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk as part of the General programme ‘Fundamental Rights and Justice’. In 2007 the European Council issued a recommendation on the prevention of injury and the promotion of safety, calling on member states to take measures to prevent injuries, including those caused by international violence, particularly domestic violence against women and children⁴².

One of the most recent developments in the area of human rights law and domestic violence is the adoption by the Committee of Ministers of the Council of Europe of the Convention on Preventing and Combating Violence against Women and Domestic Violence in April 2011. The Convention was opened for signature in Istanbul on 11 May 2011 and was signed by 13 states. It is the first international treaty to contain a definition of gender: “‘gender’ shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”⁴³. The Convention defines *domestic violence* shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim⁴⁴. The convention is the first legally binding instrument in the region that creates a comprehensive legal framework to combat violence against women through prevention, protection, prosecution, and victim support. It defines and criminalizes multiple forms of violence against women: physical, sexual and psychological violence, as well as forced marriage and female genital mutilation. The treaty also establishes an international group of independent experts to monitor its implementation at the national level. The provisions of the Convention are comprehensive in nature, encompassing not only criminal justice responses, but also areas such as awareness raising and the provision of social support measures to victims.

In July 2003, the African Union adopted its own regional treaty relating to the human rights of women- the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, as a supplement to Banjul Charter which came into force in 2005. This is a

⁴¹Inter- American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994, Article 7

⁴² Council Recommendation of 31 May 2007 on the Prevention of injury and the promotion of safety (2007/C 164/01)

⁴³Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011, Article 3(c)

⁴⁴ Art.3(b): Definitions.

powerful statement in International Law regarding the right of women to be free from domestic violence and a corresponding obligation on the states to protect that right. It requires states parties to take measures to suppress all forms of violence against women, identify the causes, punish the perpetrators, and ensure effective rehabilitation and reparation for victims.

Thus aroused the need to undertake the international obligations by the state parties to comply with the international standard to deal with the issue of domestic violence against women through legislative interventions or by policy change. The Protection of Women from Domestic Violence Act, 2005 Act has been enacted in keeping with the various guidelines given by several International conventions and declarations. The frame work for model legislation on domestic violence (Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85) acts as the source of framework for the new Act in India inspired by The United Nations Committee on Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No.19 (1989)Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action 1995. India joined in this mission by enacting Protection of Women from Domestic Violence Act, 2005. By the year 2007, out of 185 signatories of United Nations CEDAW, about 7500 countries have adopted specific legislations to criminalise domestic violence, of which 13 are in Latin America: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Nicaragua, Peru, Puerto Rico, Uruguay and Venezuela. The signing of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994 provided the momentum to enact such legislation. All the specific domestic legislations on domestic violence point out the shift in the strategy from resorting penal sanctions to taking recourse on positive civil injunctions.

Conclusion

Swami Vivekananda has rightly remarked: “Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind.” The oppression of women in the family results in the maintenance of women as second-class citizens thus depriving the country of women’s full potential for taking part in the developmental process. This is a serious developmental problem for the country. It is in this wider framework, that the violation of human rights of women occurring at the basic cell of the society i.e. the family needs to be viewed from a larger sociological framework.

The development of domestic violence as a subject in international law from 1946-2000 is stilted and haphazard. From 2000, onwards the lens of International Law begins to focus on domestic violence as a specific manifestation of violence against women. The various Conventions, Declarations and approaches that are developed explicitly acknowledge violence against women as a form of discrimination in general and domestic violence in particular as a violation of human rights. The International human rights norms and standards are an important yardstick by which national human rights norms and standards are measured. Efforts rendered by the United Nations from 1975 to 1995, through conventions and conferences, addressing violence against women, brought to light the specific issue of domestic violence against women as a topic for consideration in the international field.

International Regime on Domestic Violence against Women – Catalysts for Change

The international human rights instruments through its constant efforts has rendered or augmented the viewing of woman as rights holders. At the international level, the human rights treaty system has its own monitoring system and the monitoring and advocacy by women at the domestic level is essential to enhance the effectiveness of the international processes. A clearer understanding of the meaning and scope of the international human rights conventions and approaches as catalysts of change becomes meaningful only if women assess its potential, engages in the exercise of interpreting its scope and is empowered leading to enhancement of their capabilities. The need of the hour is the State and societal accountability.

CLIMATE CHANGE: DIVESTOR OF CHILD RIGHTS

Shivagita & Ann Thania Alex*

In recent times, climate change is emerging as a major environmental disaster. Several causes can be identified for this environmental harm. Rapid industrialization and urbanization has made our life comfortable. Industries have catered to the needs of mankind by supplying essential goods and services, generating employment and thereby contributing to the economic development of nations. At the same time they have brought with them a host of problems. Industries discharge untreated effluents and pollute the atmosphere. Some of the greenhouse gases emitted by industries are injurious to human health. Of all the greenhouse emissions, carbon dioxide is the most lethal. World Health Organisation¹ reports that, in a year, more than one million people die from chronic obstructive respiratory diseases that develop due to exposure to such air pollution. Carbon is directly responsible for causing temperatures to rise and has been the major greenhouse gas for triggering climate change. The emissions are not ordinary localized externalities; risk at a global scale is at the core of the issue². The ill effects of climate change on human health and environment has come to be widely acknowledged by the scientific community. The Intergovernmental Panel on Climate Change which is the scientific advisory body to the United Nations opines that observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes particularly temperature increases.³ Anthropogenic warming over the last three decades has likely had a discernible influence at the global scale on observed changes in many physical and biological systems.⁴ The resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change associated disturbances and other global change drivers.⁵ eg. Land use change, pollution, fragmentation of natural systems, over exploitation of resources.⁶ Approximately 20% to 30% of plant and animal species so far are likely to be at increased risk of extinction if increases in global average temperature exceed 1.5-2.5 degree centigrade.⁷ The health status of millions of people is projected to be affected through increases in malnutrition, increased deaths, diseases and injury due to extreme weather events, increased burden of diarrhoeal diseases, and increased frequency of

*Assistant Professors, School of law, Christ University, Bangalore

¹ World Health Organization, *Indoor Air Pollution and Health*, September 2011, <http://www.who.int/mediacentre/factsheets/fs292/en/index.html>

² Nicholas Stern, *The Economics of Climate Change in Climate Ethics: Essential Readings* Edited by Stephen m., Gardiner, Simon Caney, Dale Jamieson and Henry Shue (Oxford University Press 2010)

³ Core Writing Team - Lenny Bernstein, Peter Bosch, & et al, *Extended Writing Team – Terry Barker, Review Editors - Abdelkader Allali, & et al. An Assessment of the Intergovernmental Panel on Climate Change, Climate Change 2007 Synthesis Report* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷*Id.*

cardio-respiratory diseases due to higher concentrations of ground level ozone in urban areas related to climate change.⁸

The adverse impact of this trans-boundary environmental harm has created an alarm in the world community and the community came together and forged a consensus towards abating this hazard from the planet. The result was the drawing up of the United Nations Framework Convention on Climate Change, with its first conference of parties held at Kyoto. The Kyoto protocol is an international agreement linked to the United Nations Framework on Climate Change which commits its parties by setting internationally binding emission reduction targets.⁹ Ever since the conference of Kyoto, the parties have met at different places and have deliberated upon the measures that the world community has to take protect mankind from this disaster. A series of issues relating to creation of environmental fund, technology transfer from developed to developing countries, and clean development mechanism has been extensively debated. Although these deliberations have taken place at international level and nation states have resolved to take action at the national level, the ill effects of climate change on human health is assuming large proportions.

Children are the worst victims of this disaster. Because of their tender age, they are not able to withstand the change in the weather pattern. Young children are in a stage of rapid development and are less well equipped on many fronts to deal with deprivation and stress. Their more rapid metabolisms, immature organs and nervous systems, developing cognition, limited experience and behavioral characteristics are all at issue here.¹⁰ Children are particularly vulnerable to these health outcomes because of their potentially greater exposures, greater sensitivity to certain exposures, and their dependence on caregivers.¹¹ In addition, children spend more time outside especially playing sports in the heat of afternoon which puts them at increased risk of heat stroke and heat exhaustion.¹² It may also put children at increased risk of UV radiation- related skin damage including basal cell carcinoma and malignant melanoma.¹³

These reports clearly call for adoption of stringent measures for protection of children against climatic variations. It is high time that the rights of the children against disease and malnutrition are protected. The international community has also acknowledged the need to give due recognition and enforcement of rights of children. Since climate change has enormous

⁸ *Id.*

⁹ United Nations Framework Convention on Climate Change, *Kyoto Protocol*, February 9 2013, <http://unfccc.int/kyoto_protocol/items/2830.php> (last visited July 16, 2013).

¹⁰ Sheridan Bartlett, *Climate Change and Urban Children: Impacts and Implications for Adaptation in Low-and Middle-income Countries*, *Environment and Urbanisation*, October 2008, <http://eau.sagepub.com/content/20/2/501.full.pdf+html>

¹¹ Kristie L. Ebi, Jerome A Paulson, *Climate Change and Children Pediatric Clinics of North America*, Vol. 54 (2) at 213.

¹² Katherine M. Shea, *Global Climate Change and Children's Health*, *From the American Academy of Pediatrics*, Vol. 120(5) (Nov. 1 2007)

¹³ *Id.*

potential to deprive mankind of basic human rights, it is essential that the international community not only address this issue at the international level but also draw up measures for effective protection of human rights in times of ecological distress. Appreciation of the human rights in the context of protection against climate change includes (1) Human rights are grounded in person's 'humanity' (2) represent moral thresholds (3) respect each and every individual (4) take general priority over other values.¹⁴ The duty to protect these rights assumes all the more importance because of the Human Rights Council of United Nations passing a resolution finding that "climate change poses an immediate and far reaching threat to people and communities around the world and has implications for the full enjoyment of human rights".¹⁵

The Convention on the Rights of the Child (*hereinafter referred to as CRC*), 1989 through Article 24 casts a duty on the state parties to recognize the rights of the child to the enjoyment of the highest attainable standards of health and to provide facilities for the treatment of illness and rehabilitation of health. State parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.¹⁶ If international community does not take positive steps to mitigate the impact of climate change on human health, children will continue to remain affected. The rights guaranteed to them under CRC will only remain as dead letters.

Considerable decline in the quality of environment also caught the attention of the international community in 1987. The World Commission on Environment and Development headed by Gro Harlem Brundtland, the then Prime Minister of Norway was asked to formulate a global agenda for change. One of the most significant aspects of this report is that it advocated for sustainable development. Sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.¹⁷

Ecologically sustainable development has four important components. Precautionary principle, environmental impact assessment, polluter pays principle and principle of intergenerational equity. Of all these components of ecologically sustainable development, principle of intergenerational equity has relevance to our research. The proponents of intergenerational equity maintain that the present generation has a moral obligation to manage the earth in a manner that will not jeopardize the aesthetic and economic welfare of the generations that follow. From this moral premise, flow certain ecological commandments: do not cut down trees faster than they grow back, do not form lands at levels or in a manner that reduce the land's regenerating capacity, do not pollute water at levels that exceed its natural purification capacity.¹⁸ Having endorsed the principle of ecologically sustainable development and also given due

¹⁴ *supra* note 2

¹⁵ *Id* at 164.

¹⁶ Convention on the Rights of the Child, Office of the United Nations High Commissioner for Human Rights, *Monitoring Child Rights* <http://www2.ohchr.org/english/law/crc.htm>

¹⁷ S.C. Shastri, *Environmental Law*, (3rd ed. 2008, Eastern Book Company).

¹⁸ Shyam Diwan and Armin Rosencranz, *Environmental Law and Policy in India: CASES, MATERIALS AND STATUTES*, (2nd ed. Oxford University Press, 2001) at 585.

recognition to the rights of children, the world community becomes duty bound to protect the interests of children during times of ecological crisis. Several countries of the world have given due recognition to this principle of inter generational equity in their domestic environmental jurisprudence. India has accepted this environmental norm as an integral part of environmental law of the nation.¹⁹ Further, failure to protect children from the effects of climate change will hinder the world's progress towards millennium development goals.²⁰ As per reports, approximately 175 million children will be affected by climate change induced natural disasters every year over the next decade. This is 50 million more than during the ten years to 2005.²¹

Several other jurisdictions have also evinced keen interest in implementing the principle of intergenerational equity in its letter and spirit. Mention may here be made of the case decided by the Supreme Court of Philippines in *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*²² wherein the court held that there is an intergenerational responsibility to maintain a clean environment and allowed a group of children to bring this law suit in conjunction with the Philippine Ecological Network, a non-profit organization to stop the destruction of the fast disappearing rainforests in the country.²³

Although series of international developments have acknowledged the need to protect children against climate change, positive actions in the form of improving community health care systems, creating awareness with the help of civil society organizations, creating awareness about climate change, drawing up programmes for climate change mitigation, adaptation, installation of early warning system are the need of the day to be taken up by the world community. The following paragraphs discuss the same in detail.

Measures that can be Adopted to Mitigate the Deleterious Effects of Climate Change on Children

Protecting the health of children from the negative externalities of climate change should be accorded topmost priority in a nation's agenda which seeks to secure for the children the right to live in a pollution free environment. The primary health centres should be well equipped to deal with climatic changes and the spread of epidemics. As water borne and vector borne diseases are likely to spread because of climatic variations, they must be well equipped with drugs and medical personnel to deal with any kind of eventuality. The Constitution of several countries cast a duty on the state to adopt measures to improve the health and wellbeing of its citizens. This being the case, it becomes the obligation of the state to promote the healthy living of its people. In addition to this

¹⁹ State of Himachal Pradesh v Ganesh Wood Products, AIR 1996 SC 149, 159, 163.

²⁰ Environment and Climate Change, UNICEF, *Introduction*, http://www.unicef.org/environment/index_60332.html

²¹ TUNZA, UNEP, *Key Facts about Children and Climate Change*, http://www.unep.org/tunza/children/pdfs/Children_and_ClimateChange.pdf

²² 33 ILM 173 (1994)

²³ *Id.*

obligation of the state, several Constitutions also guarantee right to life as including right to live in a pollution free environment.²⁴ To ensure that basic health facilities and protection against natural calamities is provided to the common man, it becomes incumbent on nation states to lay more emphasis on decentralization of powers thereby conferring more autonomy to the community health centres to take up apposite measures towards this direction.

Medical men have a vital role to play. Pediatric health care professionals must understand the escalating nature of threats of climate change, anticipate their effects on children's health and participate as children's advocates for strong mitigation and adaptation strategies now and at all levels, from local to global.²⁵ Paediatricians have four roles to play in relation to sustainable development and child health.

- To educate themselves and to ensure that sustainable development becomes a part of teaching and training to paediatricians
- To advocate for principles of sustainable development both locally and nationally
- To set a personal example by adopting the principles of sustainable development in their own life styles.
- To develop appropriate research methods to assess the health impact of policy decisions on children.²⁶

Some of the other suggestions are to improve surveillance systems for food-borne, water-borne, vector-borne, zoonotic and other diseases in cooperation with state and local partners to have a better understanding of the impact of climate change and public health and to potentially develop models and early warning systems to improve health outcomes.²⁷

Lancet Climate Change calls for a public health movement that frames the threat of climate change for human kind as a health issue.²⁸ The Lancet commission opines that no countries will be immune from the health effects of climate change, for example, the hurricane Katrina in the USA and deaths caused by 2003 heat wave in Europe reveals that countries cannot always protect themselves from the adverse health consequences of climate related events. Even the developing economies are prone to spread of epidemics like malaria and cholera. Malaria has become endemic in the central, south eastern and north eastern parts of India. With the rising climate change, it is

²⁴ Art.9, Constitution of Malaysia; Section16, Art. II, Constitution of Philippines 1987.

²⁵ *supra* note 12

²⁶ TONY WATERSTON, SIMON LENTON, Sustainable Development, Human induced Global Climate Change, and the Health of Children< [http:// www.adc.bmj.com/content/82/2/95.full.pdf+html](http://www.adc.bmj.com/content/82/2/95.full.pdf+html)> (last visited July 15, 2013)

²⁷ Testimony Select Committee on Energy Independence and Global Warming, United States House of Representatives, Statements of Howard Frumkin, Director National Center for Environmental Health, Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry U.S. Department of Health and Human Services, *Climate Change and Public Health*, <<http://globalwarming.house.gov/tools/assets/files/0486.pdf>> (last visited July 17, 2013)

²⁸ Anthony Costello, Mustafa Abbas, & et al, *Managing the Health Effects of Climate Change*, [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(09\)60935-1/fulltext?](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(09)60935-1/fulltext?)

expected that the disease may spread to newer areas.²⁹ Thus, it is the obligation of the state instrumentalities to undertake precautionary measures and safeguards against climate change, thereby ensuring the health of its infants which would in turn contribute to the collective measures adopted by the international community against this peril. The transnational and multinational corporations, through their corporate social responsibility, should join hands with the government to deal with climate change issues with increased significance thereby contributing to the betterment of community health.

Creation of Eco-Friendly Infrastructure Conducive to All Round Development of Children

The Preamble to the World Health Organisation Constitution defines health as a “state of complete physical, mental and social well-being and not merely the absence of disease and infirmity”. The United Nations Permanent Forum on Indigenous Issue has emphasized the need to approach health issue from a holistic perspective taking into account people’s emotional, physical and social wellbeing and to recognize the connections which exist between health and other priorities of human development such as education, demographic balance, human rights and economic productivity.³⁰ At a time of increasingly unsafe environments and as the scientists predict with relative certainty that climate change will increase, both the severity and prevalence of natural disasters, schools that cannot withstand natural disasters are unacceptable. Alongside of strengthening community health support, the nation states are also obligated to provide environment friendly infrastructure. United Nations International Children’s Emergency Fund (*hereinafter referred to as UNICEF*) has accomplished considerable progress in this direction. Among the other things, the UNICEF manual emphasizes on providing a minimum package that offers guidance into addressing environmental risks and vulnerabilities to climate change within schools and their surrounding communities. These inquiry based activities for empowerment include participatory risk-mapping and facilities-based environmental solutions to support children and their communities in adapting to changing conditions and reducing risk through preparedness and response.³¹ UNICEF also emphasizes on improving water supply, gender-sensitive sanitation facilities, promoting good hygiene practices, addressing nutritional needs through school based interventions, increasing access to energy and addressing challenges posed by climate change through improvements in disaster risk reduction, preparedness and response activities.³² Schools should also be instrumental in imparting relevant and practical environmental education, thereby

²⁹ Sumana Bhattacharya, C. Sharma, R.C. Dhiman, A.P. Mitra, *Climate Change and Malaria*, <http://www.indiaenvironmentportal.org.in/files/malaria%20and%20climate%20change.pdf>

³⁰ Coordinating lead authors: Jonathan Patz, Carlos Corvalan, Pierre Horwitz, & et al, *Secretariat of the United Nations Convention to Combat Desertification, Our Planet, Our Health, Our Future, Human Health and the Rio Conventions: Biological Diversity, Climate Change and Desertification*, <
http://www.who.int/globalchange/publications/reports/health_rioconventions.pdf

³¹ UNICEF, Manual Child- Friendly School, http://www.unicef.org/publications/files/Child_Friendly_Schools_Manual_EN_040809.pdf

³² *Id.*

equipping children to respond wisely at the face of disasters. The all round development of children being the focus, giving psychological assistance to children, who are unable to adapt themselves to climate changes, also becomes important.

Fostering Scientific Research on Climate Change and its Impact on Children

International community should also foster scientific research in relation to climate change. The research would facilitate early detection and monitoring of epidemics and climate related disasters. Such research including surveillance and programme evaluation is essential to inform the prioritization of activities related to climate change adaptation in public health.³³ Frameworks for prevention include incorporation of climate change action into the ten essential functions of public health; and the World Health Organization's efforts to develop internationally comparable children's environmental health indicators, specifically there is a need for quality and continuous environmental health indicator data that are disaggregated by age group and include children.³⁴ Although the impact of climate change on human health has come to be acknowledged, there is no unanimity among the scientists as regards the impact of climate change on child's health which makes it all the more important to foster research in this area.

As scientific uncertainty exists in relation to climate change, nation states should adopt precautionary measures to avert the undesirable impact of climate change. Precautionary principle has come to be recognized as an important component of ecologically sustainable development at the international level. Environment is a complex phenomenon which is subject to change. Science cannot provide an authentic solution to all harms arising out of climate change. Scientific uncertainty in relation to environment is recognized through the adoption of precautionary principle. Scientific uncertainty should not be used as a device to postpone measures that can be taken up for the protection of environment. On a practical note, nation states can promote research on climate change through constitution of a fund; as humanity has an interest in conservation of environment, research should be taken up. This includes promoting research for public health preparedness against climate change.³⁵ Nation states can also provide research based communication and technical assistance on the health effects of climate change for health professionals, state and local health departments, university environmental studies departments, science teachers, federal, state, local officials, organisation, industry and public.³⁶

³³ Perry E. Scheffield and Philip J. Landrigan, *Global Climate Change and Children's Health: Threats and Strategies for Prevention*, Environmental Health Perspectives, 2011, March 119(3); 291-298
<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3059989>

³⁴ *Id.*

³⁵ *supra* note 27

³⁶ *Id.*; *supra* note 27.

Strengthening Participation of Stakeholders in International Environmental Forum

Principle 10 of Rio De Janero Conference, 1992 states that:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities. In their communities, and the opportunity to participate in decision- making processes -

States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.³⁷

This being the binding norm of international law, it becomes necessary for the international community to ensure the participation of children and youth in environmental decision making, both at national and international levels. As they are vulnerable and are likely to be affected by whatever decisions taken at the international forum, they have to be given an opportunity of being heard. It is also important that they are to be sensitized regarding the impact of climate change, through promoting discussions on the same within schools, families and friend circles.

United Nations Environment Programme has undertaken tremendous efforts to build the capacity of young people in matters of environmental conservation focusing on issues related to climate change. This includes:

- Providing young people with a forum for exchange of ideas and experience thus enhancing inter- country cooperation;
- Facilitating youth participation in national, regional and international environmental fora whenever possible;
- Encouraging young people’s involvement in key decision making in international environmental fora such as the, African Ministerial Conference on Environment (AMCEN), United Nations Framework Convention on Climate Change (UNFCCC), the United Nations Convention on the Biological Diversity;

³⁷ United Nations Environment Programme, *Rio Declaration on Environment and Development*, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

- Raising the visibility of environmental conservation through environmental awareness campaigns using media, sport, art and other cultural activities targeting young people from across the region.³⁸

There is ample evidence in literature which indicates people's ignorance about climate change.

Almost all Britains have heard about global warming and two thirds say that they know a great deal about it. However, public awareness of international framework for tackling climate change is low. Thus, there is a need to raise the public understanding in this issue.³⁹

Creation of public awareness along with the above suggested measures is the need of the hour. The citizens of the country are to be educated to maintain vigil against activities that impair climatic systems and to give timely responses. Awareness through media and mass campaigns will also enlighten citizens about activities adopted by the governments against climate change, which in turn affect the common well-being.

Conclusion

Scientific evidence in relation to the ill effects of climate change on mankind is alarming. It is high time that the international community set aside their differences and revisits their obligations under the United Nations Framework Convention on Climate Change. Countries of the world should join hands in a spirit of universal brotherhood and well-being and draw concrete strategies to reduce the emission of green house gases. Less developed countries may be given technical and financial assistance to switch over to a green economy as envisaged in the Climate Change Convention. The support of the youth and the children should be mobilized on a larger scale to save the earth from this peril. Unless world community works in solidarity for full realization of noble values enshrined in 'vasudaiva kudumbakom', the days are impending where our planet earth will be washed out from the face of the universe.

³⁸ UNEP, *Children, Youth & The Environment*, < <http://www.unep.org/tunza> > (last visited July 16 2013)

³⁹ Andrew Norton and John Leaman, *The Day After Tomorrow: Public Opinion on Climate Change Mori Social Research Institute*. May 2004, http://climateprediction.net/schools/docs/mori_poll.pdf

FACILITATING ACCESS TO MEDICINES: INDIAN PATENT SYSTEM AND INTERNATIONAL OBLIGATIONS

Dr. Sujatha S. Patil*

1. Introduction

The focus of the intellectual property regime that India has had to adopt since it took commitments under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) has remained on the ability of the country to provide mechanisms which can ensure that the country is able to provide access to medicines to its citizens at affordable prices. India has had a unique position among the countries in the developing world since it has a strong generic pharmaceutical industry, which has been able to provide medicines at prices that were among the lowest in the world. Much of the credit for this development goes to the Patents Act that India enacted in 1970. Two key provisions facilitated this process. The introduction of a process patent regime for chemicals and the shortening of the life of patents granted for pharmaceuticals.

However, the obligations to implement the Agreement on TRIPS changed the conditions that had seen the Indian pharmaceutical industry to take root. The critical issue was the re-introduction of the product patent regime and the limitations, this change has imposed on its ability to produce technologies through reverse engineering. It was widely held that the future prospects of the industry hinged critically on the ability of the policy makers to exploit the flexibilities that existed in the framework provided by the Agreement on TRIPS.

To make use of the flexibilities available within and outside of TRIPS turned out to be the most pragmatic solution available for developing countries, including India, to address the concerns on the availability and accessibility of medicines. According to this approach, TRIPS provides only minimum standards of protection and does not set the universal common standard for the substantial aspects of the patent law. This strategy obtained the political consensus at the Doha Ministerial Conference of 2001. The Conference adopted a separate declaration, viz. The Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration), which clearly states "the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose"¹. Thus the TRIPS implementation strategy was "to find the means within the patent system and outside it, to generate the competitive environment that will help to offset the adverse price effect of patents on developing country consumers.

The issue that is now being debated is the impact of the TRIPS Agreement on the availability and affordability of much needed medicine for the poorer populations of the world and if there is indeed a negative impact, what are the possible modalities to reduce that impact and make drugs cheaper for deserving populations and developing countries?

Between the flexibilities available in the TRIPS Agreement and the Doha Declaration on Public Health, can member countries through appropriate legislative and administrative measures, safeguard the interests of their poor populations? Can government in developing countries bring in

* Faculty of Law, Dayananda Sagar Business Academy, Bangalore.

¹ WTO, Declaration on the TRIPS Agreement and Public Health, WT/MIN (01)/DEC/W/2 (Doha, 14 November 2001), para. 4.

appropriate legislations to ensure equitable access to medicines much like the "*Patient Protection and Affordable Care Act*" of Barack Obama approved by the US Congress on March 2010?

In India the policy prescription for the implementation of the TRIPS flexibilities accepted the strategy of their incorporation in the domestic law. However, there was no consensus among the various actors regarding the scope of the flexibilities to be made available in the Indian Patents Act 1970 ('Patents Act'), while implementing the TRIPS patent regime. The implementation of the TRIPS flexibilities involves changes far beyond an amendment of the law and its required policy and institutional support for the implementation of flexibilities. This paper identifies the challenges that India is currently facing in implementation of the TRIPS flexibilities. In other words, it examines the utility of the TRIPS flexibilities in the Indian context.

2. Access to Medicines: The Indian Scenario

Since the introduction of the Indian Patents Act 1970, which prohibited product patent protection for pharmaceutical inventions, the pharmaceutical industry in India succeeded in achieving self-sufficiency. The industry, i.e., the Indian generic industry 'holds 4th position in terms of volume and 13th in terms of value of production.²' It also enjoys a 22 per cent share of the global generic market³. Currently, domestic companies control 80 percent of the domestic market. Only two MNCs, viz., Glaxo Smithkline (GSK) and Pfizer, figure in the top 10 pharmaceutical companies in India. Only four MNCs find their place among the top 20 pharmaceutical companies in the country⁴. In 1970, Indian companies only had a 20 per cent share⁵. The domestic pharmaceutical markets show a growth of 17 per cent annually⁶. The exports of drugs and pharmaceuticals by the Indian pharmaceutical industry are around USD 5.3 billion⁷. Indian pharmaceutical companies play an important role in providing life-saving drugs at affordable prices. For instance, 70 per cent of the antiretroviral drugs (ARV) procured to treat HIV/AIDS under the Global Fund to Fight HIV/AIDS, TB and Malaria (GFFTM) comes from Indian companies. Similarly, 70 per cent of UNICEF, IDA and Clinton Foundation procurement is also from Indian companies⁸. Indian companies export to nearly 225 territories consisting of independent states and non-independent states.

The absence of product patent protection played a crucial role in the development of the Indian pharmaceutical industry⁹. Indian companies could easily introduce new drugs in the market.

² Planning Commission of India, Report of the Working Group on Drugs and Pharmaceuticals for the Eleventh Five Year Plan (New Delhi: Planning Commission, 2006), p.21

³ *Ibid*

⁴ Sudip Chaudhuri. *The Indian Pharmaceutical Industry-Post TRIPS* (2009), p. 11 (unpublished).

⁵ *Ibid*. See also, Padmashree Gehl Sampath, *Economic Aspects of Access to Medicine After 2005* (2005, UNU Merit), p. 22, available at: <http://www.who.int/intellectualproperty/studies/PadmashreeSampathFinal.pdf>,

⁶ Chaudhuri (2009), *supra* note 5, p. 11.

⁷ Reji K. Joseph, *India's Trade in Drugs and Pharmaceuticals: Emerging Trends, Opportunities and Challenges*, Discussion Paper No. 159 (New Delhi: Research Information System for Developing Countries, 2009), p. 10.

⁸ Developed country government exerts political pressure on developing countries against the use of TRIPS flexibilities like compulsory licenses. See Ellent Hoen, *The Global Politics of Pharmaceutical Monopoly Power* (Diemen: AMB Publishers, 2009), pp. 44-48.

⁹ For the role of patents in the evolution of the Indian pharmaceutical Industry, see Biswajith Dhar & Niranjan Rao, *Transfer of Technology for Successful Integration into the Global Economy: A Case Study of the Pharmaceutical Industry in India* (New Delhi: UNCTAD/UNDP Programme on Globalisation, Liberalisation and Sustainable Development, 2002).

Further, it generated competition in the pharmaceutical market. This competition drove the prices of pharmaceuticals and also helped Indian companies to introduce innovative products like fixed-dose combinations (FDCs). The competitive environment in the domestic market also induced Indian companies to develop a cost-effective process for the manufacturing of medicines.

The new product patent regime changes the rules of the game. Indian generic companies are legally prevented from introducing the generic version of patented medicines. The only way to introduce generic versions of patented medicines is through a compulsory license or a government use authorisation. Otherwise, Indian generic companies can produce only off-patented medicines. This would result in denial of new medicines at an affordable price to the people. The next section examines how far the Indian Patents Act addresses this concern, while implementing the TRIPS patent regime.

3. Critical Analysis of TRIPS Flexi Provisions

India has carried out three amendments to fully comply with TRIPS patent regime. The primary aim of these amendments is to fulfill the TRIPS obligations, along with the incorporation of the TRIPS flexibilities in the domestic legislation. However, the amendments are also used to increase the efficiency of patent administration. In order to comply with the TRIPS obligation, India amended the Patents Act in 1999 (to introduce Exclusive Marketing Rights (EMR), 2002 (to comply with the rest of the obligations except product patent) and 2005 (to introduce a product patent regime). A critical examination of the relevant provisions of Patents Act is carried out below to find out how far the Indian Patents Act has incorporated TRIPS flexibilities.

(a) Scope of Patentability

One of the important concerns related to the introduction of product patent protection is the patenting of known substances. Often pharmaceutical companies misuse the patent protection to seek patents on known substances claiming incremental modifications as inventions. This practice is known as 'ever greening of patents'¹⁰. Such practice is aimed to delay the generic competition by acquiring as many patents on the known substance. Therefore, a strict patentability criterion, which denies patent protection to known substance, is essential to ensure early entry of generic medicines.

Generally speaking, there are two ways to limit the scope of patentability. (i) To increase the threshold limit of patentability criteria by providing a definition of patentability criteria, viz, novelty, inventive step and industrial applications. (ii) To exclude certain types of inventions, which do not satisfy any one of the patentability criteria, or those inventions which are in conflict with public morality, national security or affecting the health of humans, animals and plants? The Indian Patents Act attempts to limit the scope of patentability by following both methods. The criteria for patentability are defined in the Act and linked to a web of definitions. According to the Act, a patent means "a patent for any invention granted under this Act"¹¹. The word 'invention' is defined as a "new product or process involving an inventive step and capable of industrial

See also, Sudip Chaudhuri, *WTO and India's Pharmaceutical Industry: Patent Protection, TRIPS and Developing Countries*, New Delhi: Oxford University Press, 2006, p. 25.

¹⁰ Dinesh Abbrol, *Post TRIPS Technological Behaviour of Pharmaceutical Industry in India*, Journal of Science, Technology & Society 2 (2004), pp. 243-271.

¹¹ Patents Act, s. 2(m)

application”¹². Thus a patent is granted only to a new product or process involving an inventive step and capable of industrial application. However, the Act defines ‘inventive step’ as “a feature of an invention that involves technical advances as compared to the existing knowledge or having economic significance or both and that makes an invention not obvious to a person skilled in the art”¹³. According to this definition, to qualify the inventive step, the invention has to satisfy any of the three conditions, viz. Advances over existing technical knowledge or economic significance or both. Generally speaking, economic significance should not be a sole criterion for evaluating the inventive step of the invention. The economic significance of an invention depends on many other factors and it is not the purpose of patents to recognize the economic significance of an invention. However, the new definition makes the economic significance criteria as substitutable criteria to technical effect. As a result, the new definition of inventive step diluted one of the basic requirements of an inventive step. TRIPS uses economic significance in a different context. Under Article 31 (1) (ii), TRIPS states that compulsory license for dependent patent should look at whether the second patent should involve an important technical advance of considerable economic significance in relation to the invention claimed. Therefore, economic significance could have been used along with the technical effect to judge the inventive step, but not as the sole criteria. Therefore, the current definition lowers the threshold level of the inventive step. The third amendment also introduced two more definitions, with an objective of limiting the scope of patent protection¹⁴

Section 3 (d) of the Patents Act excludes 16 categories of inventions from patent protection, because they are not considered inventions within the definition of invention. There are a few exclusions having implications for the patentability of pharmaceutical substance¹⁵. However, the most important exclusion is in subsection (d), which states:

"The mere discovery of a new form of a known substance which does not result in the rite enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. For the purposes of this clause, salts, esters, ethers, polymorphs, metabolics, pure form, particle size, isomers, mixtures of isomers, complexes, combinations, and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy".

This provision excludes new forms of known substances, discovery of new properties of known substance and new use of known substances. Further, it treats salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers and mixtures of isomers, complexes,

¹² Patents Act, s. 2(j)

¹³ Patents Act, s. 2(j)(a)

¹⁴ *Ibid*

¹⁵ Patents Act, Sec. 3(a): An invention which is frivolous or which claims obviously contrary to well established natural laws; s. 3(e): A substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance; S.3(p): An invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.

combinations and other derivatives of known substance as the same substance. Therefore, subsequent patenting in any of the above-mentioned forms is prohibited.

However, the exclusions in sub-section (d) do not prohibit patenting of known substances in all circumstances. Exclusions are qualified with the word 'mere' and the phrase "which does not result in the enhancement of the known efficacy". These are ambiguous, too broad and potentially allow new forms of existing substances to be patented. For instance, as per the qualification what is banned is the patenting of mere discovery of a new form of a known substance and the patenting of discovery of new forms of known substance per se is still possible. Further, a minor amendment to an existing one can satisfy the requirement of 'enhancement of efficacy', and one is able to get around the provision as it stands. In addition, the phrase 'mere discovery' conveys that discoveries are patentable if they are not mere discoveries¹⁶. The mandate under TRIPS is to provide patent protection to only inventions and discoveries.

These qualifications offer an entry point in favor of the patentee to claim patents on all those types of claims mentioned in the explanation to Section 3(d). Furthermore, the Patent Office is not equipped like a science lab to examine whether the claimed invention differs "significantly in properties with regard to efficacy"¹⁷. These flaws result in the expanded scope of patentability. Therefore, the current provisions of the Patent Act do not rule out the possibility of ever greening of patents. Provisions pertaining to the scope of patentability, i.e., definitions of the criteria of patentability and the exclusions of patentability provide enough space for pharmaceutical companies come around the exclusions especially section 3(d) and obtain patents for known substance. Reflecting the same view the Parliamentary Standing Committee on Commerce in its report in 2008 recommended that "The Government should clarify the usage of terms 'significantly' and 'efficacy', which form part of Section 3(d), to clear the ambiguities involved in the interpretation of the said section"¹⁸.

Earlier, in 2006 Novartis AG challenged the constitutional validity of Section 3 (d) on two grounds¹⁹. (i) It argued that Section 3 (d) denies its rights under Article 27 of the TRIPS Agreement, which obligates WTO member states to provide patent protection to all fields of technology without discrimination and therefore violates the obligations under the TRIPS Agreement. (ii) It argued that in the absence of a definition or guideline, phrases like 'enhancement of the known efficacy' or "differ significantly in properties with regard to efficacy" give uncontrolled as well as unguided powers to the controller of patents. The same would result in the arbitrary exercise of the powers and violates right to equality under Article 14 of the Constitution of India. In India, a challenge to the constitutional validity of a statute is maintainable only on two grounds, viz. Legislative competency and violation of the Fundamental Rights. However, during the course of the proceedings Novartis mainly relied on the second ground.

The court refused to examine whether Section 3 (d) violates the obligations under the TRIPS Agreement and held that: ...this court has no jurisdiction to decide the validity of the amended section, being in violation of Article 27 of TRIPS, we are not going in to the question

¹⁶ K.M. Gopakumar and Tahir Amin, *Patent (Amendment) Bill 2005: A Critique*, 40 Economic and Political Weekly 15 (2005); pp. 1503-1505.

¹⁷ *Ibid*

¹⁸ Parliament of India, Department Related Standing Committee on Commerce, *Eighty Eight Report on Patents and Trademarks Systems in India* (New Delhi, 24 October 2008), p.44.

¹⁹ Novartis AG and another v. Union of India and others, W.P. Nos. 24759 and 24760 of 2006, High Court of Madras.

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whether any individual is conferred with an enforceable right under TRIPS or not. For the same reason, we also hold that we are deciding the issue namely, whether the amended section is compatible with Article 27 of TRIPS or not²⁰.

Hence it was held that the patent applicant has to show enhanced therapeutic effect in order to obtain a patent for a new form of a known substance or for its derivatives. Therefore the court held that Section 3 (d) is not in violation of Article 14 of the Constitution of India²¹.

Let us see few recent Patent Office Decision in the case of Section 3 (d) and 3 (e), what change we can notice here.

In *Pfizer v Torrent*²², the court clearly stated that a composition under section 3 (d) cannot be patented unless any significant therapeutic efficacy over the parent substance is shown. There is no evidence in the body of specification any therapeutic efficacy of the said combination. The composition of claims 1 to 13 essentially a combination of atorvastatin calcium salt and amlodipine besylate which is already disclosed and no statement of enhanced efficacy. Therefore, composition of claim I to 13 is not patentable under section 3 (d) of the Act.

In case of *Cipla v Pfizer*,²³ the Delhi patent office judged that Pfizer's patent of Sutent does not involve any inventive step. Delivering another blow to MNC drug majors, the Indian patent office has revoked US-based Pfizer's patent for cancer drug Sutent in India. The patent office has rejected Pfizer's claim for the patent over Sutent, saying Pfizer's patent does not involve any inventive step. The post-grant opposition was filed by Mumbai-based Cipla and Natco Pharma. Against the decision, Pfizer India appeals before the Intellectual Property Appellate Board (IPAB).

In case of *Cipla v Roche*²⁴, The Intellectual Property Appellate Board's (IPAB's) quashed the patent of Swiss drug maker Roche's Hepatitis C drug, Pegasys, may also impact Peginteron, manufactured by its American rival Merck. The IPAB on Friday revoked Roche's patent for Pegasys, or Peginterferon alpha 2a, on the grounds that the process of pegylation was a known concept and that it did not enhance the efficacy of the drug, making it non-patentable.

The above cases clarify that. Section 3(d) potentially precludes the patenting of hundreds of incremental pharmaceutical innovations that Indian companies attempting to patent and commercialize outside India. The Patent office itself is not in a position to consider patent under section 3(d). The ambiguities involved in this section have to be rectified.

(b) Compulsory License and Government Use

The successful functioning of compulsory licenses and the government use regime depends mainly on two factors, viz., the potential users of compulsory license (generic industrial) and the government's ability to monitor the impact of patents on access to medicines. According to

²⁰ *Ibid*

²¹ Novartis petition challenging the order of the appellate board order of rejecting its patent application on Gleevec is still pending before the Indian Supreme Court.

²² In the matter of the application for Patent No. 2571/del/1998 filed on 28th Aug 1998, Delhi Patent Office, 3 February 2009, www.patentgurukul.com

²³ See Business standard, Oct 04, 2012

²⁴ CS(OS)No89/2008andCC52/2008

the Commission on Intellectual Property Rights (CIPR), "developing countries should establish workable laws and procedures to give effect to compulsory licensing and provide appropriate provisions for government use."²⁵ Further, there should be straightforward transparent and fast procedures for the governance of compulsory license. The implementing legislation should fully exploit the flexibilities in the TRIPS for determining the grounds for compulsory licensing, as well as for non-commercial use by the government including production for export²⁶.

As per the existing provisions, the applications for compulsory licenses can be obtained only after three years from the date of grant of the patent²⁷. The only exemption is provided in a national emergency, extreme urgency and non-commercial public use. A three-year cooling period is required under the Paris Convention only when a compulsory license is granted on the ground of failure to work or insufficient working²⁸. There is no obligation under the TRIPS or the Paris Convention to give such cooling periods before the grant of a compulsory license. There is an argument that in the case of medicines this requirement may not be material, because the drugs get the marketing approval after 4-9 years from the date of grant of patents. However, it may not be true in all cases. At times the patent holder may rely on a subsequent patent, even though the marketing approval is on the initial compound in India such situations arise because there are many patent applications in the mailbox and products are available in the market. Thus, the cooling period of three years for a compulsory license delays the issuance of compulsory licenses and favors the patent holder to enjoy the patent monopoly even in case of abuse of monopoly.

Further the Act gives much discretion to the Controller on the maintainability of the compulsory license application. The Controller is required to take certain facts into consideration, while deciding the application for a compulsory license²⁹. The grant of compulsory license has to follow a cumbersome procedure.

Further, the Patents Act does not provide ceiling on the royalties in the case of a compulsory license and government use. The absence of a ceiling on royalties may give rise to higher claims for royalties and related litigation. Thus the absence of a ceiling on royalties brings a great degree of uncertainty regarding the actual use of government use.

The above-mentioned gaps in the law take away the effectiveness of a compulsory license regime under the Patents Act. As a result, during the last five years only one or two applications were filed for the issuance of a compulsory license in India. It was filed under Section 92 A of the Patents Act, which provides a compulsory license for exporting to countries which do not have the manufacturing capability in the pharmaceutical sector. This application was rejected by the Patent Office due to non-fulfillment of statutory requirements, i.e. the request of the importing country³⁰.

²⁵ CIPR (2003), supra note 1, p.44

²⁶ Ibid. See also, *Third World Network (TWN)*, Manual on Good Practices in Public Health Sensitive Policy Measures and Patent Laws (*Penang: TWN, 2004*).

²⁷ Patents Act, S. 84(1)

²⁸ Article 4 of Paris Convention

²⁹ According to Patents Act, S. 84(6), the following factors have been taken into account while granting CL. They include the nature of invention, the time, which has elapsed from the date of sealing of patent and efforts by the patentee to make use of the invention. The ability of the applicant to work the invention to the public advantage. The capacity of the applicant to undertake risk in providing capital and working of the invention and including the efforts by the applicant to obtain the licence on reasonable terms and conditions within reasonable period of time. The reasonable period means six months from the date of request.

³⁰ See Patent Office Decision dated 4th July 2008, POD/HK/2008-09/2942

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Let us see the cases where applications are filed by pharmaceutical industries for the issuance of a compulsory license in India in the new Patent Act 2005.

In case of *Natco Pharma Ltd's v. Pfizer Inc and Roche Ltd's*,³¹ the Hyderabad-based Natco Pharma Ltd's request for compulsory licenses on two patented cancer drugs could emerge as a larger trend. Natco Pharma is seeking licenses for Sutent, a renal cancer drug of Pfizer Inc. and Swiss F. Hoffmann-La Roche Ltd's lung cancer medication, Tarceva, which costs Rs. 1.5 lakh for a month's treatment nearly four times the Indian per capita annual income. Sutent, awaiting a patent grant in India, is likely to be priced at \$4,000 (Rs.1.57 lakh) for a six-week treatment.

"The case is important for the world as India is considered the factory of cheap generics for global markets, where governments want to control spiraling health care costs," The government of India must be willing to issue compulsory licenses so that generic competition can increase, and more affordable drugs be exported

India's patent regulator had started hearing the case last week but hit a roadblock when Natco objected to its hearing the patent holder, saying the WTO provision does not require this. The Hyderabad-based company has approached the Delhi high court questioning the legality of hearing the patent holders, though they are entitled to a reasonable royalty. Due to which matter is pending before the Patent Controller for compulsory licenses. In the meantime Natco got the compulsory license against Bayer on 9th March 2012.

India's first compulsory licensing decision (patents) during the post TRIPS era,

In **Bayer v. Natco**³², the much awaited compulsory licensing (CL) order in relation to Bayer's patented anticancer drug (Nexavar) is finally out. Controller General Kurian issued the order on 9th March 2012.

The order is a thoroughly well researched and logically reasoned one. After a 3 day hearing, the Controller General (CG) found in favour of Natco on all counts and issued a license in their favour.

Natco is now free to manufacture and sell a generic version of Nexavar (a kidney/liver cancer drug that goes by the generic name of Sorafenib Tosylate), but will have to pay a 6% royalty on the net sales (every quarter) to Bayer. Further, it can only charge Rs. 8800 for a monthly dose (120 tablets) of the drug (in its compulsory licensing application, Natco committed to sell at this price). In its written submission, Natco also committed to donating free supplies of the medicines to 600 needy patients each year and this commitment has also been recorded in the compulsory license (CL) order.

Government Use

Government use is another effective means to curb abuse of patents. It allows the government or its authorised agent to use the patents without the authorisation of the patent holder. Generally, the government can take over the patent invention without seeking a license or to

³¹ <http://spicyipindia.blogspot.com/2008/03/natco-vs-roche-pfizer-hearing-on-right.html>

³² O.R.A.No35/PT/2012 (see for details www.patentgurukul.com)

negotiate. This practice is available in most common law countries, especially in the US and the UK. In the UK, it is known as in the service of the Crown.' In the US, it permits the government or its authorised person to use any patents on the ground of public use. The patent holder can sue the government only for compensation and no injunction remedy is available under the US law³³. The advantage of government use is that it can bypass most of the procedural hurdles of the compulsory license. However, the purpose of government use is restricted to non-commercial use. A country like India with a public sector pharmaceutical industry should strengthen the government use provisions in its Patents Act. The TRIPS provision on the government use is mentioned in Article 31(b) as public non-commercial use. It permits skipping requirements of voluntary license and negotiating requirements. An important issue often raised is that when a government use is non-commercial use, whether it is possible to sell through private channels. The answer is in the affirmative and government can recover the cost of production and distribution for non-commercial use. The affordability of drugs can be ensured through a strong government use provision. (Indian context).

(a) Two Exemptions

Section 107A of the Patents Act, 1970, as amended contains two notable exemptions. The first relates to what is better known as the "Bolar Exemptions" and the second exemption seeks to define the contours of "Parallel Imports".

1) Bolar Exemptions

One of the less focused areas of the Indian Patents Act as amended is the provision providing for the so-called "Bolar exemption"³⁴. The basic idea behind the "Bolar exemption" is to permit the use of without prior permission for the purpose of obtaining regulatory clearance for production and marketing of a product. Thus the exception allows generic manufacturers to obtain the regulatory clearance well before the expiry of the patent and introduce the generic product in the market as soon as a patent expires. As a result, the patent holder faces competition soon after the expiry of the patent. The Panel in the *EC-Canada* case confirmed it as an exception under Article 30³⁵.

Section 107(A) (a) of the Indian Patents Act, prior to the 2005 amendment, permitted:

“Any act of making, constructing, using or selling a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force in India or a country other than India that regulates the manufacture, construction use or sale of any product.”

However, this provision unnecessarily puts several conditions like 'solely', 'reasonably related', etc. to use this exception. This imposes the burden of proof on the person using this exception. More importantly, it does not permit the importation for regulatory purpose. As a remedy to some of these defects, the third Patent Amendment amended this section by permitting

³³ See Carlos Corea, *Intellectual Property Rights and the Use of Compulsory Licences: Options for Developing Countries*, TRADE Series Working Paper No.5 (Geneva: South Centre, 1999).

³⁴ Also called “Experimental Use Exception”

³⁵ Details are available at: http://www.unctad.org/en/docs/iteipc2006_en.odf

importation within the scope of the exception. However, other conditions still remain. The patent holder may misuse these conditions to prevent generic manufacturers from using this exception.

2) Parallel Importation

This exception is based on the doctrine of exhaustion whereby the patent owner loses or 'exhausts' the right after the first sale of the patented product or a product produced through a patented process. As a result, this exception allows another person to import the patented product without the permission of the patent holder from any other source, where the product is legally introduced in the market. However, the scope of this exception depends on the type of exhaustion regime allowed under the national law, viz. International or regional or national exhaustion. Developing countries have absolute freedom to adopt international exhaustion under the Article 6 of TRIPS, and it would cease the control of the patent holder over the patented article with the first sale anywhere in the world³⁶. In the other two cases, exhaustions happen only after the sale within the jurisdiction of a region or a nation. Article 6 of TRIPS states that issues of exhaustion of intellectual property (IP) should not be taken to WTO dispute settlement mechanism. Further, the Doha Declaration states that:

The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment³⁷

In the strict sense, it means the parallel importation cannot be done by a person, who is legally authorised only to sell and not to produce. It also reduces incentives for investment in the pharmaceutical and agricultural sectors. And hinder the ability of governments in different countries to maintain price controls on pharmaceutical products within their territory. This is again an example of reducing the scope of parallel importation. In this way, India made use of the TRIPS flexibility to the fullest extent.

(b) Procedural Safeguards

TRIPS patent regime deals with the substantial law and therefore member countries still have the freedom to regulate the procedural law. Therefore, procedural safeguards can prevent the grant of frivolous patents. Procedures for the grant of patents should ensure a simple and transparent mechanism of granting the patent. Further, they should give room for the scrutiny of patent applications because the Patent Office is not fully equipped to perform a thorough examination of patents. Even the US Patent Office with 3000 examiners grants patents based only on the "preponderance of the evidence".

Public scrutiny through a pre-grant opposition is necessary to check frivolous patents. TRIPS permit member countries to have reasonable procedures and formalities consistent with it for the acquisition and maintenance of intellectual property³⁸.

³⁶ Carlos Correa, Integrating Public Health Concerns into Patent Legislation in Developing Countries, Geneva: South Centre, 2000), p. 75, available at: http://www.southcentre.org/index.php?option=com_content&task=69&itemid=67,

³⁷ WTO (2001), *supra* note 2, para 5(d)

³⁸ TRIPS, art 62(1)

However, the 2005 amendment diluted the procedural safeguards in the Indian Patents Act. There were three stages of granting a patent: a) initial publication after 18 months of filing; b) acceptance of complete specification after the examination and scrutiny of the Patent Office; and c) publication of the accepted complete specification inviting opposition from the public. The 2005 amendment removed the last two stages procedure prior to the granting of patents. Presently a patent applicant obtains all privileges of patent except the right to sue for infringement immediately after the first publication, i.e. after 18 months from the date of publication. As a result, the privileges of patent except the right to file infringement suit are available even without examination of patent applications. Further, Patent Office grants the patents immediately after the examination and there is no acceptance of complete specification before the grant of patents. As per the Ordinance, the time frame for making the examination report is left to the Rules. The New Rules under the Patents Act provide 1-3 months for the examination report preparation changing the earlier 18 month period. The third amendment also took away another important check against frivolous patents provided in Section 27 of the Patents Act which gave powers to the Controller to take *suo moto* steps to refuse grant of patent on ground of anticipated publications. Hence, the amendment diluted the process to favour the patent applicant.

(c) Licensing Agreements

Licensing is the most effective way of transferring a patented technology. The licensing agreement can provide certain conditions, which affect the purpose of transfer of technology. Licensing agreements are important because TRIPS promotes voluntary licensing by making evidence of efforts to obtain voluntary license before applying for compulsory license. Therefore, regulation of licensing agreements is critical to promote the transfer of technology, which is explicitly mentioned as one of the principles of TRIPS. TRIPS does not prevent members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of Intellectual Property Rights (IPRs) having an adverse effect on competition in the relevant market. Further, it obligates members to engage in consultation if the intellectual property owner belonging to one indulges in practices that violate the regulations on licensing agreements and vice versa.

The Patents Act declares certain provisions in the license agreement is unlawful, if it contains the following clauses³⁹, exclusive dealing with non-patented article use of a non-patented article other than that supplied by the licensor, use of any process other than the non-patented process and exclusive grant back. As mentioned above, the coercive conditions in the license are a ground for compulsory licenses. The Patents Act does not link these clauses with compulsory license or anticompetitive remedies. It mentions that these can be used as a ground against infringement proceedings⁴⁰. During the last five years, the patent holders granted at least three licensing agreements containing anti-competitive provisions to Indian generic manufactures⁴¹. However, the Patent Office could not scrutinize those licensing agreements in the absence of patent in force. Licensing agreements were granted on the basis of a pending patent application.

³⁹ Patents Act, s. 140

⁴⁰ Patents Act, s. 140(3)

⁴¹ In 2005, Roche issued a voluntary licence to Indian Pharmaceutical Company Hetero to produce its avian flu medicine Oseltamivir. In 2006, Gilead Sciences granted voluntary licence to nearly seven Indian companies to produce Tenofovir (TDF), an anti-retroviral (ARV) drug for HIV/AIDS treatment. In 2006, Bristol Myers Squibb (BMS) issued another voluntary licence to Indian Pharmaceutical company Emcure to produce Atazanavir, another ARV drug for the treatment of HIV/AIDS.

The above discussion clearly shows that Indian Patents Act contains most of the TRIPS flexibilities. However, the provisions containing the flexibilities fail to clarify critical questions associated with the TRIPS flexibilities. As a result, most of the flexibilities contained in the Patent Act suffer from the following shortcomings. (i) The legal provisions related to flexibilities give for interpretations by the administrative and judicial authorities, which may at times go against the very legislative intent of the provisions such as litigation on the constitutional validity of Section 3(d). In a common law country like India, it is important to avoid the interpretational freedom because the judicial interpretation sets precedents and legal validity. (ii) Some of the legal flexibilities, especially related to the scope of patent protection, give a case-to-case application of law and drastically reduces the utility in practice. For example, the application of Section 3(d) is often overlooked and patents are granted on patent applications claiming patents contrary to Section 3(d). Further, it also needs expert human resources to implement these flexibilities and require additional resource for the human development. (iii) The use of flexibilities would be hampered due to the extensive procedural requirements involved in the invocation of those flexibilities like compulsory license. (iv) The provisions related to flexibilities do not curtail the avoidable litigation with regard to the issuance of compulsory license and government use, etc. This creates uncertain outcomes with regard to the actual operation of flexibilities like compulsory license and hampers the practical use of these mechanisms.

4. Impact on Access to Medicines

The government informed Parliament on 21 October 2008 that the Patent Office granted 460 product patents for pharmaceutical inventions/innovations from 1 January 2005 to 30 August 2007⁴². Out of these product patents, 392 were granted to foreign applicants and only 68 patents were granted to Indian applicants. These patents cover critical diseases like HIV, cancer, renal failure and neurological disorders. The workload on patent examiners, resulted in the patenting of known substances. An examination of the granted patents by the Indian Pharmaceutical Alliance (IPA) shows that out of 2,339 pharmaceutical patents granted in India, 67 of the 86 patents that were granted in the past four years were in violation of Section 3 (d) and another of Section 3 (e)⁴³. Many patents were also granted on molecules invented in 1960, 1970, 1980 and 1990s. Since these molecules are already available in India these patents may not affect the availability of these medicines in its original molecule form, but would deny access to the incrementally modified forms of these medicines. However, this reveals the deficiency of the Patent Office in applying the legal safeguards to prevent the patenting of known substances.

As mentioned earlier Indian generic companies still control 80 per cent of the Indian pharmaceutical markets. Therefore the product patent impact is not yet felt on the whole market. However, there are at least 15 medicines patented in India, which are currently available are in the process of obtaining marketing approval in the country. Table 4.1 provides the name and therapeutic use of these patented medicines. Even though validity of some of these patents is still under dispute, these patents would block the generic availability once the Indian courts uphold the validity of these patents. The pharmaceutical MNCs, which introduced these products in

⁴² Lok Sabha (Lower House), Unstarred Question No. 535, dated 21 October 2008. See also Joe C. Mathew, "Global Drug Firms Bag 392 India Patents in 392 Months", Business Standard, 22 October 2008, available at: <http://www.business-standard.com/india/news/global-drug-firms-bag-392-india-patents-in-32-months/338073>

⁴³ Latha Jishnu, "Way to Go-New Patents for Old Drugs", Business Standard, 4 March 2009.

India, did not make any substantial reduction in the prices of these drugs. The price of these drugs without a generic alternative is unaffordable to the majority of the people of India. As shown in Table 4.1 the majority of these patented medicines are for the treatment of Cancer and HIV/AIDS. Since the HIV/AIDS treatment is currently provided freely through the public sector using a different set of medicines, the impact of these patents is yet to be felt on the ground. However, these patents may act as a barrier in the future to provide treatment to people living with HIV/AIDS, who will develop drug resistance to the current ARV drugs. The impact of patents is directly felt on drugs for the treatment of cancer. For instance, GSK charges USD 20,000 per person per year, even after the discount, for its breast cancer drug, Lapatinib (Tykerb)⁴⁴. Similarly, Roche's Hepatitis C drug, Peglated Alfa Interferon, is beyond the reach of Indian people because of its high price. The cost of Peglated Alfa Interferon is around Rs. 13,000 to 14,000 (USD 279--300) per dose. This would cost Rs 2,40,000 (USD 5156) for a 4 week treatment⁴⁵. Thus, the patent monopoly coupled with high prices is resulting in the denial of the best treatment for the Indian people.

Table 7.2: Name and Therapeutic Use of 15 Patented Medicines

Name of the Drug	Therapeutic Use	Company
Sorefanic	Cancer	Bayer
Erolotinib	Cancer	Roche
Lapatinib	Breast cancer	Glaxo
Dassatinib	Leukaemia	Bristol-Myers-Squib
Peglated Alfa Interferon	Hepatitis C	Roche
Valganciclovir	HIV/AIDS	Roche
Maraverock	HIV/AIDS	Pfizer
Raltegravir	HIV/AIDS	Merck
Entecavir	HIV/AIDS	Bristol-Myers-Squib
Vildagliptin	Diabetic	Novartis
Sitagliptin	Diabetic	Merc and Co
Saxagliptin	Diabetic	Bristol-Myers-Squi
Varencline	Smoking de-addiction	Pfizer

⁴⁴ Chaudhuri (2009), *supra* note 7, p. 10.

⁴⁵ P.B.Jayakumar, "MNCs Sell New Drugs at Exorbitant Prices in Collusion with Trade", Pharmabiz, 8 July 2006, p. 23

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Etravirine	HIV/AIDS	Tibotec Pharmaceutical
Lumiracoxib	Anti-inflammation	Novartis

During the last five years, pharmaceutical MNCs attempted to frustrate the public interest safeguards available in the Patents Act. (i) They do not recognize India's sovereign rights to see the TRIPS flexibilities. MNCs continue to lobby against Section 3(d) of the Patents Act. There is a consistent campaign against Section 3(d) stating that it denies benefits of incremental innovation to Indian patients⁴⁶. There was also a campaign against pre-grant opposition procedure stating that Indian companies are systematically misusing it by filing back-to-back pre-grant opposition in order to delay the grant of patents⁴⁷. (ii) MNCs attempted to use the courts to curtail the scope of public health safeguards like Section 3(d), which prevents the patenting of known substances, and Section 107 A, which allows the use of the patents without the permission of the patent holder for obtaining regulatory clearance. (iii) Pharmaceutical MNCs tried to neutralize the generic industry's freedom to make use of the pre-grant opposition by providing a voluntary license continuing obligation to protect the patent on generic companies. (iv) Contrary to the promises of foreign direct investment (FDI) and transfer of technology, MNCs did not make any significant FDI in the pharmaceutical sector⁴⁸. (v) MNCs closed down most of their manufacturing facilities in India and outsourced the production of their generic brands to the SME sector in India⁴⁹. MNCs importing most of the new drug formulations are undermining the promise of FDI and transfer of technology. The Indian pharmaceutical industry is responding in multiple ways, depending on their financial strength, to meet the challenges of the product patent regime. The generic industry's response includes, R&D on new drug development, patent challenges and innovation on existing drugs. The new drug development strategy is in a nascent stage and is yet to develop the final product. However, the patent opposition strategy paid good dividends to Indian companies. It helped them launch many new drugs, which would have otherwise been patented.

5. Conclusion

The above discussion clearly shows that there is a legal, policy and institutional deficit in the implementation of the TRIPS flexibilities in India. Even though the Indian Patent Act contains all the TRIPS flexibilities, the relevant provisions require further fine-tuning, especially of those related to the scope of patent protection, compulsory license and government use, etc. The current provisions provide space for legal interpretation of critical areas like the scope of patent protection, compulsory license etc. This may result in an interpretation, which is contrary to the original purpose. Further the provisions like compulsory license and government use involve cumbersome legal procedures and neutralises the practical use of public interest safeguards. Hence amendments to the existing provisions on the scope of patentability and compulsory license are required for the effective implementation of the TRIPS flexibilities.

⁴⁶ See, USIBC and Coalition for Healthy India (2009), supra note 35.

⁴⁷ C.H.Unnikrishnan, "Drug Cos Seek to Change in Indian Patent Law". Live Mint, 2 November 2007, available at <http://www.livemint.com/2007/11/02235134/Drug-cos-seek-change-im-Indian.html>

⁴⁸ Reji K Joseph, *Analysis of the Performance of FDI Companies in Drugs and Pharmaceuticals Sector in India*, paper presented at ISID-RIS Symposium on Concepts, Definition and Data Issues Relating to FDI in India (New Delhi, 16 March 2010).

⁴⁹ *Ibid*

“DEATH PENALTY AND PARDONING POWER OF PRESIDENT: A Comparative Analysis between the Position in India and United States of America”

Palasree Kirttania*

Introduction

“There is no reason why society should not rid itself of individuals proved socially harmful.” – Albert Einstein¹

Since the beginning of civilization there has been crime, and the retaliation from the civilized society has manifested in the form of punishment. Initially the punishments used to be extremely severe. In 7th Century B.C. under the Draconian Law of Greece death was the punishment for all crimes. Various forms of corporeal punishments like amputation of limbs, emasculation, torture on the rack, stoning to death, stampeding by elephants etc. were also prevalent. The very nature of the punishments was so cruel that it evoked strong response from the people in the modern times. Any form of torture, be it perpetrated on an innocent individual or a criminal, does not meet the approval of the civilized society any more.

Among these punishments, the death penalty has been the centre of controversy because it's drastic and irrevocable nature. Many countries have either abolished it formally or *de facto* abolition has taken place. The Second Optional Protocol to the International Covenant on Civil and Political Rights deal with death penalty. The state parties to the Optional Protocol has an obligation to abolish death penalty. But there are some countries where capital punishment is very much in existence, though may be only under rare circumstances. The controversy revolved around the fact that the deterrent factor is absolute; there is no chance of the offender repeating his offence. Yet, there may be cases where the accused is entitled to benefit of doubt. Or, a situation may exist where due to the exceptional nature of the crime some amnesty may be showed to the offender.

This is exactly where the question of presidential pardon comes in. In most civilizations, the head of the state has had the privilege of granting special pardon upon whom he saw fit for it. It was his prerogative to bestow his mercy upon the offender even if he has been convicted by a competent court. This principle has been incorporated in the Constitution of India also under Art. 72. The Constitution guarantees that a convict sentenced with death penalty can make a plea to the President for pardoning his sentence. This paper makes an analysis of validity of death penalty as a punishment in the present era of human rights and how far the pardoning power of the President furthers the interest of human rights.

*Teaching Assistant, NLSIU, Nagarbhavi, Bangalore

¹ Albert Einstein, *Berliener Tageblatt*, quoted in *Congressional Digest*, 243

²Jacques Barzun, *In Favour of Capital Punishment*, in *Social Ethics: Morality and Social Policy*, New York: McGraw Hill 1977, 89

“The uncontrollable brute whom I want put out of the way is not to be punished for his misdeeds, nor as an example or as a warning; he is to be killed for the protection of others.”- Jacques Barzun².

According to criminal jurisprudence there are four theories of punishment – deterrent, preventive, retributive and reformatory. Death penalty can serve as deterrent, preventive and retributive, but certainly not reformatory. This was valid in the bygone days where the policy was ‘tooth for a tooth, eye for an eye.’ The Islamic tradition supports death penalty. Shariat prescribes death penalty for various offences.

There has also been argument that penalty for one murder or more than one murders are same; therefore, the only way to prevent further homicides is to eliminate the perpetrator. Further, supporting the offenders is a burden on the honest taxpayers’ pocket. But in the present days of human rights jurisprudence where the focus of punishment has shifted from retributive to reformatory, the validity of death penalty automatically comes into question.

One of the major opposition to death penalty is because of its irreversible nature. Not only legal but ethical question arises that if state cannot restore life of a person in case of error in judgement it cannot have the right to take away life. Yet, such situations are not rare where there can be no question as to the guilt of the accused. There may be instances where the convict, if kept alive, may pose as threat to others, even inside the prison.³ In such circumstance the state is more than happy to execute such persons.

At present the countries of the world can be classified into four categories based on their treatment of death penalty. They are as follows:

- Retentionist – These countries have retained death penalty and have no hesitation about using the same in appropriate cases.
- Abolitionists – These countries have abolished death penalty altogether. No matter what the nature of the crime may be there will not be any death penalty.
- Abolitionist for ordinary crimes – These countries have adopted the position where the death penalty is applied only in most exceptional circumstances. For common criminal offences such sentence is not pronounced but only in case of treason or desertion from the armed forces during time of war would attract such penalty. India falls within this category where the apex court has opined that only in ‘rarest of rare case’ death penalty can be awarded.
- Abolitionist *de facto* – There has been no formal abolition of death penalty in these countries but execution of death sentence has not taken place for such a long time that in practice death penalty has ceased to exist.

³Reference may be made to the case of Westly Alan Dodd who was executed on 5th January, 1993 by the State of Washington on his own request. He was charged and convicted for raping and murdering 3 young boys, the youngest being 4 years old. During the trial he declared his intention to kill a prison guard and run away from the jail after which he intended to kill many more young boys.

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In spite the classification showing that many countries still retain capital punishment, at least theoretically, only a few countries practice them actively. According to Amnesty International, 85% of the 1,813 executions that have been carried out in 1999 had taken place only in five countries, namely, China, Congo, Iran, Saudi Arabia and United States of America.⁴

The final debate is with relation to the mode of execution. If it is accepted that in certain circumstances it is necessary to carry out the death sentence then the method should also be prescribed. Some countries including India still practices hanging, though this method has been vehemently criticized as being inhumane and in violation of basic human rights. The other methods are shooting (used in China), electrocution (obsolete in most places), gas chamber⁵, and now most frequently used method is lethal injection⁶, which causes death almost instantly. The recent trend is to acknowledge that since death itself is the penalty there is no necessity to inflict pain while causing death; that it should be done as humanely as possible.

India treads very cautiously when it comes to sentencing someone to death penalty. The Supreme Court of India has opined in *Bachan Singh v. State of Punjab*⁷ that death penalty can be awarded only in the rarest of rare cases. So it is understood that death penalty is not awarded frequently but after much deliberation and only when the nature of the crime requires so. The problem arises when such a convict is pardoned by the President by virtue of his pardoning power.

Origin and Purpose of Pardoning Power

Origin: Vesting of pardoning power with the executive head of a state is a long established principle. This power has been exercised in England since time immemorial.⁸ It has been a royal prerogative to exercise the power of pardon at the advice of the Home Secretary, and such power is executive in nature.⁹

Position in India: In India, the power of pardon can be traced back to the Government of India Act, 1935. Sec. 295 of the said Act divided the power of pardon between the Governor General and the Provincial Governors.¹⁰ While framing the Constitution of India, the framers of the Constitution discussed the provision relating to pardon under Art. 59(1)¹¹ which later became

⁴Amnesty International News Release, 18th April, 2000

⁵Cyanide pellets are dropped into sulfuric acid to produce lethal gas.

⁶Combination of sodium thiopental, pancuronium bromide and potassium chloride.

⁷AIR 1980 SC 898

⁸59 American Jurisprudence, 2d, Pardon and Parole §1

⁹3 D. D. Basu, Commentary on Constitutional Law of India, C.K. Thakker et al. eds., Nagpur: LexisNexis Butterworths Wahdwa, 8th ed., 2010, p.4445

¹⁰Sec. 295(1) - Where any person has been sentenced to death in a Province, the Governor General in his discretion shall have all such powers of suspension, remission of commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province. Provided that nothing in this sub-section affects any powers of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court-martial.

¹¹7 Constituent Assembly Debates, 1118 – 20, December 29, 1948

Art. 72. As it stands now, Art. 72 of the Constitution of India, 1950 speaks about the pardoning power of the President.¹²

Position in The United States of America: Art. II §2 Cl.1 of the Constitution of the United States of America provides for the pardoning power of the President.¹³ This power was granted to the President by the Constitutional Convention of 1787.¹⁴

Meaning, Nature and Scope

Meaning: “A pardon is an executive act of grace which exempts an individual from the punishment the law inflicts for a crime he has committed.”¹⁵ According to Lord Coke, a pardon is a “work of mercy, whereby the King, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical.”¹⁶ In other words, pardon means an act of forgiveness, remission or exemption. It may be forgiveness of an offence or remission of other liabilities.

Nature and Scope: Granting of pardon is an act of grace towards a convict in order to prevent miscarriage of justice. It is also a constitutional scheme where the executive head of the state exercises this power. It is an act of state and not an individual act.¹⁷

In India, the pardoning power of the President is unlimited and depends upon the discretion of the President. Though the President needs to exercise this power in accordance with the aid and advice of the Council of Ministers¹⁸, it does not delimit the power of the President. In contrast, the power of pardon of the President of America can be exercised in all cases except for impeachment.

Pardon restores the convict back to his original position as it was before commission of the crime. Once pardon has been granted, the convict is no more guilty of the crime.

¹² Art. 72. **Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases** – (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

¹³ Art. II §2 Cl.1 - The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

¹⁴ Encyclopedia of American Constitution, Leonard W. Levy & Kenneth L. Korst eds., New York: Macmillan Reference USA, 2nd ed., 2000, p. 1878

¹⁵ 67A Corpus Juris Secundum, Brooklyn, New York : The American Law Book Co. & West Publishing Co., Pardon & Parole §3

¹⁶ See *supra* note 4, § 3

¹⁷ See *supra* note 4 § 12

¹⁸ *Maru Ram v. Union of India* AIR 1980 SC 2147

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There is no fixed rule as to when pardon can be granted. It can be granted before indictment, before conviction as well as after conviction. Pardon cannot be granted as a matter of right. Neither can a convict claim the right to be heard.¹⁹

Types: Pardon can be of the following kinds:

- An absolute pardon which sets aside the sentence
- A conditional pardon
- A remission which reduces the amount of sentence without changing the character of the sentence.

In USA, the President has power to grant conditional pardons, to commute sentences, to remit fines and forfeitures and to grant amnesty.

When a pardon has been granted upon certain conditions and the convict has to fulfil such conditions in order to be eligible for grant of the same, it is conditional pardon. In common law as well as in USA a conditional pardon may be granted. But the conditions that have been imposed for granting pardon must be constitutional.

In USA a conditional pardon can be granted²⁰ provided such pardon has been accepted by the convict. Delivery must be made to him and either the convict himself or someone authorised on his behalf must accept the pardon.²¹ All necessary ingredients of a valid contract, like absence of fraud and free consent by a sane person are required. Such safeguards have been placed upon conditional pardon because the conditions imposed may be more objectionable than the punishment itself.²² But, in *Biddle v. Perovich*²³ the court upheld a commutation of sentence from death to life imprisonment even though the sentence was imposed without the prisoner's consent.²⁴

Therefore, pardon would also mean that the accused was guilty of the offence in the first place. It is not being declared 'not guilty' but an admission of the offence. Presidential pardon is an admission of guilt because unless one has committed an offence, he cannot be pardoned.

Object of Pardoning Power

¹⁹*Kehar Singh v. Union of India* AIR 1989 SC 653

²⁰*Schick v. Reed* (1974) 419 L.J.S. 256 at 266 [President Eisenhower commuted Schick's death sentence on the condition that he would be ineligible for parole.]

²¹ See *supra* note 2 § 68

²²*Ibid*

²³274 U.S. 480 (1927)

²⁴ John E. Nowak & Ronald D. Rotunda & J. Nelson Young, *Constitutional Law*, (St. Paul. Minn.: West Publishing Co., Handbook Series, 2nd ed., 1983, p. 240)

The pardoning power is to be exercised for general good and welfare of the public. If public welfare can be achieved by suspension of the execution of punishment, then there is no necessity of punishing a convict.²⁵

Another major reason behind granting the power of pardon upon the President is to rectify any error which may be committed by the judiciary. To err is human and judges are also human beings. Hence, there is a chance that inadvertently there might have been a miscarriage of justice in sentencing the convict. Under such circumstance, the executive head may exercise his power of pardon and rectify the mistake.

According to the Law Commission of India²⁶, a sentence passed by the court may require consideration because of the following reasons:

- Relevant facts might not have been placed before the court
- Even if the facts were laid down before the court, it may not have been done in the proper manner
- Certain facts may be discovered after passing the sentence
- Events that has developed after passing of the sentence

In the above circumstance, the President may exercise his power of pardon to avoid miscarriage of justice.

Position in America is quite similar to India. There too the President may exercise pardoning power for similar reasons. Further, at times it was necessary to reconcile warring factions. Since the Congress was not in session all the time, it was necessary to have such power readily available, otherwise its effectiveness would be diluted.²⁷

Other Forms of Reduction of Sentence

Under Art.72 of the Constitution of India, along with the power of pardon, the following other forms of reduction of sentences have also been contemplated:

4.1 Reprieve: The word '*reprieve*' has been taken from the French word '*reprendre*' which means 'to take back' or 'withdraw'. It imposes a stay on the execution of the sentence and merely delays the execution. In common law, there are three types of reprieve:²⁸

- *ex mandatoregis* (from the mere pleasure of the crown)
- *ex arbitrio iudicis* (power which belongs to every tribunal where the judge is not satisfied with the verdict)
- *ex necessitate legis* (required by law to be granted under certain circumstance, e.g. a woman carrying a child when she was sentenced)

²⁵See *supra* note 9 §11

²⁶Report on Capital Punishment, (1967), pp. 317 – 18

²⁷See *supra* note 8

²⁸See *supra* note 2 § 6

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Respite: It means awarding of a lesser sentence keeping in view of the fact that the convict has no prior conviction. In India, this power can be exercised both by the judiciary as well as the executive.

Remission: It is the reduction of the amount of the sentence without changing the character of the sentence.

Commutation: It is substitution of a lesser sentence for a greater one by authority of law out of clemency. It is not necessary to take the consent of the convict to commute his sentence.

Amnesty: Amnesty means a general ‘blanket pardon’. It is usually granted in case of political offences or offences committed against the sovereignty of the state, where the trial is yet to be conducted. The guilt of the accused is not established and pardon may be granted by the legislature or the executive.

The distinction between the position of the President of India and the President of USA has to be taken into account. The President of India has been vested with the power to pardon, reprieve, respite, remit or suspend a sentence whereas the President of USA has the power to grant pardon, reprieve and amnesty.

But, the President of USA enjoys a broader scope when it comes to the cases in which he can exercise his power. He has the power to grant pardon for all offences against the United States where as the President of India can grant pardon only in the following instances:

- All cases where the punishment or sentence is by Court Martial
- In cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends
- In cases of death sentence

Effect of Pardon

Effect: In India, a pardon absolves the convict of any liability, be it fine or imprisonment, which might be attached to him as punishment. In case of limited pardon, certain amount of punishment may be reduced. But he cannot be absolved from disqualification of civil rights.²⁹

In USA, pardon results in the restoration of the following rights:

- Civil rights belonging to a citizen
- All citizenship rights including right to serve on a jury and right to be a witness
- Right to have custody of children or ward

A pardon does not restore the following rights:

²⁹*D.I.G. v. Rajaram* AIR 1960 AP 259

- Right to be reinstated to his profession if his licence has been forfeited as a consequence of his guilt
- Right to recover forfeited pension
- Property or interest vested in others

Limitations of Pardoning Power

Safeguards Against Arbitrary Exercise of Power: The Constitution of India does not impose any limitation on the pardoning power of the President but it mentions the circumstances in which the pardoning power can be exercised by him. As per judicial interpretation³⁰, the President has to exercise this power in accordance with the aid and advice of the council of ministers, which amounts to a safeguard. Further, his decision is amenable to judicial review.³¹

Position in America: It was suspected that the pardoning power may be used not in the appropriate cases fit to be pardoned but to grant immunity to the favourites of the President. It was feared that such prerogative may be abused by the President. There have been instances where the President granted pardon either for personal or political reasons. Such pardons may have been constitutional in the broad sense of the term but defeats the purpose of the provision.

One of the most controversial Presidential pardon was pardoning of President Richard Nixon by President Gerald Ford. President Nixon was to be proceeded against for impeachment after the Watergate scandal. Nixon, after contemplating a grant of presidential pardon to himself, decided to resign. After his resignation, Vice-President Gerald Ford assumed the position of President and granted unconditional pardon to President Nixon. This action was challenged in *Murphy v. Ford*³² under the following the two grounds:

- One of the limitations that has been expressly mentioned in Art. II Sec. 2(1) is pardoning power will not be available in case of impeachment. Though after resignation President Nixon was not per se facing an impeachment motion, the resignation was given to avoid impeachment in the first place. President Ford transgressed the constitutional limitation by granting pardon when investigation was going on. Hence, such pardon can be considered as given for ulterior reasons.
- A pardon can be granted only when an offence has been committed. In this case, President Nixon's guilt was not yet proved. The pardon was granted on the assumption by President Ford that President Nixon had committed the offence. Granting of pardon, though is indirectly an admission of guilt, cannot be given on assumption of an offence.

President Clinton granted more than 300 pardons on the last night of his presidency, which are popularly known as 'midnight pardons'. One such pardon was granted to a billionaire named Marc Rich whose ex-wife was a friend of the Clintons. During investigation, Denise Rich exercised her 5th Amendment privilege of right against self-incrimination and refused to answer any question. The Bush administration refused to investigate further.³³

³⁰See *supra* note 13

³¹See *supra* note 12

³²(1975) 390 F. Supp. 1372

³³Otis H. Stephens, Jr. & John M. Scheb II, *American Constitutional Law*, (Thomson West, 3rd ed. p. 178)

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Some of the checks that were thought to have imposed a control on the pardoning power are as follows³⁴:

- If the President continues to be in office after grant of pardon, he can be proceeded against for impeachment on that ground.³⁵
- During election it may have an adverse effect on his vote bank
- Adverse public opinion

But, unfortunately, such safeguards have proved to be inadequate, as testified by the abovementioned instances. One reason is it is quite difficult to establish conclusively that such pardon has been granted because of favouritism or political motive. Also, though such pardons may be politically unwise or morally reprehensible, but constitutional all the same. The Constitution of America grants almost unlimited power of pardon with relation to offence against the state, excepting the impeachment proceedings.

Further, the decision of the President is amenable to judicial review. Though the President has been vested with almost unlimited power of pardon, the court retains its power to interpret the Constitution and to determine whether he has transgressed his constitutional power.³⁶ Further, while granting pardon, if the President imposes unconstitutional conditions the court can interfere. The President cannot grant pardon in anticipation of the commission of an offence as that would amount to dispensation of laws by the executive.

Scope of Judicial Review of Pardoning Power

The question here is if the pardoning power of the President is subjected to judicial review then what is the sanctity of the pardoning power? After all, it has been granted to rectify the errors that the judiciary may commit!

The position in *Kehar Singh*³⁷ was that the power of the President is a constitutional and executive power, hence cannot be brought under the scope of judicial review. The power has widest amplitude and the court cannot even suggest guidelines.

But the court can allow judicial review on certain specific grounds:

- To determine the scope of President's power of pardon.
- If the President rejects the mercy petition on erroneous ground that he could not go beyond the highest court of the land.
- To determine whether there has been an *inordinate delay* in disposing of a mercy petition by the President.
- Where an earlier mercy petition has been rejected, the convict cannot obtain an order of staying execution of death sentence by submitting repeated mercy petition.

Exercise or non-exercise of power of pardon is not immune from judicial review.³⁸ The main aim of judicial review is restricted to the following question:

³⁴See *supra* note 2

³⁵One of the grounds for impeachment against President Andrew Johnson was corrupt use of pardoning power.

³⁶*U.S v. Nixon* (1974) 468 U.S. 683

³⁷See *supra* note 13

- Did the decision making authority (the executive head) exceed its powers?
- Did the authority commit an error of law?
- Did the authority commit a breach of the rules of natural justice?
- Did the authority reach a decision that no reasonable tribunal would have reached?
- Did the authority abuse its power?

Pasyat J., in *Epuru Sudhakar v. Government of Andhra Pradesh*³⁹ laid down that judicial review of the pardoning power is available on the following grounds:-

- That the order was passed without application of mind
- That the order is mala fide
- That the order has been passed on irrelevant considerations
- That the relevant materials have been kept out of consideration
- That the order suffers from arbitrariness

It was further held in this case that it is not necessary to provide guidelines because the power of President is of widest amplitude. Specific guidelines may not be able to envisage all the types of cases that may come up. As the current position stands now, the President's power of pardon may come under judicial review.

Such a view puts the Constitutional provision in jeopardy because in the first place it is the power of the President to exercise mercy and hence cannot be usurped by the court. It violates the constitutional scheme. Secondly, all the cases of death penalty do not directly go to the President. It has to be recommended by the Home Secretary before a convict for death sentence can apply for mercy petition. Therefore a blanket statement cannot be made that the Presidential power of pardon is exercised arbitrarily. The president being the executive head of the country⁴⁰ is entitled to such power without intervention from judicial authorities.

It was further held in this case that it is not necessary to provide guidelines because the power of President is of widest amplitude. Specific guidelines may not be able to envisage all the types of cases that may come up. As the current position stands now, the President's power of pardon may come under judicial review.

Conclusion

In the course of the paper, the author has tried to establish that the nature and scope of the pardoning power is essentially the same in India and United States of America. In both the countries the President is vested with this power for the same purpose, that is, to rectify the mistake of the judiciary, if any.

Though the power in essence is similar in nature, there are certain differences. The President of USA enjoys unlimited power of pardon, except in cases of impeachment. The

³⁸ I D.D.Basu, Shorter Constitution of India, Dr. A.R. Lakshmanan J., V.R. Manohar & Bhagwati Prasad Banerjee J. eds., Nagpur: Wadhwa LexisNexis Butterworths, 14th ed., 2000 pp. 684 – 685

³⁹ AIR 2006 SC 3385

⁴⁰ Art. 53 of the Constitution of India

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Position in India and United States of America”

President of India, on the other hand, have a narrower scope of pardoning power as the Constitution has defined under what circumstances the pardoning power can be exercised.

At the same time, it should be noted that there are chances of such power being abused. There have been instances where the pardoning power of the President has been used for political gain or personal motive. To regulate such instances, the concept of judicial review of the pardoning power has been introduced. The question arises is that if pardon is granted by the President after the decision has been rendered by the court, making the same decision amenable to judicial review makes the whole exercise of executive pardon futile. The author has tried to establish that though the court has interpreted that the pardoning power of the President is amenable to judicial review it should not be so because ultimately it is the prerogative of the executive head of any country to exercise the pardoning power. Especially in situations where a person is sentenced with capital punishment if the Presidential pardon is further subjected to judicial review the sanctity of the constitutional provision itself becomes diluted. The prerogative lies with the President and it should remain so. Therefore once the apex court has delivered its judgement the final decision should lie with the executive head. But as the position stands now, the decision of the President is amenable to judicial review.

Thus, we can see that in USA as well as in India, the President has some limitation imposed upon his power, and in both the countries the safeguard taken against abuse of the power is judicial review. Hence, the researcher comes to the conclusion that the pardoning power of President in both the countries are similar.

WOMEN EMPOWERMENT AND SOCIAL INCLUSION

Jayashree R Salimath*

I. Introduction

Preamble, Fundamental Rights, Fundamental Duties and Directive Principles of the State policy of the Constitution of India deals with the principle of gender equality. The Constitution grants equality to women, and also empowers the State to adopt measures of positive discrimination for welfare of women. Within the limited framework of a democratic infrastructure, our laws, development policies, Plans and programmes have aimed at women's empowerment in different spheres. From the Fifth Five Year Plan (1974-78) onwards there has been a progressive shift in the approach to women's issues from welfare to development and empowerment. In recent years, the empowerment of women has been recognized as the central issue in determining the status of women. There have been many attempts by the government in that direction. There are some as follows:

1. The National Commission for Women was set up by an Act of Parliament in 1990 to safeguard the rights and legal entitlements of women.
2. The 73rd and 74th Amendments (1993) to the Constitution of India have provided for reservation of seats in the local bodies of *Panchayats* and Municipalities for women, laying a strong foundation for their participation in decision making at the local levels.
3. India has ratified various international conventions and human rights instruments committing to secure equal rights of women. Some of them are
 - a) The ratification of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1993.
 - b) The Mexico Plan of Action (1975), the Nairobi Forward Looking Strategies (1985), the Beijing Declaration as well as the Platform for Action (1995) and;
 - c) the Outcome Document adopted by the UNGA Session on Gender Equality and Development & Peace for the 21st century, titled "Further actions and initiatives to implement the Beijing Declaration and the Platform for Action" have been unreservedly endorsed by India for appropriate follow up.

Non-governmental organisations and other women's movements have also contributed towards empowerment of women and their welfare, contributions by them have been inspiring and efficient. However, there we could not remove the still existing wide gap between the goals enunciated in the Constitution, legislation, policies, plans, programmes, and related mechanisms on the one hand and the situational reality of the status of women in India, on the other. The same has been analyzed extensively in the Report of the Committee on the Status of Women in India, "Towards Equality", 1974 has extensively analysed it and the same has been highlighted in the National Perspective Plan for Women, 1988-2000, the *Shramshakti* Report, 1988 and the Platform for Action, Five Years After- An assessment". Gender disparity manifests itself in various forms, the most obvious being the trend of continuously declining female ratio in the population in the

* Assistant Professor, K.L.E. Society's Law College, Bangalore.

last few decades. Social stereotyping and violence at the domestic and societal levels are some of the other manifestations. Discrimination against girl children, adolescent girls and women persists in parts of the country. The underlying causes of gender inequality are related to social and economic structure, which is based on informal and formal norms, and practices. Consequently, the access of women particularly those belonging to weaker sections including Scheduled Castes/Scheduled Tribes/ Other backward Classes and minorities, majority of whom are in the rural areas and in the informal, unorganized sector – to education, health and productive resources, among others, is inadequate. Therefore, they remain largely marginalized, poor and socially excluded.

II. Need for a Policy

There is a need of a Policy to bring about the advancement, development and empowerment of women. The Policy should widely disseminate so as to encourage active participation of all stakeholders for achieving its goals. Specifically, the objectives of this Policy shall include

1. Creating an environment through positive economic and social policies for full development of women to enable them to realize their full potential
2. The *de-jure* and *de-facto* enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres – political, economic, social, cultural and civil
3. Equal access to participation and decision making of women in social, political and economic life of the nation
4. Equal access to women to health care, quality education at all levels, career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office etc.
5. Strengthening legal systems aimed at elimination of all forms of discrimination against women
6. Changing societal attitudes and community practices by active participation and involvement of both men and women.
7. Mainstreaming a gender perspective in the development process.
8. Elimination of discrimination and all forms of violence against women and the girl child; and Department of Women and Child Development
9. Building and strengthening partnerships with civil society, particularly women's organizations.

III. Judicial Legal Systems in Light of Women Empowerment

There is a need for making Legal-judicial system more responsive and gender sensitive to women's needs, especially in cases of domestic violence and personal assault. New laws should be enacted and existing laws must be reviewed to ensure that justice is quick and the punishment meted out to the culprits is commensurate with the severity of the offence. All stakeholders including community and religious leaders need to take part actively in draft to such policy which would aim to encourage changes in personal laws such as those related to marriage, divorce, maintenance and guardianship so as to eliminate discrimination against women. The evolution of property rights in a patriarchal system has done the most wrong to women in India it has further contributed to the subordinate status of women. There is need of a strong policy which would aim

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to encourage changes in laws relating to ownership of property and inheritance by evolving consensus in order to make them gender just.

IV. Equality in Decision Making

It is very necessary that for achieving Women's equality in power sharing and active participation in decision making, including decision making in political process at all levels for ensuring their achievement of the goals of empowerment. All measures should be taken to guarantee women equal access to and full participation in decision making bodies at every level, including the legislative, executive, judicial, corporate, statutory bodies, as also the advisory Commissions, Committees, Boards, Trusts etc. There must be an affirmative action such as reservations/quotas, including in higher legislative bodies whenever necessary. There is a lack of women-friendly personnel policies which can draw up to encourage women to participate effectively in the developmental process.

V. Women in Mainstream

Policies, programmes and systems shall be established to ensure mainstreaming of women's perspectives in all developmental processes, as catalysts, participants and recipients for their proper growth and empowerment. Gaps in policies and programmes need to be removed in order to bring women in mainstream, women specific interventions should be undertaken to bridge these. Coordinating and monitoring mechanisms need to be devised to assess from time to time the progress of such mainstreaming mechanisms. Women's issues and concerns need to be specifically addressed and reflected in all concerned laws, sectoral policies, plans and programmes of action.

VI. Status of Economic Empowerment of Women

1. POVERTY ERADICATION

Since women comprise the majority of the population below the poverty line they are very often in situations of extreme poverty, given the harsh realities of intra-household and social discrimination. Because of this situation they are forced to work in unorganised sectors where they can get easily money on day basis and there is no requirement of any special skill to get work. Concentration of major women in unorganised sectors is not because of lack of capability but it is because of proper policies. There is a great need of macroeconomic policies and poverty eradication programmes which can specifically address the needs and problems of such women. There has to be improved Department of Women and Child Development implementation. Steps should be taken for mobilization of poor women and convergence of services, by offering them a range of economic and social options, along with necessary support measures to enhance their capabilities. In absence of such policies it can be said that the role of state has not given its satisfactory efforts towards women empowerment and in turn for the development of this country.

2. MICRO CREDIT FOR WOMEN

In order to enhance women's access to credit for consumption and production and remove the wage gap, the establishment of new and strengthening of existing micro-credit mechanisms and microfinance institution must be undertaken so that the outreach of credit is enhanced. Other

supportive measures can be taken to ensure adequate flow of credit through extant financial institutions and banks, so that all women below poverty line have easy access to credit. Role of civil is equally important in this case where it should ensure that women should be financially strong. In absence of such status of women, it cannot be said to be a civil society where half of the members are being exploited and week.

3. WOMEN AND THEIR ROLE IN ECONOMY

Women's perspectives have not been included efficiently in designing and implementing macroeconomic and social policies by institutionalizing their participation in such processes. This has resulted in week economic of women widening the wage gap in market. This wage gap is also because of lack of contribution to socio-economic development from women as producers and workers which need to be recognized in the formal and informal sectors (including home based workers) and appropriate policies relating to employment and to her working conditions should be drawn up. Such measures could include:

1. Reinterpretation and redefinition of conventional concepts of work wherever necessary
2. e.g., the Census records,
3. To reflect women's contribution as producers and workers.
4. Preparation of satellite and national accounts.
5. Development of appropriate methodologies for undertaking (1) and (2) above.

4. IMPACT OF GLOBALIZATION

Globalization has presented new challenges for the realization of the goal of women's equality, the gender impact of which has not been systematically evaluated fully. However, from the micro-level studies that were commissioned by the Department of Women & Child Development, it is evident that there is a need for re-framing policies for access to employment and quality of employment. Benefits of the growing global economy have been unevenly distributed leading to wider economic disparities, the feminization of poverty, increased gender inequality through often deteriorating working conditions and unsafe working environment especially in the informal economy and rural areas. For successful social inclusion of women, strategies need to be designed to enhance the capacity of women and empower them to meet the negative social and economic impacts, which may flow from the globalization process.

5. WOMEN AND AGRICULTURE

In view of the critical role of women in the agriculture and allied sectors, as producers, concentrated efforts are lacking to ensure that benefits of training, extension and various programmes should reach them in proportion to their numbers. The programmes for training women in soil conservation, social forestry, dairy development and other occupations allied to agriculture like horticulture, livestock including small animal husbandry, poultry, fisheries etc. are not sufficiently expanded to benefit women workers in the agriculture sector which need to be removed by adequate policies.

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6. WOMEN IN INDUSTRY

The important role played by women in electronics, information technology and food processing and agro industry and textiles has been crucial to the development of these sectors. They have not been given comprehensive support in terms of labour legislation, social security and other support services to participate in various industrial sectors. Women at present cannot work in night shift in factories even if they wish to. Suitable measures have not been taken to enable women to work on the night shift in factories. This can be accompanied with support services for security, transportation etc.

7. SUPPORT SERVICES

The provision of support services for women, like child care facilities, including crèches at work places and educational institutions, homes for the aged and the disabled have not been expanded and improved to create an enabling environment and to ensure their full cooperation in social, political and economic life. Women-friendly personnel policies are still to be drawn up to encourage women to participate effectively in the developmental process.

VII. Social Empowerment of Women

1. EDUCATION

Equal access to education for women and girls has not been efficiently ensured which is a main reason for their social exclusion. Special measures are lacking to eliminate discrimination, universalize education, eradicate illiteracy, create a gender-sensitive educational system, increase enrolment and retention rates of girls and improve the quality of education to facilitate life-long learning as well as development of occupation/vocation/technical skills by women. State has to ensure for reducing the gender gap in secondary and higher education. There is further need of some policies with a special focus on girls and women, particularly those belonging to weaker sections including the Scheduled Castes/Scheduled Tribes/Other Backward Classes/Minorities. A gender sensitive curriculum which is missing has to be developed at all levels of educational system in order to address sex stereotyping as one of the causes of gender discrimination.

2. HEALTH

For efficient and successful empowerment of women a holistic approach to women's health which includes both nutrition and health services need to be adopted and special attention has to be given to the needs of women and the girl at all stages of the life cycle. Civil society and state must insure for reduction of infant mortality and maternal mortality, which is sensitive indicators of human development without which their social inclusion is not possible. Corporate sector is lacking adequate health care policies for women at their working place which need to be improved.

3. NUTRITION

In view of the high risk of malnutrition and disease that women face at all the three critical stages viz., infancy and childhood, adolescent and reproductive phase, focussed attention are required to be paid at all level i.e. by state, corporate sectors and civil society to meet the

nutritional needs of women at all stages of the life cycle accordingly. This is also important in view of the critical link between the health of adolescent girls, pregnant and lactating women with the health of infant and young children. Self-employed women need to be provided with special efforts to tackle the problem of macro and micro nutrient deficiencies especially amongst pregnant and lactating women as it leads to various diseases and disabilities.

4. DRINKING WATER AND SANITATION

In unorganised sectors no special attentions have been given to the need of women in the provision of safe drinking water, sewage disposal, toilet facilities and sanitation within accessible reach of working place including rural areas and urban slums.

5. SCIENCE AND TECHNOLOGY

There is a lack of any specific programmes to strengthen and to bring about a greater involvement of women in science and technology. Government has done some efforts but the same is not adequate for women who constitute nearly half of the population of this country. There are also no sufficient special measures taken for their training in areas where they have special skills like communication and information technology. Efforts to develop appropriate technologies suited to women's needs as well as to reduce their drudgery are not so efficient.

VIII. Violence against Women

All forms of violence against women, physical and mental, whether at domestic or societal levels, including those arising from customs, traditions or accepted practices shall be dealt with effectively with a view to eliminate its incidence. Institutions and mechanisms/schemes for assistance are lacking to create and strengthen for prevention of such violence, including sexual harassment at work place and customs like dowry; for the rehabilitation of the victims of violence and for taking effective action against the perpetrators of such violence. A special emphasis need to be laid on programmes and measures to deal with trafficking in women and girls.

IX. Rights of The Girl Child

Without eliminating all forms of discrimination against the girl child and violation of her rights, by undertaking strong measures both preventive and punitive within and outside the family, their empowerment and social inclusion is only a dream. Strict enforcement of laws against prenatal sex selection and the practices of female foeticide, female infanticide, child marriage, child abuse and child prostitution etc are not appropriate. Removal of discrimination in the treatment of the girl child within the family and outside and projection of a positive image of the girl child need to be actively fostered. There has to be special emphasis on the needs of the girl child and earmarking of substantial investments in the areas relating to food and nutrition, health and education, and in vocational education only then women can achieve status equal to men in the society. In implementing programmes for eliminating child labour, there is lack of a special focus on girl children which needs a great attention.

X. Legislation

The existing legislative structure need to be reviewed and additional legislative measures have to be taken by identified departments to implement the Policy. This can also involve a review of all existing laws including personal, customary and tribal laws, subordinate legislation, and related rules as well as executive and administrative regulations to eliminate all gender discriminatory references for their empowerment and social inclusion. The specific measures required can be evolved through a consultation process involving civil society, National Commission for Women and Department of Women and Child Development. In appropriate cases the consultation process may be widened to include other stakeholders too. Effective implementation of legislation has to be promoted by involving civil society and community. Appropriate changes in legislation should be undertaken, if necessary. In addition, following other specific measures need to be taken to implement the legislation effectively.

- a) Strict enforcement of all relevant legal provisions and speedy redressal of grievances should be ensured, with a special focus on violence and gender related atrocities.
- b) Measures to prevent and punish sexual harassment at the place of work, protection for women workers in the organized/ unorganized sector and strict enforcement of relevant laws such as Equal Remuneration Act and Minimum Wages Act must be undertaken,
- c) Crimes against women, their incidence, prevention, investigation, detection and prosecution will be regularly reviewed at all Crime Review fora and Conferences at the Central, State and District levels. Recognised, local, voluntary organizations should be authorized to lodge Complaints and facilitate registration, investigations and legal proceedings related to violence and atrocities against girls and women.
- d) Women's Cells in Police Stations, Encourage Women Police Stations Family Courts, *Mahila* Courts, Counselling Centers, Legal Aid Centers and *Nyaya Panchayats* should be compulsory strengthened and expanded to eliminate violence and atrocities against women. Department of Women and Child Development
- e) Widespread dissemination of information on all aspects of legal rights, human rights and other entitlements of women, through specially designed legal literacy programmes and rights information programmes should be done.

XI. Conclusion and Suggestion

Training of personnel of executive, legislative and judicial wings of the State, with a special focus on policy and programme framers, implementation and development agencies, law enforcement machinery and the judiciary, as well as non-governmental organizations must be undertaken. Other measures can include:

- a) Promoting societal awareness to gender issues and women's human rights.
- b) Review of curriculum and educational materials to include gender education and human rights issues
- c) Removal of all references derogatory to the dignity of women from all public documents and legal instruments.
- d) Use of different forms of mass media to communicate social messages relating to women's equality and empowerment.

INFLUENCE OF UNIVERSAL DECLARATION OF HUMAN RIGHTS ON THE INDIAN CONSTITUTION: A CRITICAL ANALYSIS

Dnyaneshwar P. Chouri*

I. Introduction

The primitive man had not known anything like human rights, with the dawn of civilization consequent to the growth of community life the homo-sapiens might have aspired that some respect for human rights would emerge, yet human rights eluded him. It ultimately seems that the era of human rights dawned with the industrial revolution,¹ a little more than 60 years after the human rights movement was born out of the disaster of the Second World War, human rights norms and institutions deeply inform the rhetoric, practice and theory of international law and politics, as well as the internal Constitutional structures of a large number of states.² However the human rights have become an established reality since the establishment of the United Nations in 1945.

The topic of human rights is of universal concern,³ gaining momentum and is increasingly becoming master of political priorities throughout the world.⁴ Ultimately the international community realized the importance of human rights and resolved to make a historic commitment to enshrine the fundamental rights of the individual human living in any part of the world. The commitment took the form of Universal Declaration of Human Rights (hereinafter referred as UDHR), adopted by the General Assembly of the United Nations,⁵ which is a milestone document in the history of human rights⁶ because the declaration has its own importance and cannot be regarded as having merely a historical significance. The declaration is not a legally binding instrument as such. Nevertheless some of its provisions either constitute general principles of law⁷ or represent elementary considerations of humanity, more important is its status as an authoritative guide, produced by general assembly to the interpretation of the charter. In this capacity the declaration has considerable indirect legal effect, and it is regarded by the

* Lecturer, KLE Society's Law College, Bangalore.

¹Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context*, 3rd edn., New York: Oxford University Press, 2007, P.V.

²Avimanyu Behera, "Human Rights and Supreme Court", *Indian Bar Review*, Vol. XXX(1) 2003, P. 33.

³Dr. T. R. Subramanya, "Human Rights, Their Development and Historical Evolution," *The Bangalore Law Journal*, Vol.2 (June 2007), P. 25.

⁴Elaine Pagels, the Roots and Origin of Human Rights, Alice H Henkin (ed), *Human Dignity: The Internationalization of Human Rights*, 1979, P.8.

⁵Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on 10th December 1948.

⁶Dr. Sreenivasulu N. S. and Others, "Protection of Traditional Knowledge under the Human Rights Framework," *Indian Bar Review*, Vol. XXXIX (2) 2012, P. 72.

⁷See the Statute of International Court of Justice, Art.38 (I)(C).

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assembly and by some jurists as a part of the law of the United Nations.⁸ Within a year after the adoption of UDHR, The Constitution of India was adopted by Constituent Assembly on 26th Nov 1949. No other document has inspired the oppressed people over the world than the UDHR. The framers of the Indian Constitution were influenced by it. The provision of the part III and part IV bear a close resemblance to the UDHR.⁹ In this paper an attempt has been made to assess the influence of UDHR on Indian Constitution and Supreme Court in protecting the human rights of the general public.

II. Human Rights: A Conceptual Analysis

For all practical purposes, the genesis of this international aspect of human rights is not older than the Second World War,¹⁰ means the first documentary use of the expression 'human rights' is to be found in the Charter of the United Nations.¹¹ The Preamble of this Charter, which was drawn up to prevent a recurrence of the destruction and suffering caused by the Second World War, by setting up the international organization called the United Nations, declared that the United Nations shall have for its object, *inter alia*," to reaffirm faith in 'fundamental human rights' ...", and Article-1 thereafter stated that the 'purposes' of the United Nations shall be, among others "to achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..."¹²

Human rights are rights to which all human beings are entitled, simply because we are human. Our human rights are inalienable and they belong to all of us, whatever our caste, class, race, age, gender, religion or belief, and should not be taken away from us under any circumstances.¹³ Human right are those minimal rights which every individual must have against the State or other public authority by virtue of his being a 'member of the human family' irrespective of any other consideration.¹⁴ The term 'human rights' covers a broad range of rights, from the right to freedom of religion to the right to food and shelter. All are as important as each other and are owed to us in equal measure.¹⁵ Human rights are universal regardless of who they are and where they live. Human rights treat all people as equal. Human rights respect variations in human cultures and recognize that people are different in race, colour, sex, language, religion, and political, national or social origin.¹⁶ Human rights are primarily the rights of individuals and these human rights are recognized by many of the international instruments i.e. UDHR, ICESCR etc. Hence every human being has a claim against his or her society or Government arising as a matter of right, not as a privilege or special favour. Human right

⁸Sir, Ian Brownlie, CBE, QC and Guy S. Goodwin- GILL, Brownlie's Documents on Human Rights, 6th edn., New York: Oxford University Press Inc, 2010, P.39.

⁹P. P. Rao, "Universal Human Rights and Fundamental Rights in India", Indian Journal of International Law, Vol. 45, P.565.

¹⁰Durga Das Basu, Human Rights in Constitutional Law, 2nd ed., Nagpur: Wadhwa and Company, 2003, Pp. 1-2.

¹¹Which was adopted after the Second World War at Son Francisco on June 25, 1945 and ratified by a majority of its signatories in October of that year.

¹²Durga Das Basu, Supra note 10, Pp. 8-9.

¹³South Asia Human Rights Documentation Centre (SAHRDC), Handbook of Human Rights and Criminal Justice in India, Oxford: University Press, 2006, P.1.

¹⁴Durga Das Basu, Supra note 10, P. 8..

¹⁵South Asia Human Rights Documentation Centre (SAHRDC), Supra note 11, P. 1.

¹⁶B.R.P. Bhaskar, Human Rights 2001, Bangalore: Vigil India Movement, 2001, , Pp. 118-119

encompasses the fundamental principles of humanity¹⁷ and therefore the protection of human rights are very essential¹⁸ which holds each nation responsible for respecting and promoting human rights.¹⁹

Definitional Interpretations of Human Rights

From the discussions made above, it is apparent that it is difficult to conceptualize human rights. Yet many scholars have attempted to define it in various terms, some of them are as follows:

“Human rights as universal and irrevocable elements in a scheme of justice. Accordingly, justice is the primary moral virtue within human society and all rights are fundamental to justice”.

Tiber Macham²⁰

“Human rights as, those moral rights whose moral ground and generating factors are the same, namely being human in some relevant sense”.

Kant Barier²¹

“Human rights by definition is a universal moral right, something which all people, everywhere at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because one is human”.

Cranston²²

“Human rights as those minimal rights, which every individual must have against the State or other public authority by virtue of his being a member of the human family, irrespective of any other consideration”.

D.D. Basu²³

Apart from the definitions provided by scholars, the UDHR, 1948, refers human rights as inalienable rights of all member of the human family. However varied may be the terms of definitions, they generally focus upon the idea that human rights apply to all human beings because they are human beings and thereby distinguishing human rights from other rights such as legal, contractual and conventional rights.

III. UDHR: The Magna Carta of all Mankind

The UDHR has been hailed as an historic event of profound significance and as one of the greatest achievements of the United Nations.²⁴ This declaration was hailed as the common

¹⁷*Ibid.*

¹⁸Adv. Kamayani Bali Mahabal, “Health and Human Rights are Inextricably Intertwined,” Available @ <http://www.expresshealthgmt.com/2003/215/health01.shtml>,

¹⁹B.R.P. Bhaskar, Supra note 16, P.119.

²⁰Tiber Macham, “*Prima Facie v. National (Human) Rights*, 1976”, Journal of Value Inquiry, No.2, P.119 Kant.

²¹Baier, (Ed.) Chapman, Human Rights, Nomos, XXXIII, New York Press, 1981, P. 19.

²²M. Cranston, What are Human Rights, Delhi: National Academy, 1973, P.7.

²³D.D. Basu, Human Rights in Constitutional Law, Delhi: Prentice Hall, 1994, P. 5.

²⁴Professor H. Lauterpacht, “The Universal Declarations of human Rights”, British Year Book of International Law, 1948, P. 354.

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standard of achievement for all peoples and all nations.²⁵ Thus Mrs. Roosevelt²⁶ said: this declaration may well become the international Magna Carta of all men everywhere. We hope its proclamation by General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French People in 1789, the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries”.²⁷ H. Lauterpacht, when examining the legal force of the Universal Declaration observed,²⁸ “not being a legal instrument the declaration would appear to be outside international law and its provisions cannot form the subject matter of legal interpretation.” On the other hand L. M. Goodrich maintained that “UDHR has had a significant influence on the development of standards that states are not only expected to great as goals, to be achieved but also a legal commitments to be respected”.²⁹ The declaration also found support of many eminent scholars. Quincy Wright while commenting on the declaration stated that, “While not a treaty, the declaration is of great interpretative value, manifesting the opinion of the United Nations as to scope of human rights and fundamental freedoms.”³⁰ One of the very few dissenting voices was that of H. Lauterpacht, who in a book questioned its (Declarations) moral authority. However John P. Humphrey³¹ while replying to the doubts expressed by Lauterpacht emphatically observed, “had this great lawyer, who was also a dedicated if impatient partisan of human rights, lived longer, he would have recognized not only the great moral authority of the Declaration but, it is submitted, it’s now binding character as part of the law of nations.” There can now in any event, thirty years after its adoption be no doubt, that the declaration does possess both moral and political authority.³²

The UDHR is greatly understood as a restatement of the fundamental rights which are necessary to protect individuals against tyranny, deservedly so.³³ The preamble of the UDHR incorporated a form of natural law language by inserting “whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. The preamble proclaimed it “*as a common standard of achievement for all people and for all nations, to the end that every individuals and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of member states and among the people of territories under their jurisdiction*”.³⁴ The Universal Declaration enumerated the basic postulates and principles of human rights in a most comprehensive manner. It dealt not only with civil and political rights, but with social and economic rights as well.³⁵

²⁵ A. Balu, “Human Rights and the United Nations”, World Focus, 22(01) 2001, P.7.

²⁶ Chairman of the Commission on Human Rights and the Principal Representatives of the United States and the Third Committee.

²⁷ Professor H. Lauterpacht, Supra note 24, P. 354.

²⁸ H Lauterpacht, International Law and Human rights, 1968, P. 394.

²⁹ I. M. Goodrich, The United Nations in a Changing World, 1974, P. 177.

³⁰ Quincy Wright, "National Courts and Human Rights-The Fuzii Case", American Journal of international Law, Vol. 45(1951), P. 62.

³¹ John P Humphrey served as the director of the division of Human Rights of the United Nations for a period of 20 years i.e. from 1946-1966.

³² John P. Humphrey " The Universal Declaration of Human Rights: Its history, Impact and Juridical Character" in Dr. B. G. Ramcharan (ed). Human rights: Thirty Years after the Universal Declaration (1979), P. 28.

³³ Francesca Klug, “Universal Declaration of Human Rights”, Public Law (04), 2009, P. 211.

³⁴ Preamble, UDHR, 1948

³⁵ Dr, H. O. Agarwal, Human Rights, 9th edn., Allahabad: Central Law Publications, 2006, P .37.

Thus the UDHR is the basic document of international human rights law, sets out not only the common standards applicable to human society, but in terms adopts the rule of law as the governing principle in realizing human rights³⁶ and built on the inherent dignity of every person, is rightly described as a “MAGNA CARTA FOR ALL HUMANITY”.³⁷ The declaration has no binding force of a treaty, but its provisions have found a place in the basic law and Constitutions of several countries. India is a best example to this. As a follow-up, a series of human rights covenants, conventions and treatise were concluded under the auspices of the United Nations and they have all been built on the principles of the declaration.

IV. UDHR and The Indian Constitution

India is a signatory to the Universal Declaration. The Indian Constitution is greatly influenced by this declaration. The preamble of the Constitution stated four objectives, with specific mention of the dignity of individual. These are: Justice - social, economic and political, Liberty - of thought, expression, belief, faith and worship, Equality- of status and opportunity and to promote among them all, Fraternity assuring the dignity of the individual and unity and integrity of the nation.

With a view to achieve the above mentioned aims and objects, the framers of the Indian Constitution incorporated human rights into two parts, much the same way as international covenants, civil and political rights which are justiciable human rights were included in Part III and social, economic and cultural rights which are non-justiciable, set forth in Part IV of Constitution.³⁸

A. UDHR AND FUNDAMENTAL RIGHTS

The rights conferred upon the individual under Part III of the Indian Constitution are called fundamental rights because they are secured by the Constitution, which is the supreme law of the land.³⁹ The rights guaranteed by the Constitution to all are aimed to achieve widest possible wellbeing and development of their personality.⁴⁰ The basic question presently before us is to examine as to what extent the fundamental rights contained in Part III of the Indian Constitution are in agreement with or in consonance with the human rights as contained in the UDHR. When we look closely at the content or substance of civil and political rights and personal freedom granted to the citizens of India, it becomes manifest that though the fundamental rights have not been christened as “human Rights” most of such rights find a place under the title “fundamental rights” in the Indian Constitution. The rights of Indian citizens under Part III are examined here in the light of UDHR are:

³⁶G. H. Gutta, “Human Rights: The Indian Law”, Indian Journal of International Law, Vol. 48(1-4) 2008, P. 54.

³⁷A. Balu, Supra note 25, P. 7

³⁸Lohit D. Naikar, The Law Relating to Human Rights, New Edition, Bangalore: Puliani and Puliani, 2004, Pp. 333-34.

³⁹Ibid , P.337.

⁴⁰Dilip Ukey and Sharat Madake, “Human Rights and Constitutional Accountability: A Synthesis”, CULR, Vol.24, 2000, P.104.

Influence of Universal Declaration of Human Rights on The Indian Constitution

CIVIL AND POLITICAL RIGHTS

UNIVERSAL DECLARATION OF HUMAN RIGHTS	INDIAN CONSTITUTION PART -III
1. Right to life, liberty and security of person, (Art. 3)	Art. 21
2. Prohibition of slavery, slave trade etc., (Art. 4)	Art. 23
3. Equality before law and non-discrimination, (Art.7)	Art.14 & 15(1)
4 Right to effective Remedy, (Art.8)	Art.32
5. Right against arbitrary arrest, detention etc, (Art.9)	Art.22
6. Right against ex-post facto laws, (Art. 11(2))	Art.20(1)
7. Right to freedom of movement, (Art.13(1))	Art.19(1)(d)
8. Right to own property and not to be deprived, (Art.17)	Art.19(1)(f) (Omitted)
9. Right to freedom of thought, conscience & religion, (Art.18)	Art.25(1)
10. Right to freedom of opinion and expression, (Art.19)	Art.19 (1) (a)
11. Right to freedom of peacefully assembly and association, (Art.20(1))	Art.19(1)(b)
12. Right to equal access to public service, (Art.21(1))	Art.16 (1)
13. Right to form and to join trade unions (Art.23(4))	Art.19(1)(c)

The above chart shows that many of the civil and political rights enshrined in the UDHR also find mention in Part III of the Constitution as fundamental rights. However, there are certain rights which are contained in the Universal Declaration but have not been expressly mentioned in the Constitution. These rights are: Right to be not subjected to torture, or to cruel,

inhumane treatment or punishment,⁴¹ Right to recognition everywhere as person before the law,⁴² Right to privacy,⁴³ Right to nationality⁴⁴ etc. It would not be correct to contend that the above rights have not been incorporated in Indian Constitution, though they do not find express mention in the Constitution these are either subsumed under the existing fundamental rights or have been held to emanate from the existing rights under the theory of emanation. For example, the right to life and personal liberty enshrined in Article 21 of Constitution is of widest amplitude and several un-enumerated rights fall within Article 21, these rights are: Right to go abroad, Right to privacy, Right to legal aid, Right to speedy trial etc.

Furthermore, the Constitution establishes rule of law as one of cardinal principles in the administration of justice. It also sets up independent judiciary to act as the custodian of human rights. Even parliament can't deprive the citizen of his fundamental rights. The Constitution is supreme and sovereign and all the organs of the state, function under the Constitution and are subject to the Constitution.⁴⁵

B. UDHR AND DIRECTIVE PRINCIPLES OF STATE POLICY

The economic, social and cultural rights are reflected in the part IV of the Indian Constitution⁴⁶ i.e. in Directive Principles of State Policy. Though these rights are non-justiciable, the directive principles occupies a significant position in establishing a social order for the promotion of welfare of the Indian people.⁴⁷ These rights were regarded as ideals cherished by the preamble that the state shall strive to establish a social order in which justice, social, economic and political, shall inform all the institutions of the national life⁴⁸ and it is the duty of the state to apply directive principles in making laws as they are fundamental in the governance of the country.⁴⁹ The rights of Indian citizens under Part IV are examined here in the light of UDHR are:

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

UNIVERSAL DECLARATION OF HUMAN RIGHT	INDIAN CONSTITUTION PART-IV
1. Right to social security, (Art.22)	Art.41 & 42

⁴¹Universal Declaration of Human Rights, 1948, Art.5.

⁴²Ibid, Art. 6.

⁴³Ibid, Art. 12.

⁴⁴Ibid, Art. 15(1).

⁴⁵Dr. T. R. Subramanya, "The Application of International Law in Municipal Systems : An Assessment of the Impact of Universal Declaration of Human Rights on National and International Courts," Vol. 48, Indian Journal of International Law, 2008, P. 396.

⁴⁶Lohit D Nikar, *Supra note* 38, Pp. 332-333.

⁴⁷Dr. B. R. Purohit , "Indian Fundamental Rights and the Universal Declaration of Human Rights", Vol. XIV, Central India Law Quarterly, 2001, P.150.

⁴⁸*Ibid*.

⁴⁹Article 37, Constitution of India.

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2. Right to work, to free choice of an employment, to just and favourable conditions of work etc., (Art.23(1))	Art.41
3. Right to equal pay for equal work, (Art.23(2))	Art.39 (d)
4. Right to just and favourable remuneration, (Art.23 (3))	Art.43
5. Right to rest and leisure, (Art.24)	Art.43
6. Right of standard of living adequate for him and his family, (Art.25(1))	Art.39(a) & Art.47
7. Right to education and free education in the elementary and fundamental stages, (Art.26(1))	Art.41 & 45
8. Right to proper social order, (Art.28)	Art. 38

The above chart shows the most of the economic, social and cultural rights proclaimed in the UDHR have been incorporated in part IV of the Indian Constitution. However, the Constitution of India is conspicuous by absence of express mention of certain rights proclaimed in the Universal Declaration such as Right to special care and assistance to mothers and children and some social protection for all children, whether born in or out of wedlock,⁵⁰ Parents rights to choose the kind of education for their children,⁵¹ Right of everyone to freely participate in the cultural life of the community to enjoy arts and to share in scientific advancement and its benefits⁵² and right of everyone to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁵³ So in respect of the above rights absence of express mention does not mean that these rights have not been incorporated in Indian Constitution. As a matter of fact the above rights are either subsumed in the existing rights or are part thereof or have been expressed in a little different wording and having a little different scope.⁵⁴

⁵⁰Universal Declaration of Human Rights, 1948, Art.25(2)

⁵¹*Ibid*, Art. 26(3).

⁵²*Ibid*, Art. 27(1).

⁵³*Ibid*, Art. 27(2).

⁵⁴For example: Art. 39(f) Provides states to direct its policy towards securing “that children are given opportunities and facility to develop in a healthy manner and in conditions of freedom and dignities and that childhood and youth are protected against exploitation and against moral and material abandonment”. Art. 42 Makes “provision for just and humane conditions of work and maternity relief”. Art. 47. Provides for the “Duty of the state to raise the level of nutrition and standard of living and to improve public health”.

V. UDHR and Indian Courts

The founders of the Indian Constitution, it appears were conscious about the content of the Universal Declaration and therefore they gave due recognition to its provisions⁵⁵ and the supreme court of India is also not an exception to this. While referring to the fundamental rights in Part 3 of the Constitution, Sikri C. J., of the Supreme Court in *Kehavanand Bharati v. State of Kerala*⁵⁶, observes:

"I am unable to hold this provisions how that rights are not natural or inalienable rights. As a matter of fact, India was a party to the UDHR ... and that declaration describes some fundamental rights are inalienable"

Gradually, over the years, the role of Supreme Court of India has been commendable in expanding the areas of human rights preponderantly.⁵⁷ While interpreting the Indian Constitution harmoniously with the norms laid down in international human rights instruments,⁵⁸ a majority of the cases related to Constitutional matters decided by the apex court in India, have been strongly influenced by the UDHR.⁵⁹

In *Ahmadabad Municipal Corporation v. Nabab Khan, Gulam Khan and Other*⁶⁰ the apex court considered the provisions of Article 19(1)(e) read with Article 21 of the Constitution of India and Article 25(1) of the UDHR and held that everyone has a right to standard of living , adequate health and welfare of himself and his family.

In *Geeta Hariharan and Another v. Reserve Bank of India*,⁶¹ the court declared that:

"the domestic courts are under an obligation to give regard to international conventions and norms construing domestic norms when there no inconsistency between them."

In *P. G. Gupta v. State of Gujarat*,⁶² the Supreme Court considers the human right to shelter and rights enshrined in Article 19(1)(e) of the Constitution of India and Articles 21 of the UDHR and CCECR and held that it is the duty of the state to construct houses at reasonable cost and make them easily accessible to the poor. The said principle was found embodied and inbuilt in the Constitution of India to secure socio economic democracy so that everyone has right to life, liberty and security of person. The court also emphasized on Article 21 of the UDHR which envisaged that everyone has a right to social security and is entitled to its realization & become the economic, social and cultural rights are indispensable for his dignity and free development of his personality.

⁵⁵Dr. T. R. Subramanya, *Supra* note 45, P. 402.

⁵⁶AIR, 1973, SC 1461, 1536.

⁵⁷Avimanyu Behera, *Supra* note 2, P. 34.

⁵⁸Dr. T. R. Subramanya, *Supra* note 45, P.402.

⁵⁹See *Vishaka and Others v. State of Rajasthan and Ors.* (1997) 6 SCC 241.

⁶⁰1995 (Suppl.) 2 SCC 182.

⁶¹AIR 1995.

⁶²1995(Suppl.) 2 SCC 182.

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Furthermore, in *Chairman Railway Board and Others v. Mrs. Chandrimadas*,⁶³ the supreme court of India observed that:

*"the Universal Declaration has the international recognition as the 'moral code of conduct' having been adopted by the general assembly of the United Nations,⁶⁴ the applicability of the UDHR and principles thereof may have to be read, if need be into the domestic jurisprudence"*⁶⁵.

From the above decided cases one can understand the influence of UDHR on Indian courts.

VI. CONCLUSION

Finally it is concluded that since its adoption, the UDHR has profound influence, both internationally and nationally. It has been rightly pointed out, that "whatever is legal quality the declaration has set a standard by which national behaviour can be measured and to which nations can aspire. The Indian Constitution also greatly influenced by this declaration and therefore the two but inseparable aspects of human rights, namely the civil and political rights and economic, social and cultural are both reflected in the Constitution of India. The realization of civil and political rights was considered as a goal within immediate reach while the economic, social and cultural rights were regarded as ideals for which the country should strive. Some of these have incorporated in Part III of the Constitution, while others find place in Part IV of Constitution. The Supreme Court of India is also greatly influenced by this declaration and while giving the status as a fundamental right to any directive principles, the Indian courts categorically refers the principles of UDHR and in several cases courts treats UDHR as a moral code of conduct.

⁶³(2000) 1 SCC 265.

⁶⁴*Ibid*, P.277.

⁶⁵*Ibid*, P. 279.

THE LEGAL SYSTEM IN INDIA: CONTEMPORARY PROBLEMS

Shivaraj S. Huchhanavar*

Kavita S. Belagali*

“Law should not sit limply, while those who defy it go free and those who seek its protection lose hope”.¹

1. Introduction

Certainly, the British rule did not firmly establish their idea of Rule of Law in colonial India. Cohn (1990) describes the problems of the judicial system during that period. According to him, the Courts were used more to harass people than to settle disputes. Corruption was rampant and legal matters would drag on for long periods, providing opportunity for more bribes and a constant source of income for lawyers. The enforcement of Court rulings was not to be taken for granted. We all know that our legal system is based on English legal system, structure of Courts, Procedural and Substantive Laws, Legal Education, Police system, etc., in Independent India are based on English frame work. As a result even after 65 years of Independence we are in a situation which is not better than Pre-Independence. We took refuge under the system which was used to ruin our liberty and to extend ruthless foreign rule in this country, there was always little hope overcoming those past problems not only for the present but even for future. With this critical bent of mind authors will in brief discuss about existing Court system in India and the present problems with which Indian justice administration is suffering.

2. Overview of Judicial System in India

Since independence and after the promulgation of our Constitution rapid strides have been made in almost all fields. The communication revolution has opened the eyes, ears and minds of millions of people, resulting in increasing expectations of an ever growing population. The desire for quick, fair and affordable justice is universal. Protection of life and liberty have been given a pre-eminent position in our Constitution by enacting Article 21 as a fundamental right and imposing a duty on the State to protect life and personal liberty of every citizen. Any deprivation or breach of this valuable right is not permissible unless the procedure prescribed by law for that purpose is just, fair and reasonable. The entire existence of the orderly society depends upon sound and efficient functioning of the judicial System. These are the lofty ideals upon which efficiency of Administration of Justice is being measured; let us see how far our judicial system stood on these tests.

* Lecturer, K.L.E. Society's Law College, Bangalore.

* Guest Faculty of Law, K.L.E. Society's Law College, Chikodi.

¹ *Jennison v. Baker* (1972) 1 All ER 997.

The Legal System in India: Contemporary Problems

It is one of the salient features of the constitution of India that, there is single stratified judiciary established and constituted according to Constitutional provisions. Judiciary in India headed by Supreme Court, it was established on 28 January 1950 and today consists of 30 puisne judges and a Chief Justice of India. All the judges of Supreme Court including Chief Justice of India are appointed by President of India, and they can be removed by impeachment process on the ground of proved mis-behaviour or incapacity².

All proceedings in the Supreme Court are conducted in English³ and are open to the public⁴. The seat of the Supreme Court is at Delhi⁵. Except for the chamber, where the judge sits singly, benches of two or more judges hear all matters. Normally five judge bench hears constitutional matters but in special cases, larger benches are constituted. In addition to the judicial autonomy, the Supreme Court has freedom from administrative dependence. In crisis arising out of diverse situations people approach the Apex Court for relief. It can exercise such power essential in rendering complete justice. Decision of the Supreme Court is considered to be the Law of the Land binding on all lower Courts unless overruled by Supreme Court itself or abrogated by legislation to that effect. Being the Apex Court of the Country it is considered as a Court of Record and having power to punish for contempt of court of itself and lower Courts within the territory of India. Below the Supreme Court, there exists High Court for every State or Union Territory constituted under Art. 214. It is also having concurrent jurisdiction of issuing writs, and High Court is also considered to be Court of Record with power to punish for contempt of Court. More importantly it exercise supervisory jurisdiction over subordinate lower Courts. Decision of HC within its territorial jurisdiction shall bind all lower courts. The supervisory jurisdiction of the High Court obliges the High Court to confine to the scrutiny of records and proceedings of the lower tribunal, except when such conclusion is so perverse/ unreasonable that no Court could ever have reached them. The High Court exercises its administrative, judicial, and disciplinary control over the members of the Judicial Service of the State. This includes general superintendence of the working of the subordinate courts, disciplinary control over the presiding officers of the subordinate courts and to recommend the imposition of punishment of dismissal, removal, and reduction in rank or compulsory retirement. Control also includes suspension of a member of the Judicial Service for purposes of holding a disciplinary inquiry, transfer, confirmation and promotion.

3. Challenges Before Indian Judicial System

Galanter (1984: 500) summarizes the public's perception of Indian Judicial System as follows: Courts in India are viewed with a curious ambivalence; they are simultaneously fountains of justice and cesspools of manipulation. Litigation is widely regarded as infested with dishonesty and corruption. There is long list of problems for a while it seems that there is no end these miseries, in the name of justice there is always been injustice because of delay.

² Art 124.

³ Art 348.

⁴ Art 145 (cc).

⁵ Art 130.

Though there is well arranged (apparently) judicial system in India it is far behind in achieving its objectives for which it is established. There are multiple reasons to it; in brief we shall comprehend more important impediments of Indian Judicial system.

3.1. Problem of delayed Justice

The Courts in India are facing the problem of overburden. There are multiple reasons to it. There is more filing of cases than in the past. The judge -population ratio in India is much less than in any other country in the world. The procedure in the Courts is rigid, lengthy and more formal. There are many vacancies in the Courts from the lower to the highest. All these factors have resulted in the backlog of cases, which has caused docket explosion. Over 45 lakh cases are pending in India's 24 High Courts and shocking 2.8 Crore cases are pending in lower Courts across the country. The figures appear to be quite alarming and surprisingly are growing day by day. The first table below discloses pendency of cases up to 2013 in Supreme Court and up to, 2011 for High Courts and Lower Courts up to 2010. The second table displays the state wise record of pending cases. The third and fourth table provides statistics on vacancies up to February 1, 2012.

List of Pending Cases before Supreme Court and High Courts:

Table -I

Courts		2009	2010	2011	2013
SC*	Admission	34,976	32,565	33,454	
	Regular	20,815	21,997	25,065	29,176 ⁶
	Total	55,791	54,562	58,519	67,275 ⁷
High Courts*		40,60,709	42,17,903	43.22 lakh ⁸	
Lower Courts**		2,72,92,453	2,79,53,070		
Total		3,13,92,453	3,22,25,535		

*Statistics as on December 31, 2011, ** Statistics as on September 30, 2010.

The number of pending cases in Supreme Court had reduced in 2010 from 2009 by 2.2 per cent. But in 2011 to 2013 it again rose. But for both High Courts and Lower Courts the number had gone up by 3.8 per cent and 2.5 per cent respectively, but in recent fast there is steady increase in the number of pending cases even before High Courts.

⁶ http://supremecourtindia.nic.in/p_stat/pm01052013.pdf Out of 67,275 pending matters, 41,239 matters (26,605 incomplete miscellaneous matters and 14,634 not ready regular hearing matters) are such matters which cannot be listed for 'hearing' before Hon'ble Court.

⁷ *Ibid.*

⁸ http://articles.timesofindia.indiatimes.com/2012-10-05/india/34278926_1_high-courts-crore-cases-supreme-court.

List of Pending Cases in States and Union Territories:

Table -II

Sl.No.	State/Union Territory	High Courts*	Lower Courts*
1	Uttar Pradesh	9,73,599	56,31,993
2	Andhra Pradesh	1,94,691	9,56,448
3	Maharashtra	3,47,618	40,57,973
4	Goa	BHC	29,721
5	Daman & Diu	BHC	2,034
6	Dadra and Nagar Haveli	BHC	3,950
7	West Bengal	3,33,763	27,47,170
8	A & N Islands	CHC	15,031
9	Chhattisgarh	56,102	2,70,186
10	Delhi	60,375	9,39,850
11	Gujarat	98,128	22,01,244
12	Assam	53,400	2,51,020
13	Nagaland	GHC	5,080
14	Meghalaya	GHC	12,889
15	Manipur	GHC	8,757
16	Tripura	GHC	57,467
17	Mizoram	GHC	4,415
18	Arunachal Pradesh	GHC	6,348
19	Himachal Pradesh	46,698	1,70,724
20	Jammu & Kashmir	65,905	1,84,656

21	Jharkhand	57,218	2,84,391
22	Karnataka	2,09,843	11,54,526
23	Kerala	1,20,764	9,72,995
24	Lakshadweep	KHC	215
25	Madhya Pradesh	2,13,028	11,59,421
26	Tamil Nadu	4,44,979	12,55,011
27	Puducherry	MHC	27,016
28	Orissa	2,75,052	11,13,844
29	Bihar	1,28,293	15,23,142
30	Punjab	2,37,658	5,72,550
31	Haryana	-----	5,65,591
32	Chandigarh	P & H HC	84,668
33	Rajasthan	2,82,826	15,09,066
34	Sikkim	50	1,304
35	Uttarakhand	17,911	1,72,374
Total		4,217,903	2,79,53,070

* Statistics as on September 2010, BHC - Bombay High Court, GHC - Guwahati High Court, CHC - Calcutta High Court, KHC - Kerala High Court, P & H HC - Punjab & Haryana High Court.

From the above table it is clear that Allahabad High Court has the maximum number of pending cases (9, 73,599 cases) followed by Madras High Court (4, 44,979 cases) and Bombay High Court (3, 47,618 cases) Sikkim High Court has the lowest number of pending cases (52 cases). At second number from bottom is Uttarakhand High Court having 11,911 pending cases. Uttar Pradesh also tops in the list of pending cases in lower Courts at 56, 31,993, followed by Maharashtra at 40, 57,973.

There are many reasons for this sad state of affairs, for decades the Indian legal system has been mired by backlog in its outstanding caseload, the result of over-elaborate, unenforced procedures, automatic appeals, and systemic vacancies from the bench, among other factors. Some 74% of the cases in Indian courts are less than five years old, of which some 40% are less

than 1 year old and the 26% of cases that are older than five years⁹. The Indian Law Commission (“ILC”) has maintained that the reason for judicial delay is not a lack of clear procedural laws, but rather the imperfect execution, or even utter non-observance, thereof¹⁰.

3.1. (a) Insufficient Number of Judges: In India, lack of judges has generally been cited as the main reason for Court congestion and delays. Indeed, the number of judges per capita has been low compared to other countries. For instance, data on 30 selected countries from the ILC in its 14th Report categorically stated that, “The delay results not from the procedure laid down by it but by reason of the non-observance of many of its important provisions particularly those intended to expedite the disposal of proceedings.”

World Bank *Justice Sector at a Glance* database indicates that in 2000 the average number of judges per 100,000 inhabitants was 6.3 to 8.6 the corresponding number for India is about 2.7 judges. Without closer analysis, however, one cannot draw the conclusion that the backlogs result from an understaffed or underfunded Court system. About 63 percent of the civil cases are more than a year old (31 percent are more than 3 years old), while 59 percent of the criminal cases are more than a year old (25 percent are more than 3 years old). “One of the greatest challenges that stares us in the face as we approach the 21st Century is the failure of judiciary to deliver justice expeditiously, which has brought about a sense of frustration amongst the litigants. It has been noticed with dismay in recent years that often landlords do not file suits in rent Courts but take the help of anti-social elements to throw out the tenants by force and coercion. This is nothing else but resorting to the rule of the jungle. If this tendency proliferates, it would be sad day for the constitutional democracy to which we are all wedded¹¹.”

3.1. (b) Unfilled Vacancies: Below described Statistics released by the Department of Justice that the number of vacancies in Supreme Court and High Courts has increased from the last year. There have been nearly 32.5 percent vacancies in the High Courts for the past two years but in 2012 it has come down to 29.9 percent and in Lower Courts in 2010 there been 18.48 percent vacancies. One of the reasons of the huge backlog of cases is that India is facing alarming shortage of judges. Keeping in mind the pendency of cases in all the Courts there is needed to increase the strength of judges in various Courts.

⁹ National Court Management Systems (NCMS): Policy & Action Plan.
http://supremecourtindia.nic.in/p_stat/pm01052013.pdf at p. 5.

¹⁰ Law Commission of India, 77th Report. 4.1.

¹¹ Anand, A.S, *Indian Judiciary and Challenges of 21st Century*, Indian Journal of Public Administration, July September, p. 299. (1999).

Statement Showing the Approved Strength, Working Strength and Vacancies of Judges in the Supreme Court of India and the High Courts

Table – III

(As on 01.10.2013)

Sl. No	Name of the Court	Approved Strength			Working Strength			Vacancies as per Approved Strength		
A.	Supreme Court	31			30			1		
B.	High Court	Pmt.	Addl.	Total	Pmt.	Addl.	Total	Pmt.	Addl.	Total
1	Allahabad	76	84	160	75	13	88	01	71	72
2	Andhra Pradesh	33	16	49	17	09	26	16	07	23
3	Bombay	48	27	75	40	18	58	08	09	17
4	Calcutta	45	13	58	37	06	43	08	07	15
5	Chhattisgarh	06	12	18	05	07	12	01	05	06
6	Delhi	29	19	48	28	14	42	01	05	06
7	Gauhati	17	07	24	11	05	16	06	02	08
8	Gujarat	29	13	42	24	07	31	05	06	11
9	Himachal Pradesh	07	04	11	05	02	07	02	02	04
10	Jammu & Kashmir	09	05	14	08	03	11	01	02	03
11	Jharkhand*	10	10	20	07	03	10	03	07	10
12	Karnataka	#34	16	50	31	04	35	03	12	15
13	Kerala	27	11	38	24	06	30	03	05	08
14	Madhya Pradesh *	32	11	43	27	06	33	03	05	10
15	Madras *	45	15	60	40	02	42	05	13	18
16	Manipur	04	-	04	02	-	02	02	-	02
17	Meghalaya	03	-	03	02	01	03	01	- 01	0
18	Orissa	17	05	22	14	-	14	03	05	08
19	Patna	29	14	43	27	06	33	02	08	10
20	Punjab & Haryana	38	30	68	33	14	47	05	16	21
21	Rajasthan	32	08	40	20	09	29	12	- 01	11
22	Sikkim	03	0	03	03	0	03	0	-	0
23	Tripura	04	-	04	04	-	04	0	0	0
24	Uttarakhand	09	0	09	07	0	07	02	-	02
Total		586	320	906	491	135	626	95	185	280

* Acting Chief Justice

The Legal System in India: Contemporary Problems

Below mentioned table is self-explanatory as to the vacancies in Supreme Court of India and High Courts.

Table- IV

Courts		2010	2011	2012	2013
SC	Sanctioned	31	31	31	31
	Vacant	2	2	5	1
HC	Sanctioned	895	895	895	906
	Vacant	287	291	268	280
Lower Courts	Sanctioned	17151		14275	-----
	Vacant	3170	----	3670	-----
Total Number of Vacancy				3943¹²	-----

The judge-population ratio in India is 11 per million population, whereas in UK it is 50.09 per million population, Australia-57.07 per million, US-107 per million. Further, the requirement of the total number of judges is 75,000 whereas the total sanctioned strength is only 18,077 in which 3943¹³ are vacant. As per the information collected by First National Judicial Pay Commission, every state except Delhi has been providing less than 1% of the budget for subordinate judiciary whereas the figure is 1.03% in case of Delhi¹⁴. In terms of G.N.P., the overall expenditure on judiciary in our country is hardly 0.264 per cent, whereas it is 1.2 per cent in Singapore, 1.4 per cent in United States of America and 4.3 per cent in United Kingdom. Such insufficient funding in the administration of justice inevitably suffers from the problem of delay and pendency because there is more burden on the judges as they have to hear more cases that what they are actually supposed to hear. This shows how grossly inadequate is the judge strength per-millions of population in India. That is the reason why the Supreme Court has in its recent decision in, *All India Judges Association & Others v. Union of India*¹⁵ and others directed that the existing judge population ratio of 10.5 or 13 judges per million people should be raised to 50 judges per million people in a phased manner within five years.

¹²<http://supremecourtindia.nic.in/ncms27092012.pdf> at. p 16.

¹³ As per 2012 statistics available on <http://supremecourtindia.nic.in/ncms27092012.pdf>.

¹⁴ In the Ninth Plan (1997-2000), the Centre released Rs.385 Crores for priority demands of judiciary which amounted to 0.071 per cent of the total expenditure of Rs.5, 41, 207 Crores. During Tenth Plan (2002-2007), the allocation was Rs.700 Crores, which is 0.078 per cent of the total plan outlay of Rs.8, 93, 183 Crores.

¹⁵ (2002) 4, S.C.C.247.

3.1. (c) Misuse of Procedural Laws: Another important reason for delayed justice in India is that unreasonable adjournment by Advocates and postponement of conclusion of suit or trials. Certainly procedural law will prove defective when its implementers disregard the purpose for which it is made. Procedural law is made to protect the interest of the party by giving adequate opportunity to submit his case before the court, if it is used to delay the administration Justice, a well drafted of procedural law will prove to be inefficient.

Reasons for delayed proceedings are best explained by Indian Institute of Management, Bangalore (IIMB). The IIMB, after an in-depth study, it concluded that most people having stakes in the judicial work are of opinion that justice delivery system is unsatisfactory or poor. The main reason given by it is the delay in disposal of cases. IIMB studied the order sheets of several cases and after carefully analysing them it stated as follows: (1) The time taken to serve summons and emergency notices to defendants varied from three months to three years. (2) The time taken to file written statements ranged from six months to twenty four months. (3) Interlocutory applications caused delays ranging from four months to four years. (4) Framing of issues consumed as much as three years and six months in one case. (5) Other stages that delayed the cases were absence of advocates and, of course, innumerable adjournments given for a variety of reasons. (6) The major causes of delays were "summons not being served on time" and "witnesses not being present in Court". For criminal cases, the most widely felt source of delay was "inadequate number of concerned personnel". For civil cases, it was "filing of unwarranted Interlocutory Applications"¹⁶.

3.1. (d) State is the Largest Litigator: Another important reason for pending cases is that, the central and state governments are the largest litigants, government owned corporations, semi-government bodies and other statutory organizations are also having huge number of cases. In Bombay High Court alone, there were as many as 1,205 Writ petitions filed against these bodies from January 1 to June 7, of the year 2000- Excluding those filed on the appellate side, while total number of suits filed is 2,402.

3.2. Problem of Independence of Judiciary:

Independence of the Judiciary is essences of the Rule of Law, tough Constitution of India has taken care of it, in existing social conditions it is seems to be insufficient. Today independence of judiciary is destroyed by political influences and corruption.

However the corruption in judiciary is also greatly affecting independence of judiciary, it has provided ample opportunity for interference of politics in the judiciary. Independence of judiciary can be affected by two kind of influences; first one is external influences and the other internal influences. In *K.P. Tiwari v. State of M.P.*¹⁷, the Supreme Court observed: "The lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks – more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however, gross it may look, should not, therefore, be attributed to improper motive." Constant pressure on lower court results in to loss of independency and undue subordination to Higher Court. Some-times such pressure induces judge

¹⁶ <http://www.kar.nic.in/fnjpc/cwcm&adr.html>

¹⁷ 1994 Supp. (1) SCC 540.

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to conclude cases urgently, this contribute greater error and least opportunity to victim to submit his case before court.

Whereas appellate courts are in good position to dispose cases. The raw materials for the appellate court are already collected, assembled and focused unlike in the trial court. The appellate court hears only the oral arguments in a tension free atmosphere and it has plenty of time to come to conclusion. There is enough time for the appellate court to think and re-think on any legal issue. There is a qualitative difference in the variety, novelty and method in the decision-making by the appellate court. Apart from that, unlike in the trial court, the appellate court generally has substantial contribution from the well-prepared lawyers. The assistance given by lawyers to the appellate court generally is far better than the assistance given to the trial court.

However the power of the appellate Courts is used most frequently to find fault with the trial judge in each and every matter of the decision-making. Trial judges are treated with very little respect, even though it is not proper for the appellate Court to make derogatory remarks against trial judge. In *Braj Kishore Thakur v. Union of India and Others*¹⁸, Justice K.T. Thomas speaking for the Supreme Court while deprecating the caustic and severe censure made by the single judge of the Patna High Court against the Senior District and Sessions Judge of Bihar Judicial Service, observed: "Judicial restraint is a virtue, which shall be concomitant of every judicial disposition. It is an attribute of a Judge, which he is obliged to keep refurbished from time to time, particularly while dealing with matters before him whether in exercise of appellate or revisional or other supervisory jurisdiction. Higher Courts must remind themselves constantly that higher tiers are provided in the judicial hierarchy to set right errors, which could possibly have crept in the findings or orders of courts at the lower tiers. Such powers are certainly not for belching diatribe at judicial personages in lower cadre".

The Hon'ble Justice added: "No greater damage can be caused to the administration of justice and to the confidence of people in judicial institutions when judges of higher Courts publicly express lack of faith in the subordinate judges. It has been said, time and again, that respect for judiciary is not enhanced by using intemperate language and by casting aspersions against lower judiciary. It is well to remember that a judicial officer against whom aspersions are made in the judgment could not appear before the higher court to defend his order, judges of higher courts must, therefore, exercise greater judicial restraint and adopt greater care when they are tempted to employ strong terms against the lower judiciary."

In *State of Rajasthan v. Prakash Chand & others*¹⁹ deprecating the tendency of certain judges in making disparaging and derogatory remarks in intemperate language, it was observed: "The foundation of our system which is based on the independence and impartiality of those who man it, will be shaken if disparaging and derogatory remarks are permitted to be made against brother Judges with impunity. It is high time that we realize that the much-cherished judicial independence has to be protected not only from outside forces but also from those who are an integral part of the system. Dangers from within will have much larger and greater potential for harm than dangers from outside. We alone in the judicial family can guard against such dangers

¹⁸ (1997) 4 SCC 65, at 66 and 70.

¹⁹ (1998) 1 SCC 1.

from within. One of the surer means to achieve it is by the Judges remaining circumspect and self-disciplined in the discharge of their judicial functions."

Authors submits that the, utmost care must be taken to prevent judicial subversion of lower court judge to Higher Courts, as is equally important that of protection of judiciary from external influences over its independence.

3.3. Language of the Courts:

In almost all states, the judicial proceedings in lower courts are conducted and recorded in local language of the State concerned. Proceedings, including evidences are recorded by the *Peshkar* (Reader) in vernacular while the Presiding Officer either in his own hand or by dictation to the steno/typist records the proceedings in English or local language. On account of implementation of transfer policy of judges of the High Courts, generally few judges in a High Court are from other States. The transferee judges, who are not familiar with local language of the State, face considerable difficulty in dealing with cases when the records are only in local language. The translation of all the records into English is an enormous task besides the cost factors and even if it be done, it would cause delay in disposal of cases. Therefore, language also in a way becomes a hindrance in the way to attain speedy disposal of cases²⁰.

3.4. Dispute Resolution Process in India:

In spite of the constitutional guarantees, judicial decisions and the reports by various high powered committees the concept of speedy justice has remained an elusive goal. By reason of non-disposal of criminal cases in time, there are more than 0.20 million of Under-trials. The Government has to spend to the tune of Rs. 3,610 million per year on this. In practice however we find that the Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty. Failure to ascertain truth may be on account of errors or omissions on the part of the investigation agency, the prosecution, the witnesses or inadequacies in the principles and laws regulating the system. There is no provision in the Code which expressly imposes a duty on the Court to search for truth. It is a general feeling that it is falsehood that often succeeds in Courts²¹.

The system followed in India for administration of criminal justice is the adversarial system of common law inherited from the British Colonial Rulers. The accused is presumed to be innocent and the burden is on the prosecution to prove the guilt beyond reasonable doubt. The accused also enjoys the right to remain silent and cannot be compelled to reply. The aim of the Criminal Justice System is to punish the guilty and protect the innocent. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge²². Over the years taking advantage of several lacunae in the adversarial system large number of criminals are escaping convictions. This has seriously eroded the confidence of the people in the efficacy of the system. Therefore it is necessary to examine how to plug the escape routes and to block the possible new ones. The Adversarial System lacks

²⁰ <http://www.kar.nic.in/fnjpg/cwcm&adr.html>

²¹ Committee on Reforms of Criminal Justice System, 2003, Vol-1.

²² *Supranote*, 24.

dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth. Participation of the victim will also assist the court in exercising its discretion in regard to grant or cancellation of bail. The victim will also have opportunity to adduce evidence in regard to his loss, pain and suffering and assist the court in determining the quantum of compensation. In cases where prosecution seeks to withdraw from the case, the victim would be in a position to assist the court in proper exercise of its discretion and may even offer to take the responsibility of continuing the prosecution. Presence of the victim before the court would also facilitate in the matter of compounding or settlement of the case. As the prosecution has to prove the case beyond reasonable doubts, the system appears to be skewed in favour of the accused. It is therefore necessary to strengthen the Adversarial System by adopting with suitable modifications some of the good and useful features of the Inquisitorial System.

3.5. Problems in Criminal Justice System:

3.5. (a) Low Rate of Convictions: In India Criminal Courts have not been able to cope up with the number of cases that come before them for trial every year. The total number of complaints received by the police and cases registered during the year 2000 in India is 56,62,773. It is a matter of common knowledge that several persons who are victims of crimes do not complain to the police. During the year 2000 the total number of cases charge-sheeted after investigation is 50,98,304. The total number of cases disposed of by the Courts in the year 2000 is 9,32,774. So far as the cases under IPC are concerned, the analysis in the report on page 1 of the NCRB report shows that 79% of IPC cases were investigated in the year 2000, 78.4% of them were charge-sheeted, 18.3% of them were tried and 41.8% of them resulted in conviction. In many Countries like U.K., U.S.A, France, Japan and Singapore the rate of conviction is more than 90%. This shows that among 100 cases only 79% registered among those only 18.3% convicted this means only 12 to 13 persons accused of committing crimes were convicted. This does not mean that altogether there were frivolous accusations, it means there are ample opportunity to escape from punishment or else we must say legal system is incompetent to bring culprit to justice.

Quality of justice suffers not only when an innocent person is punished or a guilty person is exonerated but when there is enormous delay in deciding the criminal cases. It is a trite saying that justice delayed is justice denied. It is seen that 10,382 cases of the duration of 3 to 5 years, 6,503 cases of the duration of 5-10 years and 2,187 cases of the duration of over 10 years were disposed of by all the Courts in India during 2000. Taking more than 3 years (sometimes even 10 years) for disposal of proceedings amounts to denying fair trial. Speedy trial is a right of the accused that flows from Article 21 as held by the Supreme Court. If the accused is acquitted after such long delay one can imagine the unnecessary suffering he was subjected to. Many a times such inordinate delay contributes to acquittal of guilty persons either because the evidence is lost or because of lapse of time the witnesses do not remember all the details or the witnesses do not come forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason it is justice that becomes a casualty²³.

²³Committee on Reforms of Criminal Justice System, 2003, Vol.-I at, p.21.

3.5. (b) Absence of competent Prosecuting Advocate: So far as the system of prosecution is concerned, it is often seen that best legal talent is not availed of for placing its case before the Court. The accused is normally represented by a very competent lawyer of his choice. There is a mismatch in that; an equally competent lawyer is not there to represent the prosecution. The burden of proof being very heavy on the prosecution, it is all the more necessary for the prosecution to be represented by a very able and competent lawyer. Lack of co-ordination between the investigation and the prosecution is another problem. This makes things worse. Apart from this the victim whose rights are invaded by the accused is not accorded any right to participate except as a witness. The system does not afford him any opportunity to assist the court such as adducing evidence or putting questions to the witnesses. The system is thus utterly insensitive to the rights of the victim. The focus is all on the accused and none on the victim. The system has denied itself the benefit of this important source. Voice of victim who is ultimate sufferer had no opportunity to question accused this is how justice dispensing in India looks totally alien to illiterate, ignorant and indigent minds, this is one of the reason why people does not believe in court proceedings. Silence of victim in court is double blow to Justice Administration, as it makes finding of truth difficult and on the other hand breaks confidence of victim in the system.

A witness turning hostile is a common feature in criminal cases. Delay in disposal of cases affords greater opportunity for the accused to win over the witnesses to his side by threats, or inducements. Payment made towards witness is too low, some time he faces great difficulty to attend long run proceedings which result in his economic ruin as he has to sacrifice his one day earning to attend court and on the other hand court will not bother to pay adequately for his presence. These all factors discourage a genuine witness from deposing in court. True description to Indian criminal justice system is provided by Krishna Iyer J, as “The glory and greatness of Bharat notwithstanding, do we not, even after the braggartly semi centennial noises, behave as a lawless brood, tribal and casteist, meek and submissive when political goons and mafia gangs commit crimes in cold blood, and canny corruption and economic offences ubiquitous? The criminal culture among the higher rungs and creamy layers of society, even when nakedly exposed, does not produce the public outrage one should expect, with no burst of rage from those who must speak... Sans the punitive rule of law, democracy becomes a rope of sand... India is not a soft State, a sick society, a pathologically submissive polity. In this darkling national milieu, the penal law and its merciless enforcement need strong emphasis. Alas the criminals are on the triumph, the police suffer from “dependencia syndrome” and integrity is on the decadence and the judges themselves are activists in acquittals of anti-social felons. Less than ten percent of crimes finally end in conviction and societal demoralization is inevitable”²⁴.

3.5. (c) Judicial Inquest is not for the Truth: “Truth does not pay homage to any society ancient or modern. But society has to pay homage to truth or perish” (said by Swami Vivekanand) ultimate end of judicial system is to base justice administration on ‘truth’, truth that which satisfies the party, that which satisfies society, so the truth only must satisfy the judge. Truth is touchstone up on which whole system of law and rule of law must base, if not such system will soon disappear or discarded. Unfortunately quite often the Judge acquits the accused after recording a finding that the prosecution has miserably failed to prove its case against the accused attributing the failure to defective, incompetent or dishonest investigation. Technical or non-fulfillment of any procedural

²⁴Committee on Reforms of Criminal Justice System, 2003, Vol-I at, p.29.

requirement or inadequacies of evidence or non-examination of material witnesses, mistakes in investigation and similar other factors have quite often contributed to acquittals. This amounts to failure of the courts' to search for truth to do justice. Failure of court to investigate and uphold the truth undermines the prestige and efficacy of courts at least in the mind of persons who know truth of that case. In this regard role of advocate and police is of paramount importance today layman thinks that truth has nothing to do in court, and he know very well that he must dispose what his lawyer has said to dispose and he seldom speak truth. Most honest men in public life is forced to lie before court the reason is simple, everyone knows it in accident cases to get compensation from insurer advocates uses to produces a vehicle having full insurance claim even though it is in any way involved in accident, driver of later vehicle will dispose in court that he had committed that accident, because it benefits all the parties. These are reasons why lawyers are called liars; same is the case of judiciary.

Instead of being too much adversarial, he (judge) must show real interest in searching out the truth; technical ground must not shadow the truth. In this regard active participation of the victim during investigation would be helpful in discovering truth. Victim can assist investigation in finding out the real offender and in collecting evidence to prove the commission of the offence by the assailant. He can also offer suggestions for proper investigation of the case. When the investigation proceeds on wrong lines the victim can move the court for appropriate directions to ensure proper investigation of the case.

3.5. (d) Right to Remain Silent or Right Against Self-incrimination: The right not to be compelled to testify against himself is a universally recognized right of the accused under Art 14 of the International Covenant on Civil and Political Rights and is a fundamental right conferred by Art 20 (3) of the Constitution of India. Art. 20(3) do not prohibit the accused being questioned during investigation or trial. When questioned the accused may deny or make a confession. The right against self-incrimination is guaranteed under Indian Constitution for the reason that it is universally accepted or it is recognized in International Covenant, but authors believe that there is no reason why person (accused) must not be compelled to speak truth. Why law protects him from deposing truth? This right is nothing less than an opportunity or an encouragement to lie. We consider that remaining silence when there is duty to speak as fraud²⁵. Is it not the duty of every one to assist in administration of justice? Then is it not fraud? Is it not opposed to the public policy?

Article 20 no doubt does not prohibit questioning accused, but it says that accused is not bound to answer. *There was neither rkingdom nor the King; neither punishment nor the guilty to be punished. People were acting according to Dharma; and thereby protecting one another*²⁶. So there is no rationale behind this right, there is no reason why he shall not depose truth in the presence of judge, where there is absence of coercive environment.

Eminent lawyer Sri. Fali Nariman has said "It is time that we recognize the right of silence during a trial is not really a right, but a privilege and although every accused has a right to

²⁵ The Indian Contract Act, 1872, Sec 16 (Judicial Interpretation).

²⁶ Justice M.RamaJais., *Legal and constitutional History of India*, (1984) 1st ed. (Delhi: Universal Law Publishing Co. Ltd, Reprint (2005) at.p. 575. *Naivrajyamna raja- assinnhdandona cha dandikah Dharmenaivparjah sarvarakshanti smaparsparam.*

be presumed innocent till he is proved guilty, in terrorist related and other grave crimes the accused has an obligation to assist the discovery of truth.²⁷

Common man had different approach towards right to remain silence, than what lawmakers think off, it can be understood in better way taking this example, it is normal for a child who has stolen a cookie to be questioned by his parent on its disappearance. It would be absurd if the child's defence is that he may not be questioned and in any event cannot be expected to reply as this might incriminate him. Yet when he has stolen a bicycle this is the accepted situation *vis a vis* police and court, entrenched in our Constitution. He does not even have to raise this defence; the constitution does it for him. And we don't find it absurd! We don't consider whether the legal walls which we erect that impede society's search for the truth are warranted. And we have no inkling of the cost of our strange procedure in monetary terms and in wasted judicial, prosecutorial and police man hours. Those that know are silent²⁸.

The privilege that a child cannot enjoy is constitutional right and is being enjoyed by an accused of crime! Well it is scientifically proved that a person who accepts his mistakes can be corrected (reformed) without much difficulty, Indian Law (ancient) suggest that *Paschataap* or *Prayaschita* (expiation) is the best punishment so when person admits his wrong in court of law definitely there will be psychological suffering that which will helps in his self-reformation as an righteous man in feature. The overarching aim of the Criminal Justice System should be to find out the truth. The person, who is most likely to know the truth of an offence which has been committed, is the offender himself. Accordingly in the authors view, right to remain silence must not be general principle of criminal law it must be an exception to the general rule that every men in Court of Law ought to speak truth or obliged to speak truth, and that the compulsory examination of the accused by court is an essential feature of sound criminal procedure.

3.5. (e) Justice to Victim: No doubt Crime is an act against society, convict is punished to protect interest of the State, thereby discourage violation of law and disturbance to social harmony. The State (and society), it was argued, is itself the victim when a citizen commits a crime and thereby questions its norms and authority. In the process of this transformation of torts to crimes, the focus of attention of the system shifted from the real victim who suffered the injury (as a result of the failure of the State) to the offender and how he is dealt with by the State. Criminal justice came to comprehend all about crime, the criminal, the way he is dealt with, the process of proving his guilt and the ultimate punishment given to him. Apart from this much emphasis has to lay down for the protection of interest of Victim. Reason for this is that victim is the real sufferer, physically, mentally and also financially, justice can be said to be done only when victim is adequately restored to his original conditions of his life.

No doubt bringing culprit to justice satisfies victim in big way, certainly it is not all that can be done to him. Victim fundamentally has two rights one right to participate in proceeding, second right to compensate for loss or injury caused to him by such crime. But these two rights fully made available to him, we can consider that reporting first information is the first stage of criminal proceedings and by and large in all criminal cases for victim this is the last stage where he

²⁷ Committee on Reforms of Criminal Justice System, Vol-I at, p 53.

²⁸ *Ibid*, at. p 56.

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can fully dispose what happened with him (some time Police Officer refuse to record FIR that is different problem again). After FIR, victim along with witness bound to answer to only question which will be asked during proceedings, he is not authorized to rebut accused. Victims have a right to testify as prosecution witness. However, victims often fall prey to intimidation and harassment by offenders which tend to dissuade them from testifying freely and truthfully. Though it is the duty of the State to prevent such things, the situation according to available evidence is disturbing. Prosecution of accused is considered to be state responsibility in which interest of victim largely in stake.

In the granting and cancellation of bail, victims have substantial interests though not fully recognized by law. Similarly prosecution can seek withdrawal at any time during trial without consulting the victim (Section 321 Cr. P. C.), of course, the victim may proceed to prosecute the case as a private complainant; but he seems to have no right to challenge the prosecution decision at the trial stage itself. There is no victim protection law as such and police is not in a position to protect every victim. Such conduct, of course, is prohibited under the IPC (Section 504 IPC)²⁹.

Compensation to victim can be awarded under some of the provisions (Sec 357 Cr.P.C) but adequate use of this provision not being made but it is to certain extent satisfactory that writ Courts have shown keen interest in awarding compensation in case of certain crimes as violation of fundamental right, this new jurisprudence is called as compensatory Jurisprudence³⁰. In this regard there is urgent need to give legislative effect, to constitutional claim of compensation to the victims of crime.

3.6. Legal Education:

Quality of legal education is having direct bearing on legal system, a sound and value loaded legal education is sine qua non for better administration justice. We have borrowed legal system form English practices. It is evident that legal system of India is one of closest replica of English practice. In India legal education (British) started in 1868. In 1868, in the province of Punjab, the law classes were started by the *Anjuman-I-Punjab*, which was taken over by the Punjab University in 1870. The duration of the course was 2-years and education was given in two separate classes, one in English and the other in Urdu.

From the day of its origin object of legal education in India is to create a good legal professional so as to assist courts in administration of justice; however fact is that till today no prompt attempt has been made by Government to achieve these objects. Take example of our own state, in Karnataka, there are 97 colleges imparting legal education throughout the State, among them hardly 8 to 10 colleges are aided (recently Govt. decided to extend grant in facility to other 19 private law colleges), remaining colleges are run by private society's or by individuals. These colleges including Government Colleges are in such pathetic conditions that, hardly few colleges had full time qualified teachers; local practitioners are engaged for teaching in many of the institution. Private run colleges find it difficult to have good library which is essence of legal education. Physical infrastructure is far from satisfactory, computer education; internet facilities;

²⁹ Committee on Reforms of Criminal Justice System, 2003, Vol.-I at. p. 87.

³⁰ For Example in *Nilahati Behera v. State of Orissa* [(1993) 2 SCC 746] one lakh fifty thousand compensation was awarded for custodial death.

mooting and other clinical legal education facilities yet remained as dreams especially of rural students.

Apart from this, fundamental defect of our legal education is that, presently legal education is all about learning western thought and jurisprudence, law students have nothing to do with cultural, moral, ethical and traditional values of our own society. This ultimately leading to demoralization in judiciary, and it is one of the reasons why legal profession is loosening out its ethical content.

Altogether primary object of education is to build overall personality of student, especially in legal education study of cultural ethos, customary practices are very much necessary. Justice is said to be done when it satisfies the victim and then the society, this necessitates studying needs of both individual and society. Study of social environment under which such legal system is working is primary requirement without which scholarship will not have social relevance. Studying western jurisprudence will not create a lawyer or leader of the type which this country is looking for. Education must represent true aspirations of past and present of the society in which it is working. Our students not having privilege to study Kautilaya's Arthashastra, but they compelled to read Austin's Positive Law theory of law, in what why it is relevant to our society is great question, our value loaded Vedic study and Dharmasutra are totally discarded, which resulting in cultural and moral shrinkage in the whole society. We must reconstruct our education system without which social transformation towards self-rule will not be commenced, studying western ideas manipulates mind of our young generation they still believe that our cultural practice are quite inferior to west, they think that we must dress like west, eat like west, and live like west, but forgets we the people of India were dominated the world for thousand of years, we were the sources of knowledge to the whole world, our science, arts, were unique in themselves. This negative tendency is because of our education system, we must inculcate in them a sense of pride about our nation and about her past glory.

Today career of our students depends on their academic performance this fact forces them to limit their study to text books, which are but bundle of western ideas. This cultural discontent of education not only a problem of legal education, our arts, history, science, and other social science were a copy of western thought process. Improvement in legal education not only need of the day but question of survival of exalted pedigree of cultural superiority of this country.

4. Conclusion

India has been making rapid strides in almost all the fields. The revolution in the field of communication has substantially increased the expectations of an ever growing population. With growth of population, there increases demand for life essentials, increase in demand leads to scarcity, and ultimately scarcity ends with clash of interest, resulting in conflict. Judicial system shall cope with emerging regimes of new avenues of technological advancement and increasing demand for adjudicatory intervention in settling the clash of interest. It is estimated that the number of Judges/Courts expanded six fold while the number of cases expanded by double that number i.e. twelve fold. The judicial system has to continue to expand significantly over the next three decades, rising, by the most conservative estimate, to at least about 15 crores of cases requiring at least some 75,000 Courts/Judges.

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This estimation clearly establishes that the existing frame work of Indian Judicial system has to undergo sea change to effectively counter the future problems. Global and national experience shows that the number of new cases filed into a judicial system increases with literacy and economic wealth (for example, Kerala, with a literacy rate of over 90%, has some 28 new cases per thousand population as against some 4 cases per thousand population in Jharkhand which has a literacy rate of some 53%). As India's literacy rate and per capita income increases the number of new cases filed per thousand population is likely to increase from the current rate of about 15 (up from roughly around 3 cases per thousand cases some three decades ago) to about 75 cases in the next three decades. By this time India's population should be about 1.5billion. This will mean that at least some 15 crores of cases may be filed into the judicial system each year by then.

Many researchers are of the view that with increase in the literacy rate in India or elsewhere is having direct relation with increasing number of cases. They argue that increase in number of cases is on account of better awareness of the legal rights, is a welcome development and should not be a cause of concern. However, this conclusion needs serious attention, as authors are of the view that settlement of dispute only through Law Courts will not be an appropriate mode of reconciliation of claims. This is the great mistaken belief with which Indian Judicial system suffering from centuries. For every dispute Law Courts is not a solution, especially in India, clash of interest can be best settled by community participation. It means education must inculcate a culture wherein educated must understand how to harmonize his own interest with the interest of others. But in India it is considered that the elite citizen is one who fights in Court of Law for rights of his own and of others. With increase in literacy there shall be decrease in the cases approaching adjudicatory bodies. Real education is that which assist the reconciliation of interest; Dugit a great Jurist terms it as social solidarity.

Important aspect of efficient legal order is prevention of clash of interest. It requires all round planning pertaining to social, economic, political, and cultural issues. It does not mean that there is no pressing need to bring reforms in existing legal system. Today, Indian judicial system suffers from inadequacy of responsiveness in funding, appointment of judges, constitution of adequate number of courts, delay in implementing recommended measures, etc. along with these other social, cultural, political and economic issues contributed for the failure of legal system.

THE CONCEPT OF STRICT CONSTRUCTION UNDER THE CONSTITUTION

Mahesh R.S.*

Introduction

How appropriate is an interpretation or application of a statute that is broader or narrower than its literal meaning?

The first thing to remember about the term “Strict Construction” is that it has been used to denote a wide variety of concepts, listed here in ascending order of “Strictness”.

- (1) The Court will not extend the law beyond its meaning to take care of a broader legislative purpose. Here ‘Strict’ means merely that the court will refrain from exercising its creative function to apply the rule announced in the statute to situations not covered by it, even though such an extension would help to advance the manifest ulterior purpose of the statute. Here, strictness relates not to the meaning of the statute but to using the statute as a basis for judicial law making by analogy with it.
- (2) The court will so resolve a significant uncertainty of meaning even against the weight of probability.
- (3) The court will resolve an evenly balanced uncertainty of meaning in favor of criminal defendant, the common law, the “common right”, a taxpayer or sovereignty.
- (4) The court will adhere closely to the literal meaning of the statute and infer nothing that would extend its reach.
- (5) Express meaning, the event will restrict application of the statute to its narrower purpose.¹

Strict Construction of Taxing Statute

Article 265 of the Constitution of India provides: “No tax shall be levied or collected except by the authority of law”. Article 366 of the Constitution which defines taxation and tax reads: “Taxation includes the imposition of any tax or impost whether general or local or special and ‘tax’ shall be construed accordingly.” In broad sense a fee being compulsory imposition of money is also a tax.²

Every taxing statute has a charging section and provisions laying down the procedure to assess the tax and penalties and method of their collection and may also contain provisions to prevent pilferage of revenue. Penalty provision in a taxing Act has to be specifically provided and cannot be inferred. There are three components of a taxing statute namely:- subject of the tax,

* Lecturer, K.L.E. Society’s Law College, Bangalore.

¹ Dickerson (Reed), “The Interpretation and Application Of Statutes”, Little Brown, Boston, p. 206

² G.P. Singh, “Principles of Statutory Interpretation”, Lexis Nexis Butterworths, Wadhwa, Nagpur, Tenth Edition, 2006. pp.741, 741.

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person liable to pay the tax and the rate at which the tax is levied. If there be any real ambiguity in respect of any of these components which is not removable by reasonable construction there would be no tax in law till defect is removed by the legislature.³

Taxes are distributed between the Union and States by various entries in List I and List II of the VII Schedule to the Constitution. The Parliament can under its residuary power under entry 97 of List I can levy a tax not mentioned in these lists. A taxing statute means a statute or an Act making compulsory imposition whether of tax or fee. There are three ingredients in the imposition of tax viz;

- i) Declaration of liability in respect of persons or property;
- ii) Assessment of tax that qualifies the sum which the person liable has to pay;
- iii) Methods of recovery if the person taxed does not voluntarily pay.⁴

General Principle of Strict Construction

A taxing Statute is to be strictly construed. In the words of Lord CAIRNS: “If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute.”⁵

Justice Bhagwati has also expressed the principle regarding interpretation of taxing laws. In his words: “In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statutes, no tax can be imposed by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter”.⁶

The judicial opinion of binding authority flowing from several pronouncements of the Supreme Court has settled the following principles:-

- (1) In interpreting a taxing statute, equitable considerations are entirely out of place. Taxing Statutes cannot be interpreted on any presumption or assumption. A taxing Statute has to be interpreted in the light of what is clearly expressed. It cannot import provisions in the statute so as to supply any deficiency. It cannot imply anything which is not expressed
- (2) Before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section, and

³ Ibid, PP.743, 744.

⁴ Dr. Avtar Singh, “Introduction to Interpretation of Statutes”, Second Edition, Wadhwa, Nagpur, 2005. p. 233

⁵ *Supra* note-3, p. 745

⁶ *Supra* note-4, p.235

- (3) If the words are ambiguous and open to two interpretations, the benefit of interpretation is to be given to the subject.⁷

Lord Simonds gave this maxim of tax law that, “the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him”.

Provisions relating to fiscal statutes are required to be strictly construed and there is no scope for looking to the unexpressed intendment. The benefit of this interpretation is given to the subject only when the words used are ambiguous and reasonably open to two interpretations. If the legislature fails to express itself clearly and the tax-payer escapes by not being brought within the letter of the law, no question, unjustness as such arises.

The Stamp Act, 1899 is a piece of fiscal legislation. There is no scope for equity for judiciousness if the letter of law is clear and unambiguous. It has been held that the provisions of the Stamp Act enforced solely at the instance of the revenue officials. Thus, benefit of any ambiguity or conflict in different provisions of such an Act goes to the citizen.

Another important principle pertinent here, is that of the avoidance of double taxation of the same income that will be avoided by adopting another construction which may reasonably be open. On the basis of this general rule it is said that several heads of income mentioned in the Income Tax Laws are mutually exclusive and a particular income can come under only one of the heads.

The Court Fees Act is also strictly construed. If the fee is heavy, the Act may seriously restrict the rights of a person to seek his remedies in a court of justice and as access to justice is the basis of the legal system, in a case where there is reasonable doubt, the benefit of construction must go to him who says that the lesser Court Fee alone be paid.⁸

Illustrative Cases

- *In C.I.T. v. Karmachand Premchand Ltd*⁹

The assessee carried on business both within and outside taxable territories of India. When he sustained losses in business which was carried on outside taxable territories he contended that those losses should be set off against profits in taxable territories for computation of his taxable income. Third proviso to Section 5 of the Business Profit Tax, 1947 provided that the Act was not to apply to any income, profits or gains of business accruing or arising within any part of India to which the Act did not extend, unless such income, profits or gains were received in or brought into the taxable territories. This section was construed by the Supreme Court and the court felt that the matter was not free from difficulty and gave the benefit of construction to the assessee by holding that language of the proviso did not exclude the outside business from consideration but only accepted the income thereof, unless received or deemed to be received in taxable territories.¹⁰

⁷ *Ibid*, p.234.

⁸ *Ibid*, p.235, 236.

⁹ AIR 1960 SC.

¹⁰ *Supra* note-2, p.757.

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- *In IRC v. Duke of Westminster*¹¹

The Duke executed a series of deeds in favour of his employees in which he covenanted to pay certain weekly sums for a period of seven years in consideration of past services during the joint recipients. The Duke contended that the payments under his total income were in substance made as remuneration for services and could not be so deducted. The contention of the Revenue Authority was rejected by the House of Lords and it was held that when a deed is not challenged as non-genuine or mere cloak to conceal a different transaction the substance of the matter cannot be distinguished from the legal rights and obligations arising under the deed.¹²

- *In Philip John Plasket Thomas v. CIT*¹³

Section 16(3)(a)(iii) of the Income Tax Act, 1922 which provided for inclusion in computing the total income of the husband, so much of the income of a wife as arises 'from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration was construed. It was held that for the application of the above provision the relationship of wife and husband must exist at the time when income accrued to the wife and also at the time when the transfer of assets was made. Income accruing to a wife from assets transferred to her prior to the marriage could not be taken into account for computing the total income of the husband even in respect of any period after the marriage.¹⁴

- *Azamjha v. Expenditure Tax Officer, Hyderabad*¹⁵

Logic or reason is not of much avail in a taxing Act is the principle well illustrated in this case. Here question related to the definition of 'dependent' in Section 2(g) of the Expenditure Tax Act, 1957 which provide, "Dependent means where the assessee is an individual, his or her spouse or minor child and includes any persona wholly or mainly dependent on the assessee for support and maintenance". While Constructing it, it was held that the concluding words in the definition "wholly or mainly dependent on the assessee" did not refer to spouse or minor they had their separate income and were not in fact wholly or mainly dependant on the assessee.¹⁶

Qualification of the rule of Strict Construction

When the statutory provision is reasonably open to only one meaning, no question of strict construction of a taxing statute arises. Strict construction of a taxing statute does not mean that where the subject falls clearly within the letter of law, the court can avoid the tax by putting a restricted construction on the basis of some supposed hardship or on the ground that the tax or penalty imposed is heavy or oppressive. Where two views are possible, the one in favour of the assessee must be adopted. The interpretation favoring the assessee which has been acted upon and accepted by Revenue for a long period should not be disturbed except for compelling reasons.

¹¹ (1935) All ER Rep. 259(HL).

¹² *Ibid*, pp. 754,755.

¹³ AIR 1964 SC 587.

¹⁴ *Supra* note-4, p.237.

¹⁵ AIR 1964 SC 587.

¹⁶ *Supra* note-4, p.237.

Where the literal interpretation leads to absurd or unit ended results, the language of the statute can be modified to accord with the legislative intention and to avoid absurdity also applies in interpreting a taxing statute.¹⁷

A taxing Statute must be construed reasonably and receive purposive construction so as to give effect to purport and object they seek to achieve. The object of the statute has to be kept in view and a construction consistent with the object has to be placed on the words used if there be ambiguity, is also applicable in construing a taxing statement.

In interpreting an exemption, legislative intent is also material. Where the legislative intent was to grant exemption to life saving drugs or medicines or equipments, only if imported for being used in India and not for export. Those provisions which are introduced to open up liability which had become barred by lapse of time will be subject to the rule of strict construction. Such provisions are not given larger retrospectivity than is necessitated by express words or clear implication.¹⁸

American view

It seems to have been generally accepted in U.S.A. that in case of doubt in construction of taxing statutes the doubt is to be resolved in favor of the tax payer and against the Government. There is, however, another view which favors the adoption of liberal construction of such statutes in order to aid the taxing power of the State and there are instances where the courts have given effect to the spirit or equity of revenue laws. The liberal view seeks its support on the theory that ultimate objective of all tax measures is accomplishment of good social order and a strict interpretation results in loss of revenue to the Government and operates to the dis-advantage of others contributing for its support.¹⁹

Rule of Strict Construction in Criminal Statutes

Almost every crime which exists at common law independently of any statute requires for its commission some blameworthy state of mind on the part of the actor, called *mens rea*. Where an offence is created by statute, however comprehensive and unqualified the language of the statute it is usually understood as silently requiring that the element of *mens rea* should be imported into the definition of the crime, unless a contrary intention is expressed or implied. In other words, the plain words of the statute are read subject to a presumption (of arguable weight), which may rebutted, that “the general rule of law that no crime can committed, unless there is *mens rea*” has not been ousted by the particular enactment. By *mens rea* is meant, in the context condition, whether constituted by knowledge or intention or otherwise: it is part of this work to examine the specific elements required to constitute the *mens rea* of particular of offences.²⁰

It is of the utmost importance for the protection of the liberty of the subject that a court always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens*

¹⁷ *Supra* note-2, p.761.

¹⁸ *Ibid*, p.763.

¹⁹ *Ibid*, pp.774, 775.

²⁰ P.St.J. Langan. “Maxwell on The Interpretation of Statutes”, Twelfth Edition, N.M. Tripathi Pvt., Ltd., 1976. p.123.

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rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.”

According to Lord EVERSHED, then, two conditions must be satisfied if the presumption as to *mens rea* is to be rebutted: strict liability must be “required to give practical effect to the legislative intention”, and the person charged with a breach of the statutory requirements must have had some opportunity of furthering their observance.²¹

In Lim Chin Aik’s case it was held that the accused could not be guilty of entering and remaining in Singapore Contrary to an order, prohibiting him from doing so and made under the Singapore Immigration Ordinance of 1959, when that order had not been brought to his attention. To impose absolute liability on a prohibited person would not have complied with it if he did not know of it and no practicable means of his ascertaining that he had become a prohibited person was provided by the ordinance.

Under the Prevention of Crime Act 1953, Sec.1(1), it is an offence for any person, without lawful authority or reasonable excuse, to have “with him in any public place any offensive weapon.” The words “has with him” here mean “knowingly has with him”. “If some innocent person has a cash slipped into his pocket by an escaping rogue, he would not be guilty of having it with him within the meaning of the section.”²²

Evasion of Statutes

It is permissible to evade an Act of the parliament in the sense that a person may not do that which the Act prohibits but he is free to do anything which though equally advantageous to him as that which is prohibited is never the less outside the prohibition, penalty or burden imposed by the Act. If a Statute prohibits doing of A, the courts are powerless to extend the prohibition to cover B when the legal significance of ‘A’ & ‘B’ are different and distinct even of both ‘A’ and ‘B’ in substance produce similar results. It is well established that penal and taxing laws are not to be extended by analogy to cover acts and situations not within the words of the statute on any doctrine of substance of the matter. But this principle has no application where that is done is really the thing prohibited although under color or cloak of a different transaction not prohibited by the statute. If, what a person does, is really A, but covers the reality by giving to it the color of B the courts will go behind the form and enforce the prohibition. It is therefore, not permissible to evade an Act of Parliament by resorting to a fraudulent device or by covering the reality by a non-genuine transaction.²³

There are Fundamental difference between acceptable tax mitigation and unacceptable tax avoidance. The former are cases in which the tax payer takes advantage of the law to plan his affairs so as to minimize the incidence of tax. “Unacceptable tax avoidance typically involves the creation of artificial to achieve adventitious tax benefit for the tax payer and in truth are no more

²¹ *Ibid*, pp.124, 125.

²² *Ibid*, p.125.

²³ *Supra* note-2, p.775.

than raids on the public funds at the expense of the general body of tax-payer and as such are unacceptable.²⁴

A person is free to arrange his business in such a way so that he is able to avoid a law and its evil consequences so long as he does not break that or any other law. Now the courts have reached the extent of not recognizing tax avoidance schemes or devices even if they are strictly not non-genuine. In *Mc. Dowell & Co. Ltd., v. Commercial Tax Officer*²⁵. J.CHINNAPPA REDDY observed: “In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid a tax and whether the transaction is such that the judicial process may accord its approval to it.”²⁶

Conclusion

The easy part of answer for Strict Construction is that, when performing its cognitive function of ascertaining what a statute means, a court should temper its reading by taking into account the proper context of the statute. The normal result of such tempering is to narrow the sweep of otherwise broad generalities. The limiting force of context is a major factor in making communication practicable.

²⁴ *Ibid*, p.779.

²⁵ (1985) 3 SCC 230.

²⁶ *Supra* note-4, p.243.

COMPULSORY LICENSING OF PATENT IN INDIA: A SPECIAL REFERENCE TO COMPULSORY LICENSING OF PHARMACUTICAL PATENT

Manojkumar V. Hiremath*

Introduction:

Utilitarian theory of protection of intellectual property supports creation of intellectual property rights as an appropriate means to foster innovation, subject to the caveat that such rights are limited in duration so as to balance the social welfare, loss of monopoly and exploitation. In tune with this theory the grant of a patent under the present legal regime in the world gives the patentee a limited period of exclusivity where the patentee can prevent others from practicing the patented invention. This limited period of exclusivity affords the patentee control over the invention's price and, in turn, gives the patentee an opportunity to earn the money he has invested in research and make profits and further it encourages for further research.

Today in all countries which are signatories to TRIPS the patent is granted to invention of a product as well as process if it passes the triple test of being new, non-obvious and usefulness. In India after 2005 amendment to the Indian Patent Act, 1970 if an invention either process or product if proved to be novel, non-obvious and industrially applicable and if it does not fall under the category of non-patentable subject matters enumerated under Section 3 and 4 then such invention is granted a patent. On the grant of patent the patentee gets right to exploit patent (Sec.48&70), right to assign (Sec.70), right to grant license (Sec.70) and right to surrender the patent (Sec.63). The patentee can enjoy these rights for the period of 20 years from the date of making first application for obtaining patent (Sec.53).

The exclusive rights granted to patentee for twenty years are not absolute but subjected to certain limitations. The limitations are in the form of Government use of patent (Sec.100), Compulsory Licenses (Sec.84, 92 & 92A), Revocation for non-working (Sec.64), Use of inventions for defense purposes (Sec.157A) and Use of inventions in foreign vessels (Sec.49) etc.

Compulsory licensing has become contentious issue in the wake of first ever grant of compulsory license in India to Natco Pharma Ltd. to manufacture and sell the generic version of the drug 'Sorafenib tosylate' patented by Bayer Corporation which is useful for treatment of advanced stage liver and kidney cancer. Hence compulsory licensing of patent which is one of the rarely resorted methods of limiting the exclusive right of the patentee is discussed in the Indian context with special reference to pharmaceutical patent.

*Lecturer, KLE, Society's Law College, Bangalore

Concept of Compulsory Licensing:

The patentee can, and quite often does, authorize others to practice the patented technology, which is usually done for a negotiated fee that is known as license granted by patentee and it's a voluntary act of the patentee in exercise of right conferred on him on granting of patent. Compulsory licenses, in contrast, are basically "involuntary contracts between a willing buyer and an unwilling seller imposed or enforced by the state."¹ Compulsory licenses are an abrogation of a patentee's right, where the government allows itself or a third party to practice the patented invention without the patentee's consent.²

The reference can be made to the World Trade Organization (WTO) webpage where the concept of Compulsory License is defined. Compulsory License is a license through which the government allows someone else to produce the patented product or process without the consent of the patent owner.³

It's not voluntary grant of license by the patentee but it's a grant of license under the compulsion of Government by accepting the prescribed royalty amount from the licensee to whom the Government has permitted to produce the patented product of the patentee on the proved grounds and in the presence of circumstances specified under the patent law. It's not an arbitrary exercise of power by the government because sufficient procedural safeguards are provided under the patent law while granting compulsory license. However the Compulsory license takes away the patentee's exclusive control over the patented technology.

Compulsory licenses are generally authorized in the event of undesirable behavior by the patentee, such as anti-competitive, non-working, or blocking behavior; in the event of "public need," such as government infringement or national emergency; or in the context of food and drugs.⁴

Compulsory Licensing Under WTO Laws:

The Paris Convention of 1883 provides for compulsory licensing but it does not define compulsory licensing. Article 5A (2) of the Paris Convention envisages for each contracting state to take legislative measures for the grant of Compulsory Licenses. Article 5A (2) of the Paris Convention reads:

"Each country of the Union shall have the right to take legislative measures providing for the grant of Compulsory Licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

¹ Gianna Julian-Arnold, *International Compulsory Licensing: The Rationales and the Reality*, in Srividhya Ragavan (Edt), *Patent and Trade Disparities in Developing Countries*, Oxford Universities Press, New York, 2012, p.170.

² Christopher A. Cotropia, "Compulsory Licensing Under TRIPS and the Supreme Court of the United States' Decision in eBay v. Merc Exchange" available at: <http://ssrn.com/abstract=1086142>.

³ Available on - http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm.

⁴ Colleen Chien, "Cheap Drugs At What Price To Innovation: Does The Compulsory Licensing Of Pharmaceuticals Hurt Innovation" Berkeley Technology Law Journal, available on <http://www.law.berkeley.edu/journals/btlj/articles/vol18/Chien.web.pdf>.

It is evident that compulsory licensing is not a new concept rather it is in vogue from 19th century only. But very rarely it is resorted to by the governments.

But the term “compulsory licensing” does not appear in the TRIPS Agreement. Instead, the phrase “other use without authorization of the right holder” appears in the title of Article 31. However compulsory licensing is included within the meaning of “other use”, it also includes use by governments for their own purposes and public purposes.

The TRIPS Agreement does not specifically list the reasons which might be used to justify in compulsory licensing. However, the Doha Declaration 2001 on TRIPS and Public Health confirms that countries are free to determine the grounds for granting compulsory licences. Thus by virtue of Doha Declaration now Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) provides for the granting of Compulsory License.

Compulsory License Under Indian Patent Act, 1970:

In order to comply with obligations under TRIPS the Indian Patents Act 1970 (herein after referred as Act) was amended thrice, in 1999, 2002 and 2005. Presently Section 84, 92 and 92A of the Indian Patent Act, 1970 deals with compulsory license. Although the Act when enacted contained provisions for granting of Compulsory License, the amendment of 2002 completely replaced them with new provisions.

Now Chapter XVI of Indian Patent Act, 1970 deals with the power of the Central Government to issue Compulsory License and revocation of Patent. Whenever Government exercises its power under this chapter it has to take into consideration the general principles regarding working of patented inventions laid down under Section 83 of the Act.

General principles applicable to working of patented inventions are:

- (a) That the patents are granted to encourage inventions.
- (b) The patented inventions are worked in India on a commercial scale.
- (c) The patented inventions are worked to the fullest extent and without undue delay.
- (d) Patents are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article.
- (e) The protection and enforcement of patent rights contribute to the promotion of technological innovation.
- (f) To facilitate the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge.
- (g) Dissemination of patented invention must be in a manner conducive to social and economic welfare, and to a balance of rights and obligations.
- (h) That patents granted do not impede protection of public health and nutrition.
- (i) Patent grant should act as instrument to promote public interest especially in sectors of vital importance for socio-economic and technological development of India.
- (j) Patent grant does not prohibit in any way central government in taking measures to protect public health.
- (k) The patent right is not abused by the patentee or person deriving title or interest on patent from the patentee.

(l) The patentee or persons claiming under him should not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

(m) That patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public

Methods of Grant of Compulsory License:

The Government in exercise of its power under Chapter XVI of Indian Patent Act, 1970 can grant Compulsory License in three different circumstances viz,

- i) On an Application by Interested Person on the grounds enumerated under Section 84.
- ii) By notification in case of national emergency or in circumstances of extreme urgency or in case of public non-commercial use under Section 92.
- iii) Compulsory license for export of patented pharmaceutical products in certain exceptional circumstances under section 92A.

I. Compulsory License On An Application By Interested Person On The Grounds Enumerated:

Under Section 84 it is provided that any interested person can apply for Compulsory License after the expiry of three years from the date of grant of patent on any of the grounds enumerated there under.

Three grounds for issue of Compulsory Licenses under Sec.84 are:

1. That the reasonable requirements of the public have not been satisfied or
2. That it is not available to the public at a reasonable price or
3. That the granted patent is not worked in India

These grounds can be analysed as lack of sufficient availability of patented product to general public, difficulty in accessing the patented product by general public due to unreasonable pricing and non-acceptability of the behavior of patentee of not producing the patented product in India.

Any interested person can submit an application before Controller of Patent for Compulsory License on any of these three grounds, on receipt of such application the Controller takes into consideration of following things into consideration and takes decision.

1. Whether there exists a ground on which Compulsory License is sought by an interested person.
2. The nature of the invention and the time which has elapsed since the sealing of the patent.
3. The measures already taken by the patentee or any licensee to make full use of the invention.
4. The ability of the applicant to work the invention to the public advantage.
5. The capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted.
6. Whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and within reasonable time period.⁵

⁵ Section 84(6) of Indian Patent Act, 1970

But in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anticompetitive practices adopted by the patentee the Controller need take into consideration of above aspects.⁶

If the applicant has applied for Compulsory License on the ground that the reasonable requirements of the public have not been satisfied then the Controller can presume the existence of that ground if any of the deemed failure given under Section 84(7) exists.

Deemed Failure of Patentee to Exploit Invention:

Section 84 (7) provides that reasonable requirements of the public shall be deemed not to have been satisfied in the following circumstances;

1. Refusal of the patentee to grant a licence or licences on reasonable terms.
2. An existing trade or industry or the development thereof or the establishment of any new trade or industry in India or the trade or industry of any person or class of persons trading or manufacturing in India is affected because of non-exploitation or under exploitation of the patented invention.
3. The demand for the patented article has not been met to an adequate extent or on reasonable terms.
4. A market for export of the patented article manufactured in India is not being supplied or developed.
5. The establishment or development of commercial activities in India is affected
6. Failure of the patentee to manufacture the patented article in India to an adequate extent and supply them on reasonable terms; or as a result of the refusal of the patentee to grant licenses on reasonable terms resulting in prejudicing the establishment of new trade or industry in India.
7. Prejudice caused to industry & trade by reason of conditions imposed by the patentee upon the grant of licenses.
8. Non-working of the patent to the fullest extent that is practicable.
9. Import of the patented article thereby hindering the working of the patented invention in India on a commercial scale.

Conditions of Compulsory License:

Whenever Controller grants Compulsory License it shall be subject to the conditions provided under section 85 and 94 of the Act. Section 85 provides for revocation of license for non-exploitation and section 94 provides for termination of compulsory license on the ground of disappearance of justifications for granting compulsory license.

Revocation of Patent (Section 85):

Section 85 provides that, if a patentee and licensee who has obtained Compulsory License under Section 84 does not exploit the invention within two years from the grant of license then at the instance of Central Government or any interested person the Controller can revoke the patent on the ground that, the reasonable requirement of the general public is not met or patented product

⁶ Proviso to Section 84(6) of Indian Patent Act, 1970

is not available to the public at a reasonably affordable price or invention is not been worked in the territory of India.

Termination of Compulsory Licence (Section 94):

Compulsory licence granted under section 84 may be terminated by the controller On an application made by the patentee or any other person deriving title or interest in the patent, if it is proved that the circumstances that gave rise to the grant thereof no longer exist and such circumstances are unlikely to recur. On such application the Controller shall give opportunity to licensee to file his objections and there by decide about the termination of such Compulsory License.

II. Compulsory Licences on Notification by Central Government:

In circumstances of national emergency or in circumstances of extreme urgency or in case of public non-commercial use, if the Central Government is satisfied that in respect of any patent in force that it is necessary that Compulsory Licenses should be granted at any time after the sealing thereof to work the invention, it may make a declaration to that effect, by notification in the Official Gazette.

After such gazette notification if any interested person makes an application for Compulsory License, then the Controller shall grant such license and secure that the articles manufactured under the patent shall be available to the public at the lowest prices consistent with the patentees rights.

Though the same procedure which is applicable to Compulsory License under section 84 is applicable to Compulsory License granted under section 92, the controller can dispense with such procedure in the following circumstances;

- i. If it is necessary to meet the extreme or national emergency circumstances
- ii. In case of public health crises, relating to AIDS, HIV, Tuberculosis, Malaria or other epidemics,

III. Compulsory Licence for Export of Patented Pharmaceutical Products in Certain Exceptional Circumstances:

If any interested person makes application for Compulsory License to manufacture and export of patented pharmaceutical products to any country which has insufficient or has no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems then Compulsory License is granted subject to conditions under 92A.

Compulsory licence under section 92 A will be granted only if compulsory licence has been granted by such country to which the interested person propose to export or such country has allowed importation of the patented pharmaceutical products from India. The Controller shall, grant a compulsory licence solely for manufacture and export of the concerned pharmaceutical product to such country subject to terms and conditions.

Need for Pharmaceutical Patent:

The explanation for why patents are more important to pharmaceutical firms in appropriating the benefits from innovation follows directly from the characteristics of the pharmaceutical R & D process. In essence, it takes several hundred million dollars to discover, develop, and gain regulatory approval for a new medicine. In the absence of patent protection, imitators could have free ride on the innovator's innovation with some approval of drug control authorities and duplicate the compound for a small fraction of the originator's costs. In essence, imitation costs in pharmaceuticals are extremely low compared to the innovator's costs for discovering and developing a new compound, hence patent protection for pharmaceuticals is must.

Patents are an incentive for Pharma companies to invest in drug development. Drug development is an expensive venture that requires millions of dollars being spent and some time without returns. When a miracle drug is finally produced, patenting and exclusive manufacturing rights allow these companies to make sufficient profits to justify their previous investments, as well as to invest in future innovations.

Law of Pharmaceutical Patenting in India and its Impact:

Prior to 2005 amendment to the Indian Patent Act, 1970 inventions in chemicals, food and drugs, were given only process patent for the term 7 years from the date of filing or 5 years from the date of sealing the patent. But in order to comply with the TRIPS obligation by 2005 Amendment to the Act now in India chemicals, food and drugs are given product as well as process patent for the period of 20 years from the date of first application.

During the golden days of Indian Generics (prior to 2005) India did not recognize patents in areas considered vital to human life - food and health. Therefore none of the pharmaceutical patents were valid in India, allowing Indian companies to manufacture generic medicines without licensing to the originators as long as the process used for manufacturing was different from that used by the original company. The Indian pharmaceuticals became experts in reverse engineering. This allowed Indian generics to compete in the world market most importantly by providing medicines at an affordable prize to areas of the world that badly needed them. The best example for this is the antiviral drugs manufactured by Cipla. These generics were made available in Africa as well as South America. The availability of these generics at an affordable prize no doubt had a great effect on curtailing the spread of the HIV epidemic.

Before 2005 amendment when only process patent was being granted to pharmaceutical inventions the pharmaceutical industries flourished in India because many of the pharmaceutical industries were producing generic version of patented drugs by adopting different process other than the patented process which was in consonance with the then prevailing patent law in India. The manufacture of generic version of drug was possible by using reverse engineering process.

But when India started giving product as well as process patent to pharmaceutical inventions the act of producing generic version of the patented drug became unlawful because such imitation of patented product became infringement of product patent of the patentee. As consequence the generic industries started facing the infringement actions by the Innovator pharmaceutical industries whose patented drugs were being produced by them in generic form.

The outcome is many of the drugs and medicines became unaffordable to common man as innovator pharmaceutical industries started selling their product at exorbitant price. Many life saving drugs became unaffordable for common man, such being the scenario the government resorted to exercise its power under patent law to issue compulsory license in 2012 and that became contentious issue in the pharmaceutical world.

Case of Compulsory Licensing of Bayer Anti-Cancer Drug:

A big debate started in India when decision relating to Compulsory License came out in March 2012. It was opined that the decision in Bayer case, hamper the process of innovation in drug development and discourage Pharma companies from investing in innovation.

Looking at the implications for the Indian pharmaceutical companies, the provisions of compulsory license has the potential to provide business opportunities that can catapult a company to greater heights in the pharmaceutical sector. These companies - by carefully studying patented products in terms of its market demand and supply equation, price points and manufacturing facilities - can carve out a niche for themselves to fuel their company's growth and expansion. Though this may seem lucrative, there has to be a meticulous approach that considers the greater good of the consumers in order to expect a favourable view from the Controller. Moreover, companies who have been considering evasive options to capitalise on a patented product's demand can now opt for a legitimate path in the form of Compulsory License.

Though the compulsory license provisions seem favourable for non-patent owners, the patent owners are viewing these provisions as detrimental to their interests. These patent owners, having spent considerable time, money and effort on their inventions, feel that the provisions of the compulsory license reduce the protection of their patents. Notwithstanding these apprehensions, it is important for the patent owners to note that the compulsory license implication is not only to limit the protection of their patented inventions, but also to ensure that the compulsory license provisions are viewed as guidelines to ensure that the patent owners do not become complacent about their inventions. The compulsory license provisions can now be treated as guidelines to ensure that patented inventions cater to the greater good by being adequately available to the public; being affordable in pricing; and having local manufacturing facilities to avoid importation.

Well-known Indian academic specialising in intellectual property law Shamnad Basheer points out that, the generics tap into a market that is not catered to by these giants – the middle and low income group. This group of the population cannot afford the patented drugs at their exorbitant prices and have to rely only on generics. By licensing to generic producing companies the innovative pharmaceutical companies can not only increase the reach of their drug but can also make sufficient profits through royalties⁷. Further he has observed that, Compulsory licenses will

⁷Available on - <http://www.indiabioscience.org/artiCompulsoryLicensees/compulsory-licensing-%E2%80%93-does-it-affect-pharma-companies>.

be on the rise all over the world because it is the middle path between extreme patent protectionism and patent abolitionism.⁸

Natco Pharma Ltd v Bayer Corporation:

Provisions of the compulsory license drew attention in India when an application was made by Natco Pharma Ltd ('Natco') to the Controller, for granting compulsory license in its favour with respect to the compound 'Sorafenib tosylate' (the 'Drug'), a patented product of Bayer Corporation ('Bayer'). The case, *Natco Pharma Ltd v Bayer Corporation* is the first of its kind in the history of Indian patent law whereby the Controller awarded compulsory license in favour of an applicant.

M/s Bayer Corporation of USA an internationally renowned manufacturer of innovative drugs, invented a drug called 'Sorafenib tosylate', useful in the treatment of advanced stage liver and kidney cancer in 1990s.

On 13/1/99 it got patent in USA and application under PCT was filed and it got patent in India on 3/3/2008. The patentee company in 2005 had launched the invented drug under trade name Nexavar. The Nexavar drug stops the growth of blood vessels and targets other important cellular growth factors. It is not life saving drug but a life extending drug. In case of Kidney cancer life of patient can be extended by 4-5 years and in case of liver cancer the life of a patient can be extended by about 6-8 months. The drug has to be taken by patient throughout his life time. And the cost of therapy is Rs.2, 80,428/- per month and Rs.33, 65,136/- per year.

M/s NATCO Pharma Ltd, Hyderabad, A.P is reputed Indian Generic drug manufacturer. NATCO developed process of manufacture of the Drug (Nexavar) invented by Bayer and received license from the Drug Controller General of India for manufacturing the drug in bulk and for marketing it in the form of tablets in April-2011.

The NATCO approached the Bayer Co with a request for voluntary license for manufacture and sell the drug, but Bayer declined. Then NATCO filed application for Compulsory License on 29/7/2011 under section 84 (1) Of Patent Act,1970 r/w Rule 96 of Patent Rules 2003 in respect of patented drug Nexavar. The NATCO proposed to sell the drug at Rs.8800 as against Rs.2.80, 428 by Bayer Co.

As the three years lapsed from the grant of patent and as the applicant was interested person within the meaning of the Act. The prima-facia case was made out under section 87(1) of Patent Act, 1970 hence Patent Controller by order on 9/8/2011 directed the applicant to serve the copy of the Application on Patentee and Application was published in the Official Journal on 12/8/2011.

On 23/8/2011 the Patentee (Bayer) filed a request seeking an extension of time by one month to file opposition and it was allowed. Patentee on 7/10/2011 filed interlocutory petition to stay the matter on the ground that an infringement proceeding is pending before the High Court of

⁸ Available on - <http://www.ip-watch.org/2013/03/04/indias-first-compulsory-licence-upheld-but-legal-fights-likely-to-continue/>.

Delhi against the Applicant for the same patent. On 27/10/2011 the petition of the patentee to stay the matter was dismissed.

Meanwhile patentee filed Writ Petition in the High Court of Bombay challenging the order of controller of 9/8/2011 but it was dismissed by the court. Later patentee filed notice of opposition with evidences and the conditions for license under section 87(2) of the Patent Act r/w Rule 98(1).

On 13/1/2012 applicant and patentee were heard and controller ordered for submission of further evidence as the evidence submitted by both the parties were inadequate to arrive at a decision.

On 27th and 28th of Feb.2012 both parties were heard and additional evidence was perused. From the form No.27 submitted by the patentee it was revealed that the patentee has not imported drug to India in 2008 and in 2009-2010 patentee had imported small quantity of drugs which was inadequate.

Bayer took defence that certain quantity of drugs is being supplied by Cipla and certain quantity by itself; hence requirement of the general public is met out. Controller observed that, Cipla's sale does not aid Bayers' case in any way, particularly since Bayer sued Cipla for infringement. Such allegedly "illicit" sales cannot be counted towards Bayer's "working" of the patent.

Bayer sold the drug at an "excessive" price (Rs. 2,80,428/- a month) and was able to meet the requirements of only 2% of the patient population. Therefore, two of the grounds under section 84 had been satisfied, namely that: (i) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, and that (ii) that the patented invention is not available to the public at a reasonably affordable price.

Bayer preferred an appeal before Intellectual Property Appellate Board and it upheld the order of Patent Controller.⁹ Further buyer preferred appeal before Bombay High Court and High Court also upheld the order of the Controller and Tribunal¹⁰.

Conclusion:

In the light of the foregoing discussion it is concluded that, the Government control over the patent holders in the form of compulsory license within the parameters of patent law is an intelligent device to keep the caprice of patent holder in restraint whenever circumstance justifies. This method of limiting the exclusive rights of patentee is very sparingly used in the world. India is not the first country to put into practice, between November 2006 and January 2007, Thailand issued Compulsory Licenses for two AIDS drugs and one anti-hypertension drug. Cameroon on January 2005, issued compulsory licenses for HIV/AIDS drugs Nevirapine, Ghana on October

⁹ Full decision of IPAB is available on - <http://www.ipab.tn.nic.in/223-2012.htm>.

¹⁰ *Bayer Corp. v. UOI and another* Available on - <http://login.westlawindia.com/maf/wlinsa/app/document?&suppsrguid=ia744d05e00000149e65053f1929dd7f7&docguid=IFA0755200E4E11E4AFCDBA4199679564&hitguid=IFA072E100E4E11E4AFCDBA4199679564&rank=1&spos=1&epos=1&td=7&crumb-action=append&context=11&resolvein=true>

2005 issued compulsory license for importation into Ghana of generic HIV medicines, and few other developing and under developed countries have resorted to compulsory licensing of patented drugs which are exorbitantly priced and supplied in limited quantity by the innovator pharmaceutical industries.

However there is a kind of opposition by the developed countries like USA, Canada, and Germany, for the use of compulsory licensing mechanism by the developing and underdeveloped countries because it's the innovator pharmaceuticals companies of these countries which are selling the life saving patented drugs at exorbitant price in developing and underdeveloped countries. Ironically these very opposing countries have made use of the mechanism of compulsory licensing for their benefit in the recent past.

Compulsory License being a controlling measure in the hands of state is very sparingly used in any country, because there is threat in curtailing the rights of patentee and cutting short his exclusive right, because that may hinder the growth of technology and innovation . If research and innovation activities stops it affects the national economy as well as interest of whole population. But in case of pharmaceuticals compulsory licensing is need of the hour in the interest of public health and it is advantageous to Generic industry.

Good news for the common man and specifically to the patients suffering from different deadly deceases is that Department of Industrial Policy and Promotion is actively considering the grant of compulsory licences for three new anti-cancer drugs viz, trastuzumab patented by Roche, ixabepilone and dasatinib are patented by Bristol-Myers each of these costs over Rs. 1.24 lakh, Rs. 1 lakh and Rs. 1.17 lakh for a month's dose respectively.

PROTECTION OF TRADITIONAL KNOWLEDGE AS AN INTELLECTUAL PROPERTY

D.B. Solapure*

Introduction

“When a knowledgeable old person dies, a whole library disappears”

African Proverb

In the order of social relations, we find the basis of different types of institutions. Property is one of such institution. As all institutions imply relation between individuals, the institution of property also regulates the relation between individuals apart from ascertaining their relation with reference to objects as well. The meaning of this right is that, all other persons are forbidden to interfere with the owner in the exercise of his right in respect of the thing owned, up to the point at which the limits of that right are prescribed by law.¹

The term “property” used in the Indian Constitution is a wider one. Definitely, it will include intellectual property too.² Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields³. At the initial stage right to property has been treated as a fundamental right⁴. In subsequent stages it has been deleted through an amendment, but now it is a constitutional right.⁵ At the same time certain special rights relating to property have been given in the case of minorities’.⁶

There is a famous saying in Rig Veda⁷ known as “*nase thesu*” talks about natural, diagnostic, therapeutic methods for human treatment. The concept of “knowledge of power” has been realized in the Vedic era itself. The best example is Vishwamitra case. Sri Vishwamitra happens to be the author of “*Gayathri Mantra*”.⁸

Most cultures around the world from time immemorial have exhibited dialectical tendencies of encouraging sharing of knowledge as widely as possible and at the same time encouraging, or at least tolerating, the efforts of some knowledge producers to keep their intellectual property secret. Sometimes the owners of the property tried to keep it secret through various coercive strategies. Traditional weavers of *patan* silk once were reported to impart the skills of producing *patan* silk only to their daughters in law instead of daughters so that skill did

* Lecturer K.L.E. Society’s Law College, Bangalore.

¹ *Golaknath v. State of Punjab*, AIR 1967 SC 1643 at p. 1709

² *R.C.Cooper v. Union of India*, AIR 1970 SC567

³ WIPO “*Intellectual Property Handbook: Policy, Law and Use*”, WIPO, 2004 Second Edition, Reprinted 2008.

⁴ Article 19(f) of the Indian Constitution.

⁵ Article 300-A of the Indian Constitution, which reads as, “No person shall be deprived of his property save by authority of law”.

⁶ Article 31, The Indian Constitution, 1950

⁷ First among the four Vedas.

⁸ 3rd Mandala, Rig veda , <http://www.kapillavastu.com/uploads/RIGVEDA.pdf>

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not go out of the family. Only four families are now left practicing this 750 year old silk weaving and dyeing tradition.⁹

Since time immemorial, people have always been curious about their environment. They have experimented, explored and the process adapted themselves to survive through ages. When hungry, people hunted, when ill, they found a way to heal. Whenever bored, people found ways to entertain themselves, and in the process invented singing, dancing and music. Till recently, the world's richest man was an oil worker. Today he is knowledge worker" .this statement sums up the importance of the knowledge in a rapidly changing society, the world over. In the good old days, the popular adage was that 'knowledge is power' but in modern times, knowledge has been recognized not only as a source of power but also as the primary source of the property. It is this recognition that justifies the protection of intellectual property (IP) created either by individuals or by communities. The traditional forms of IP like patents, trademarks, copyrights and designs fall into the categories of individually created IP where the beneficiaries of the protection of such IP are primarily the individuals, at least during the limited period during which they enjoy monopoly rights. After the expiry of the statutory period of protection, such IP flows into public domain. On the other hand, there are certain other forms of IP, created, owned managed and continued by the communities for considerable durations of time. Traditional knowledge (hereafter called as TK) is one of such community owned and managed IP. The IP in the form of patents, trademarks, copyright and designs etc. is created, generally as result of the phenomenal growth in the field of science and technology during the last few centuries.¹⁰

Many products based on TK are important sources of income, food and health care for large parts of the populations of a number of developing countries. Traditional medicine plays an important role in health care in both developed and developing countries. In fact, due to their availability and affordability, the traditional medicines and therapy systems of the developing countries provide health care to the vast majority of these countries' residents.¹¹ Forest lore and knowledge passed down over generations by indigenous peoples is open for exploitation by any one, the United Nations University believes. It a loophole in international law on intellectual property rights is affront to traditional group's culture. As it stands, the law says indigenous peoples keen to protect their secrets have to put them in the public domain.¹² Recently, Western science has become more interested in TK and realized that TK may help to find useful solutions to current problems, sometimes in combination with "modern" scientific and technological knowledge. Despite the growing recognition of TK as a valuable source of knowledge, it has generally been regarded under Western intellectual property laws as information in the "public domain", freely available for use by anybody. Moreover, in some cases, diverse forms of TK have

⁹ P.Vivekanandan, T.N.Prakash, *et.al.* "Protecting Traditional Knowledge of small, scattered and disadvantaged grassroots innovators and traditional knowledge holders: Honey Bee perspective", p.1 Available at: http://r0.unctad.org/trade_env/test1/meetings/tk2/honeybee.pdf

¹⁰ Dr.G.B. Reddy, "Intellectual property rights and the law", 4th Ed. (2005), Gogia Law Agency, Hyderabad, Pp.395-396.

¹¹ Xiaorui Zhang, "Traditional Medicine: Its Importance and Protection", p.3. Available at: http://unctad.org/en/docs/ditcted10_en.pdf

¹² Alex Kirby, "Traditional Knowledge is 'in Peril'", BBC News online Environment Correspondent, Available at: <http://newsvote.bbc.co.uk/mpapps/pagetools/print/>

been appropriated under intellectual property rights by researchers and commercial enterprises, without any compensation to the knowledge's creators or possessors.¹³

Traditional knowledge is loosely defined by WIPO as including: "tradition-based¹⁴ literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary, or artistic fields."¹⁵ In addition, the knowledge system is generally perceived as pertaining to a particular people or territory. Finally, it is described as knowledge that is not necessarily old or static but rather that evolves in response to a changing environment.¹⁶ So far, much of the debate focuses on the "political" and "real" costs and benefits of traditional knowledge rights, but there is little discussion of the legal consequences of current protections. Given the underlying ideological conflict, some legal dissension is likely to occur regarding enforcement and protection of traditional knowledge rights.¹⁷

Since the Convention on Biological Diversity (CBD) entered into force in 1993, countries and multilateral and regional organizations have been developing a wide range of conceptual proposals, policies and legislation to protect the traditional knowledge (TK) and collective intellectual rights of indigenous peoples, as they relate to biodiversity. The issue is not *whether* but rather, *how* TK can be legally protected in an effective manner, in absence (often) of tailored legal tools and instruments. Many initiatives to date suggest the use of classic IP tools but adapted to respond to TK features, in combination with non IP tools such as contracts, registers and funds. These classic IP instruments promote individual recognition (in contrast to collective aspects of indigenous peoples livelihoods); grant monopoly, exclusionary rights which affect interests of other indigenous individuals and especially, groups; require specific identification of a creator or innovator (then again, impacting collective interests); result in high transaction costs (i.e. administrative processes, negotiation of licenses, legal fees, maintenance of right fees, etc.); grant rights over creations and innovations which need to have a pre-defined degree of creativeness and innovativeness, to name a few reasons why TK does not naturally at least, "fit" into IP protection frameworks and templates.¹⁸

As part of these developments, growing evidence demonstrates that shared and widely disseminated TK is the prevailing rule rather than the exception, in the context of indigenous people's culture and livelihoods. Though certain TK is still secretly guarded by specific leaders and figures in communities (i.e. the shaman, the elder, the healer, and specific men and women), it is not surprising that a portion of this special knowledge is also kept by other leaders and figures in neighboring communities, is distributed across jurisdictions and is transboundary in nature. There

¹³ Carlos M Correa, "Traditional Knowledge and Intellectual Property: Issues and options surrounding the protection of traditional knowledge", A Discussion Paper, available at: <http://www.quno.org>,

¹⁴ The term "tradition-based" refers to "knowledge systems, creations, innovations and cultural expressions" which have been transmitted from one generation to the next.

¹⁵ WIPO Igc, Traditional Knowledge—Operational Terms and Definitions 11, WIPO Doc. Wipo/Grtkf/Ic/13/9 (2002).

¹⁶ WIPO IGC, Traditional Knowledge—Operational Terms and Definitions 11, WIPO Doc. WIPO/Grtkf/Ic/13/9 (May 20, 2002); Graham Dutfield & Uma Suthersanen, Global Intellectual Property Law 7 (2008).

¹⁷ David R. Hansen, "Protection of Traditional Knowledge: Trade Barriers and the Public Domain", available at, http://works.bepress.com/david_hansen/11

¹⁸ Manuel Ruiz Muller, "Protecting Shared and Widely Distributed Traditional Knowledge: Issues, challenges and options", July 2013, Peruvian Society for Environmental Law, p.1

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is also evidence that a broader set of knowledge which is not secret or confidential, but can still be considered part of the cultural heritage and livelihood of communities, is even more broadly shared among and within communities and disseminated with nonindigenous individuals, sometimes even codified in research papers and books. To some, this latter TK falls under the public domain.¹⁹

Local and traditional knowledge has been successfully built into several areas of agriculture, for example in the domestication of wild trees, in plant breeding, and in soil and water management. Scientists should work more closely with local communities and traditional practices should have a higher profile in science education. Efforts should be made to archive and evaluate the knowledge of local people and to protect it under fairer international intellectual property legislation.²⁰

Many indigenous and local communities²¹ object to the way their communally developed agricultural strains, folklore, and traditional medicines—their “traditional knowledge”—serve as free building blocks for the patents and copyrights of outsiders, often without any recognition, compensation, or control over the way this information is used. Traditional knowledge provides certain multibillion dollar industries, including pharmaceuticals, cosmetics, and agriculture, with useful leads for product discovery and development. Intellectual property law readily recognizes these industries’ “innovations.” But it often turns a blind eye to the incremental and seemingly unscientific contributions of traditional knowledge holders, who are some of the world’s poorest people.²²

In response to the seeming inequity of this scenario and others, indigenous and local communities, their advocates, and developing country governments have, for over a decade, pressed for traditional knowledge protection in the form of internationally recognized intellectual property rights. But while the issue of traditional knowledge protection has elicited public sympathy, meaningful international agreement has been difficult to achieve for a number of reasons.²³

Some communities possess useful knowledge and traditions that have been passed down from one generation to another. These traditional practices and artworks, or the medicinal knowledge may be highly valued by the community, and possibly by others. However, intellectual

¹⁹ Not all widely distributed and disseminated and distributed TK is part of the public domain. This will depend on the extent that the TK has been documented, is described in literature (i.e. academic journals and books) and is available from sources such as libraries, internet, publications, etc. For a detailed analysis of the issue of “public domain” available at, http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_8.pdf. Note on the Meanings of the Term “Public Domain” in the Intellectual Property System, with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions.

²⁰ See, www.greenfacts.org/en/agriculture-iaastd/.

²¹ The phrase “indigenous and local communities” is widely used in the existing scholarly literature on traditional knowledge (TK), as well as in national and international laws concerning TK. Neither the term “indigenous” nor “local community” has a precise, internationally agreed-upon definition. See, e.g., Rosemary J. Coombe, *The Recognition of Indigenous Peoples and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 277 (2001).

²² Deepa Varadarajan, “A Trade Secret Approach to Protecting Traditional Knowledge”, *The Yale Journal Of International Law*, Vol. 36, p. 372(2011)

²³ *Ibid*, p.373

property law does not necessarily protect knowledge relating to the medicinal uses of plants, reproductions of communal works, traditional cultural practices, or

Spiritual rituals. This is because much of this knowledge is not new or cannot be identified as having been created by a particular individual.²⁴

Far from protecting this knowledge, intellectual property law may, in some instances, have facilitated the taking and commercialization of this traditional knowledge by individuals or entities that are external to the traditional knowledge-generating community. The result is often an inequitable situation in which the knowledge is used, including for commercial purposes, without attribution or compensation to the knowledge-generating community. This use or taking without consent or compensation has been characterized as “bio-piracy” or “misappropriation.”²⁵ The taking and use (or misuse) of the cultural works, genetic resources and knowledge of traditional and indigenous peoples, has led to a call to protect traditional knowledge and traditional cultural expressions.²⁶ This includes the possibility of legislation to create a *sui generis* traditional knowledge right. The real danger to which India is exposed and against which proper protection is to be ensured relates to the area of the country’s biological resources and traditional knowledge. The Biological Diversity Act, 2002 is to be enforced seriously and cases of bio-piracy through patents for Basmati, Turmeric etc. should be things of the past. What needs to be emphasized is that the entire work of monitoring the illegal activities of citizens or others outside India in misappropriating the biological resources in India to the prejudice of the country cannot be expected to be done by the government alone.²⁷

The goal of access to affordable knowledge goods is relevant to the traditional knowledge discussion because developing countries are the primary advocates of traditional knowledge at the World Intellectual Property Organization (“WIPO”). Furthermore, their concerns about the TRIPS can be described as largely related to the effect of intellectual property rights on access to affordable knowledge goods. Patents and copyright, in particular, have been criticized on this basis. It is not a stretch to state, as a general proposition, that intellectual property generating countries have benefitted from TRIPS far more than developing countries. Further, the misappropriation allegations made by developing countries and indigenous peoples appear to be valid and well-documented. There are clearly some problems with the current intellectual property structure. The traditional knowledge dialogue has advanced to a stage where there is growing recognition of the need to value and acknowledge the contributions of indigenous and local

²⁴ The various forms of traditional knowledge may implicate different kinds of intellectual property. For example, patent law relates to medicinal traditional knowledge, whereas artistic and cultural practices relate to copyright law, and identifying symbols may pertain to trademarks and geographical indications. Copyright Act of 1957 as Amended by Copyright (Amendment) Act, 1999 w.e.f. 15-01-2000 (provides that copyright subsists “in original works of authorship fixed in any tangible medium of expression.”). Patent Act of 1970 as amended in 1999 Act 17 of 1999 w.e.f. 1-1-1995, (this general patentability provision states that only one who “invents or discovers” an invention that is “new and useful” may obtain a patent).

²⁵ Srividhya Ragavan, “*Protection of Traditional Knowledge*”, 2 MINN. INTELL.PROP. REV. 1 (2001)

²⁶ In the World Intellectual Property Organization (WIPO) context, traditional cultural expressions can be considered a subset of traditional knowledge. Traditional knowledge and traditional cultural expressions are often seen as part of a single “integrated heritage.” However, due to the specific legal and policy questions raised by traditional cultural expressions in the intellectual property context, WIPO has separate, but parallel, work programs for traditional knowledge and traditional cultural expressions. See *Traditional Cultural Expressions (Folklore)*, WIPO, <http://www.wipo.int/tk/en/folklore/>

²⁷ T.Ramappa, “*Intellectual Property Rights Law in India*”, 1st edn.2010, Asia Law House, Hyderabad. P. 468

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communities. There is an attempt to maximize the benefits of traditional knowledge for these communities while minimizing the harmful effects of misappropriation. As part of this effort, there have been various studies on the protection of traditional knowledge, and there is a wealth of valuable scholarship on the relationship between traditional knowledge and intellectual property. Numerous scholars have concluded that traditional knowledge can be only partially protected under the existing system. Others have queried whether it should be treated as property at all.²⁸

Over the past decade, traditional knowledge (TK) has received increasing attention on the international agenda. Factors contributing to this include the recognition of TK's importance in the lives of the majority of the world's population and in the conservation of biodiversity; concerns about the rapid loss of TK and global cultural diversity; concerns about unauthorized and inappropriate patenting and use of TK, with little or no sharing of resulting benefits with the original holders of TK; interest in harnessing the potential of TK for local sustainable development; and increasing attention to indigenous rights. Many countries and communities worldwide are considering how to best address this issue at the national, regional and international levels. As is apparent from the wide range of interests and concerns listed above, TK is a complex and multi-faceted issue. It is thus being discussed in a range of forums, each with its own perspective and its own area of competence and expertise. This is useful and necessary. However, focusing on one part of the issue and ignoring all the other aspects risks creating a patchwork of particular solutions that in the end do not fit seamlessly together and that in some cases may partially or wholly cancel out each other's well-intended effects. There is a need, therefore, for a holistic approach.²⁹ The protection of knowledge, innovations and practices of indigenous and local communities (hereinafter referred to as TK) has received increasing attention since the adoption of the Convention on Biological Diversity (CBD) in 1992. Article 8 (j) of the CBD recognized that TK plays a key role in the preservation and sustainable use of biodiversity. Though conceived in the context of an international action for biodiversity conservation, the CBD triggered a much broader debate that unveiled other facets of TK and different concepts and objectives about the "protection" of TK.³⁰ The initiatives for specifically dealing with TK issues arose from different concerns and perspectives³¹, such as,

- The recognition of the importance of TK as source of food and healthcare for a large part of the populations in developing countries, particularly the least developed countries (LDCs);
- The rapid pace at which TK is being lost as local ecosystems are degraded and traditional communities are integrated into the wider society;
- The asymmetry between the benefits obtained by companies that commercially exploit products derived from TK and the lack of benefits for TK holders;
- The misappropriation ("bio-piracy") of TK under patents and other intellectual property rights (IPRs);

²⁸ J. Janewa OseiTutu, "Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law", 15 Intellectual Property L. Rev. 147 (2011). Available at: <http://scholarship.law.marquette.edu/iplr/vol15/iss1/3>

²⁹ Sophia Twarog, "Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions", p.61 Available at: http://unctad.org/en/docs/ditcted10_en.pdf

³⁰ Carlos M. Correa, "Protecting Traditional Knowledge: Lessons From National Experiences", Available at: http://r0.unctad.org/trade_env/TK2.htm

³¹ See UNCTAD Secretariat, 2000.

- The need to enable indigenous and local communities to harness TK for their benefit and to promote development and trade.³²

These aspects have been discussed in different fora (CBD, WHO, WIPO, UNCTAD, UNESCO and WTO) and a number of regulations and policies on the protection of TK have been proposed or adopted at the national level. Work done has contributed to the clarification of many of the issues at stake and to the development of some national regimes and policies. However, significant work is still needed at the international and national level to operationalize such protection. One of the main difficulties is that this concept has different meanings depending on the objectives sought and the context where it is applied. While a broad range of measures may be used, a key issue is to find the instruments that are appropriate to achieve the desired objectives.

Considerable discussion has taken place with regard to different instruments for the protections of TK. Intellectual property rights have attracted, in particular, significant attention. The General Assembly of the World Intellectual Property Organization (WIPO) established in 2000 an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGCGR TKF), with the mandate of discussing (a) access to genetic resources and benefit sharing; b) protection of TK; and c) protection of expressions of folklore. The IGCGR TKF, which has held five sessions, provided a forum for discussion of legal, policy, economic and scientific issues relating to TK protection, including the analysis of *sui generis* forms for TK protection³³. A number of countries have adopted legislation to protect TK.

As far as Indian regime for protection of traditional knowledge is concern, the Indian Plant Variety Protection and Farmers' Rights Act, 2001 provides for the protection of Farmer's Rights. They include the right of farmers to save the harvested seed of protected varieties and to sell it as long as they do not market it under the protected brand name. To protect the knowledge of farmers and enable a share of benefits to be derived from new varieties, there are provisions for a national gene fund into which breeders will have to pay revenues for using farmer varieties. The legislation requires full disclosure of the source and origin of varieties and complete passport data from breeders. The penalty for non-disclosure is a heavy fine and/or a jail term

The Biodiversity Act, 2002, regulates access to genetic resources and associated knowledge by foreign individuals and institutions. It aims at ensuring the conservation of biodiversity, sustainable use of its components and equitable benefit sharing. Access would be granted to citizens only after prior intimation, while it would be granted to foreigners after prior approval, which would also be required for the transfer of research results abroad, except for "collaborative research." Indian citizens, companies are allowed free access to biological resources within the country for research purposes but are barred from transferring findings to foreign entities without the approval of the National Biodiversity Authority (NBA).

The Patent Second Amendment Act (adopted in 2002) provides that the applicant must disclose in their patent applications the source of origin of the biological material used in the invention (section 10). It also allows for opposition to be filed on the ground that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological

³² David R. Hansen, *Supra note*, 18.

³³ For a summary of the IGCGR TKF's discussions, see WIPO Secretariat (2003a).

Protection of Traditional Knowledge as an Intellectual Property

material used for the invention. The grounds for rejection of the patent application, as well as revocation of the patent, include non-disclosure or wrongful disclosure of the source of origin of biological resource or knowledge in the patent application, and prior disclosure of knowledge, oral or otherwise.

The new concept of GIs as introduced in the TRIPS Agreement recognizes “quality, reputation or other characteristic of the goods” as conditions for protection. Considering the fact that the quality, reputation or the unique characteristics of many of the geographical indications are the result of traditional and ancient methods and formulae that are transmitted from one generation to the other³⁴, it is argued that there could be a possibility of protecting TK through GIs. It has also been suggested that since GIs played a role in the sustained development of the socio economic conditions of the producers of GIs, for example the producers of wines and spirits in Europe, there could be a bright prospect of protecting the interest of TK holders by effectively protecting GIs.³⁵

One more approach for protecting traditional knowledge is a Trade Secrete law. The doctrinal and normative divide between traditional knowledge protection and intellectual property law has been overemphasized, and that trade secret law can help narrow it. First, in terms of doctrinal fit, trade secret doctrine offers a viable model for protecting a subset of traditional knowledge that is not already publicly available. Broadly speaking, trade secret law imposes liability for the wrongful acquisition, use, or disclosure of valuable information that is the subject of reasonable secrecy efforts. While various scholars have acknowledged trade secret law’s potential for traditional knowledge holders, its possibilities have yet to be examined in sufficient depth.³⁶

Unlike other categories of intellectual property, trade secret law may accommodate the conflicting privacy and commercialization concerns of traditional knowledge holders.³⁷ The protection of traditional knowledge may be seen as not only an intellectual property issue, but also as a trade and human rights issue.³⁸ In view of the serious abuses by patenting of indigenous medicine like *neem*, *turmeric*, *quinine*, *smoke bush* and *jar amala*, this development is on the right direction. But the legal development will be complete only with passing a statute recognizing community based right in traditional knowledge with adequate measures for their enforcement and benefit sharing system.³⁹

Traditional knowledge now a day’s receiving worldwide concern for protecting it in the existing intellectual property law. But as the existing intellectual property law is inadequate to

³⁴ Sergio Escudero, “Working Paper on International Protection of Geographical Indications for Developing Countries”, July 2001, South Centre, <http://www.southcentre.org/publications/workingpapers/wp10.pdf>.

³⁵ Gopalakrishnan, N.S. *et al* (2007) “*Exploring the Relationship between GIs and TK: An Analysis of the Legal Tools for the Protection of GIs in Asia*”, ICTSD Programme on Intellectual Property Rights and Sustainable Development, International Centre for Trade and Sustainable Development, Geneva, Switzerland.

³⁶ Deepa Varadarajan, “*A Trade Secret Approach to Protecting Traditional Knowledge*”, The Yale Journal Of International Law, Vol. 36, p.375 (2011)

³⁷ *Ibid*

³⁸ Stephen J. Munzer & Kal Raustiala, “*The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*”, 27 CARDOZO ARTS & ENT. L.J. 37, 48

³⁹ Prof. (Dr.) P. Ishwar Bhat, “*Historical Evolution and Development of Intellectual Property Rights: a Focus on Some Themes*”, Issue 1 Nov.2005, Kare Law Journal, p29.

address the debate hence it has been suggested that there should be a *Sui generis* system of law which can give better protection to the traditional knowledge and preserves and protect the legitimate interest of the holders of traditional knowledge. Indeed it has to be treated as an intellectual property and must receive protection as the creators of intellectual property like copyright, patent, geographical indication, trademark's etc. are receiving. Many states passed a specific legislation for protecting traditional knowledge. Some of the states have attempted to protect through existing intellectual property law. Further India has to adopt the international norms and it should pass the specific legislation for protecting traditional knowledge so it will contribute for the economic development of the nation.

STATUS OF UNBORN PERSON – A LEGAL PREDICAMENT

Sandhya Ram S.A.*

Humanity has traveled a long way from slavery to freedom to subject hood to citizenship to human rights. But for the unborn persons, the issue is between human hood and thing hood. An unborn child is not a person in the eye of law, hence not capable of having fundamental and human rights and therefore devoid of effective legal protection¹. The right of the unborn to live and to be born, many a time conflicts with the right of a woman to control her body, to make a choice about her life and her right to privacy. The woman who carries this tiny being is not its only rival; there are more issues of settling third part liabilities, both civil and criminal as against the unborn victims of injury and violence. The issue is one of identifying and recognizing the “trump card”² in the pack of rights.

The Legal Fiction of Personhood

A person is any being whom law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man³. The fact that human beings alone are considered to be natural persons is based on certain notions⁴. This can be illustrated in the form of a logical inference as follows:

Premise 1: Rights and duties *in here* in those beings that have the ability to choose

Premise 2: Human beings alone have the ability to make a choice

Inference: Human beings alone have rights and duties

Correction to the inference: Only those human beings who have the ability to make a choice have rights and duties.

This jurisprudence of personhood is of utility when man’s power to make a choice, that is rationality, is a condition precedent to assume obligations and rights arising out of agreements. In this context personhood denotes legal capacity and not the personality inherent in a human being. No legal system founded on the principles of justice and liberty will mandate such a pre requisite to citizens’ entitlement to fundamental and human rights. However when it comes to the legal status of an unborn child, it is submitted that, the legal systems have adopted a fluid perspective.

* Assttiant Professor, V.M. Salgaocar College of Law, Goa

¹ See Durga Das Basu, *Human Rights in Constitutional Law* (Wadhwa & Co., Nagpur, 2nd ed. 2003) 74

² See generally Ronald Dworkin, *Taking Rights Seriously* (Universal Law Publishing Co. Pvt Ltd., Delhi, 2nd Indian Reprint 1999). Prof. Dworkin draws the analogy of right being a trump card prevailing over all other lesser rights.

³ P. J. Fitzgerald, *Salmond on Jurisprudence* (Universal Law Publishing Co. Pvt Ltd., Delhi, 12th ed. Indian Reprint 2004) 299

⁴ See *Ibid* 298

The Legal Dialectics Regarding Status of the Unborn Child: A Legal Survey

Anomaly and inconsistency prevail in the various aspects and branches of law, wherever the legal status of the unborn is dealt with.

a) Property Law

For property matters, the child in the mother's womb (and even the child yet to be conceived) is given personhood to a great extent ensuring the legal capacity to own/inherit property. The Transfer of Property Act, 1882 makes it permissible subject to conditions, the creation of an interest for the benefit of a person not in existence at the date of transfer.⁵ Also, the Indian Succession Act, 1925 allows a bequeathal to be made in favour of a person not in existence at the time of testator's death⁶. The Hindu Succession Act, 1956 has conferred a right to succeed to the father's estate on a child who was in the mother's womb when the father died intestate⁷. Under the Hindu Law, a child in the mother's womb is treated as a coparcener and a share is kept reserved if the pregnancy is known at the time of partition. In case when a share is not so reserved or when the pregnancy was not known, the unborn son after birth is entitled to demand re-opening of partition.

It is submitted that these provisions are incorporated to avoid confusions relating to property and has very less to do with the right to be born of the child in the womb. The rights of an unborn person, whether proprietary or personal, are all contingent on his being born alive. The legal personality attributed to him by way of anticipation falls away *ab initio* if he never takes his place among the living⁸

b) Criminal Law

The Indian Penal Code⁹ addresses offences relating to miscarriage, subject to the overriding effect of Medical Termination of Pregnancy Act, 1971. Special reference is made to Section 312 of the Indian Penal Code¹⁰ which makes causing miscarriage an offence punishable under the code. The Explanation to the same section specifies that a woman, who causes herself to miscarry, is within the meaning of the section. The maximum punishment varies in case the woman be quick with the child and otherwise.

It is evident that the law is attempting to give a greater weightage here to the foetus during the later months of gestation as compared to the first months. It is also to be noticed that all these provisions dealing with miscarriage uses the word "child" instead of words like 'foetus' or

⁵ Section 13, Transfer of Property Act, 1882. This section does not apply to Muslims as Mohammedan law strictly prohibits any gift to an unborn person.

⁶ Section 11, Indian Succession Act, 1925

⁷ Section 20, Hindu Succession Act, 1956

⁸ *Supra* n. 3 at 298

⁹ Sections 312 -316, Indian Penal Code, 1860

¹⁰ Section 312 states that: "Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with the child, shall be punished with imprisonment of either description for a term which may extend to seven years, and also shall be liable with fine"

'embryo' which all tend to denote a formative stage of the human being, something less than a human. However it is regrettable that no minimum punishment was prescribed for these offences, and thereby reduced child destruction to a crime, but not equivalent to murder or manslaughter. However by virtue of the Medical Termination of Pregnancy Act 1971, as amended in 2002, a minimum punishment of two years rigorous imprisonment is prescribed, thereby modifying Section 312 of Indian Penal Code as well.

It is pertinent to point out Section 416 of the Criminal Procedure Code which states that "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if thinks fit commute the sentence to imprisonment for life."¹¹ It is submitted that this provision is directly aimed at protecting the life of the unborn child, irrespective of the gestation period and affords full-fledged recognition of the unborn child, the foetus, the embryo or whatever cellular stage it may be in, as a human being who cannot be deprived of his right to life. The principle embodied in this provision is obvious; carrying out the execution would take two human lives, including one convicted of no crime. Here the law considers the unborn child as an independent personality and not as a limb of the mother. However if the mother (prisoner- convict) decides to end her pregnancy subject to the Medical Termination of Pregnancy Act, law will step aside and allow the unborn child to be killed and thereby pregnancy be put to an end. If at all any claim of independent human existence of the unborn is raised by someone ('The Petitioner', let us assume is an NGO bearing the name Society for the Protection of the Unborn Child), law will shy away from the petitioner and will oblige by the wishes of the prisoner woman, her privacy rights, her human right to make a choice and decide about her body and her liberty.

When law decides to protect the interests of the woman in the above illustration, it is appreciable that even a prisoner's liberty is safeguarded under our democracy. What one fails to decipher here is the legal reasoning, the logic in considering the rights of the woman without facing the question of right to life of the unborn child. To uphold the mother's right over and above that of the fetus is not in fact the point in dispute, as priorities can be rightly set by law. The issue is one of considering the unborn as invisible with respect to medical termination of pregnancy and protects the same being from execution under S.416 of the Criminal Procedure Code.

c) Medical Termination of Pregnancy Act, 1971

It appears from the Statement of Objects of the Act that this law aims at liberalizing the provisions of Indian Penal Code relating to miscarriage, to extend efficient medical facilities to a woman in need of abortion and thereby prevent "avoidable wastage of mother's health, strength and sometimes life" which happens when their pregnant uteri are tampered with by inefficient hands. The Statement of Objects justifies this liberalized stand by stating that "Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy".

¹¹ See Article 6 of International Covenant on Civil and Political Rights, 1966. Similar provision was contained in the Sentence of Death (Expectant Mothers) Act, 1931 (repealed in 1998 following the abolishing of death penalty in U.K) and in Innocent Child Protection Act, 2000 of U.S.A.

Status of Unborn Persons – A Legal Predicament

The MTP Act allows medical termination of pregnancy, notwithstanding the Indian Penal Code¹². Medical termination of pregnancy can be lawfully done only by a registered medical practitioner¹³ at a place approved for this purpose by the government or at a government hospital¹⁴. The consent of the woman is compulsory, and if the woman has not attained the age of 18 years and where the woman is a mentally ill person, the written consent of the guardian is necessary¹⁵.

The Act seeks to liberalize medical termination of pregnancy in three cases. Firstly, as a health measure when there is danger to the life or risk to physical or mental health of the woman¹⁶; Secondly, on humanitarian grounds such as when pregnancy arises from a sex crime like rape¹⁷, and Thirdly, on eugenic grounds where there is substantial risk that the child, if born, would suffer from physical or mental abnormalities to be seriously handicapped¹⁸. The assessment of these grounds is left to the opinion formed in good faith of one registered medical practitioner if the pregnancy is less than 12 weeks¹⁹ and of two registered medical practitioners if the pregnancy is more than 12 weeks but does not exceed 20 weeks²⁰. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.²¹ Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such *unwanted pregnancy* may be presumed to constitute a grave injury to the mental health of the pregnant woman²².

If the pregnancy exceeds 20 weeks, it could be terminated only when the registered medical practitioner is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.²³ Here again, the consent of the woman or guardian, as the case may be is necessary.

The MTP Act vis a vis the Legal Status of the Unborn

It is strange that in a country where right to life is a guaranteed fundamental right under the Constitution and where the higher judiciary has expanded this right to include all rights that go to make life meaningful, such wide and unguided discretionary power is granted to one or two registered medical practitioners to form an opinion in good faith and thereby put an end to a growing life in the womb. Whenever a woman alleges rape, it shall be presumed that the pregnancy results in grave injury to her mental health. In all cases of unwed pregnancy, this will be the projected ground for medical termination of pregnancy. Where the pregnancy is posed as the result of the failure of family planning scheme adopted by the married couple, grave injury to the

¹² S.3(1), Medical Termination of Pregnancy Act, 1971

¹³ S.3(2), Medical Termination of Pregnancy Act, 1971

¹⁴ S.4, Medical Termination of Pregnancy Act, 1971

¹⁵ Section 3(4), Medical Termination of Pregnancy Act, 1971

¹⁶ Section 3(2)(i), Medical Termination of Pregnancy Act, 1971

¹⁷ Explanation I to Section 3(2), Medical Termination of Pregnancy Act, 1971

¹⁸ Section 3(2)(ii), Medical Termination of Pregnancy Act, 1971

¹⁹ Section 3(2)(a), Medical Termination of Pregnancy Act, 1971

²⁰ Section 3(2)(b), Medical Termination of Pregnancy Act, 1971

²¹ Explanation I to Section 3 of Medical termination of Pregnancy Act, 1971

²² Explanation II to Section 3 of Medical termination of Pregnancy Act, 1971(emphasis supplied)

²³ Section 5, Medical Termination of Pregnancy Act, 1971

mental health of the woman may be presumed. This is allowing married men and women to choose whether to want the pregnancy or stop the unwanted pregnancy after pregnancy has occurred. Whether they had in fact used any device or method or if used whether it was used to limit the number of children are all matters which are to be accepted at the face value. So the Act is in fact liberalizing the right of the married couple to kill the unborn child upto a gestation period of 20 weeks. The ground on which opinion is to be formed is the same where the pregnancy is up to 12 weeks or up to 20 weeks, except that the latter requires the opinion of two registered medical practitioners. Even though the Act uses the look good title, “Medical Termination of Pregnancy Act”, things don’t look that good when one understands that no pregnancy can be terminated otherwise than by killing the growing foetus, or rather a child.

When the Act allows the killing of a ‘wrongly’ formed child in the womb on the apprehension of the child being seriously handicapped the rationale behind this provision is not very clear. The following assumptions may be drawn:

Assumption 1: For the convenience of the parents

Assumption 2: In the lines of euthanasia

Assumption 3: For the betterment of human race by eliminating bad genetic outcome.

Law should be clear on this point. Whatever be the assumption drawn, none of those have a logical standing, if the gestation period crosses 20 weeks. And for the same reason, they fail, as they cannot be a ground to medically terminate the life of a handicapped newborn baby. It is submitted that the whole rationale behind this legislative attitude is founded on the disrespect and intolerance towards handicapped humans. This law is lacking in clarity of purpose, contains no measure to prevent abuse of the permissible scheme, disrespects human life and dignity of the human person, allows the destiny of the unborn person to be subject to the arbitrary choice of the woman and allots unguided power to registered medical practitioners. This law is founded on the basic premise that the unborn child is not a person and therefore does not deserve to be granted any legal protection at all. By calling a human foetus as an unwanted pregnancy, the viable human existence of the unborn child is conveniently forgotten.

d) International Human Rights Documents

The important human rights documents mentions about “all members of the human family”²⁴. “Article 3 of the Universal Declaration of Human Rights declares that everyone has the the right to life, liberty and security of the person and Article 6 asserts that everyone has the right to recognition everywhere as a person before the law. The Declaration of the Rights of the Child & the Convention on the Rights of the Child proclaims in the Preamble that “... the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” Principle 4 of the Declaration reads thus: “The child shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care.” Article 6 of the Convention states that “States Parties recognize that every child has the inherent right to

²⁴ Preambles of Universal Declaration of Human Rights, International Convention on Civil and Political Rights and Convention on the Rights of the Child states : “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

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life” and calls upon the Sates Parties to ensure to the maximum extent possible the survival and development of the child and appropriate pre-natal and post-natal health care for mothers.

WHY IS THE UNBORN INVISIBLE TO LAW?

Acknowledging the legal personality of the unborn child, would appear to be against the right to abortion of the woman. And taking away that right is not appropriate in a democracy recognizing the liberty of the woman over her own person. It is true that the fetus requires a woman’s body to complete its development and become viable enough to be born into the world. But it is wrong to consider the child as a trespasser into one’s body²⁵, because in a vast majority of cases, the woman is responsible for her pregnancy. Like how the woman has a right over her body, the child has a right over his body, which of course is not part of his mother’s body. If at all law permits one right to prevail over the other, which law can rightfully do, it should be on sound lines of reasoning and of course to apply in limited contexts.

The consequence of denying legal personality to the unborn with the sole objective of addressing the superior rights of the woman is far reaching, abominable and devoid of respect for human dignity. This will deny to the fetus even a right to burial which every human being is entitled to, thereby making its mortal remains treated like any other biological waste. If a pregnant woman is murdered, the offender fetches punishment only for the murder of the woman, and not of the child. If a child in the womb dies as a result of violence inflicted upon the woman, the offender cannot be punished for the death of the unborn, as far as the offender is ignorant about the fact of pregnancy.

It is worthwhile to mention the Unborn Victims of Violence Act, 2004²⁶, of the United States which recognizes that when a criminal attacks a pregnant woman, and injures or kills both her and her unborn child, he has claimed two human victims. The law covers the "child in utero," defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." However, the law explicitly provides that it does not apply to any abortion to which a woman has consented, to any act of the mother herself (legal or illegal), or to any form of medical treatment.

In the area of civil liability the age old dictum was that a child is entitled to compensation for injury caused to it while it was in the mother’s womb, provided the child is born alive.²⁷ However a change is discerned in the decision of the Maharashtra State Consumer Reddressal Commission²⁸ where a fetus was held to be a consumer. In an insurance claim made by the mother for the loss of her unborn child of seven months gestation, the Commission took note of the American law²⁹

²⁵ See J.J. Thomson, “A Defence of Abortion” in R.M. Dworkin (ed.), *The Philosophy of Law* (Oxford University Press, 1977) 112. Thomson uses a lot of rhetoric like equating a child as a third party in the mother’s house, and claims that the woman should be given all liberty to unplug this person from the mother’s body. But see J. Finnings, “The Rights and Wrongs of Abortion”, *ibid* 129. Finnings examines the issue from a Hohfeldian analysis of rights and renders a tit for tat reply to Thomson.

²⁶ Enacted by the Senate and the House of Representatives of the United States of America on 20th January 2004, this Act is also known as “Laci & Conner’s Law”. See http://www.nrlc.org/Unborn_victims/index.html

²⁷ See *Supra* n. 3 at 304

²⁸ Kanta Mohanlal Kotecha v. Branch Manager, United India Insurance Co. Ltd. The pronouncement was made on November 6, 2006 from Justice B.B. Vagyani. See *Times News Network* March 5th and 6th 2007

²⁹ Unborn Victims of Violence Act, 2004

and ruled that the unborn child in the womb is living and entitled to personhood and thereby held that the claim in respect of the unborn child was maintainable.

Lastly, the denial of legal personality to the unborn will bring in a lot of uncertainty over its legal status. If the unborn child is not granted personhood, does the status amount to thinghood? If so, can the unborn be the subject matter of ownership? Or is the status a *sui generis*, a unique class of its own. Law should not shy away from answering this crucial question which alone can put to rest the rights controversy.

Conclusion

Various principles and norms denying personhood to an unborn child prevail even in this era of resonance of human rights. Law needs to be changed to acknowledge the legal existence of the unborn child. The fact that the unborn child is physically dependent on its mother prior to birth need not lead to the assumption that it has no relevant separate existence or to the assumption that it has no moral or legal significance.³⁰ The child in the mother's womb, being very much a member of the human family ought to be granted entitlement to basic human rights. As between the unborn child and a third party, absolute personhood is to be granted to the unborn child. It is submitted that such a measure would ensure a duty of care towards the unborn child imposing tortious liability, not only on the mother but also on third parties in all cases of negligence including environmental pollution by industries.³¹ As between the woman and the child in her uterus, law has to fix clear standards as to when the rights and liberties of the woman as a person may prevail over the right to be born of the unborn child. Any law which permits medical termination of pregnancy has to have due regard to the gestational development of the unborn child and allow termination of pregnancy as an exception to the right to be born of the unborn child. Whenever choice is to prevail over life, law has to make sure that the choice is not an arbitrary choice.

³⁰ Jane E.S. Fortin, "Legal Protection for the Unborn Child", 51 Mod. L. Rev (1988) 54 at 82. Fortin suggests that a distinction should be drawn between the early human embryo and a foetus of more than 10 weeks gestational development; only the latter meriting recognition as a human being.

³¹ It may be noted that in *Union Carbide Corporation v. Union of India* AIR 1992 SC 248, damages was awarded to children born with abnormalities after inhaling the highly toxic gases.

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